



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 120 of 2011

(From Original Conviction and Sentence in Criminal Case No. 36 of 2011 of the Senior Resident Magistrate's Court at Kaloleni – S.R. Wewa (SRM))

AMINA JUMA MUMBETSA APPELLANT

- Versus -

REPUBLIC RESPONDENT

JUDGMENT

The Appellant was convicted and sentenced to ten years imprisonment for the offence of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 9th day of January 2011 at (Name withheld) Village in (Name withheld) Location committed an indecent act with a child namely J.M by touching his private part namely penis. Mr. Jami for the State does concede this appeal.

I have perused the proceedings and judgment of the lower Court. The Appellant had bene charged with defilement of a child contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act as the substantive charge but was later on convicted on the alternative Count of indecent act.

The complainant was aged 16 years at the time of the alleged offence. He claims to have escorted her to her house from where she proceeded to pull him inside, covered his mouth, he tried to escape but she ties him with ropes. She removed his shirt and shorts. She forced him to have sex with her but she was not successful. She had sat on his stomach.

P.M (PW2) told the trial Court that she was in the house when the Appellant and one D.R arrived and asked to be served with palm wine.

The Appellant got drunk and asked to be escorted by the complainant. Later in the company of D.R they went to search for Juma only to peep through the window and see the Appellant on top of the complainant. Later they saw the complainant emerge while holding his clothes while naked.

The complainant in his evidence had mentioned one David and Tinga who were present and witnessed the act. These two witnesses were not availed before the trial Magistrate to testify.

The complainant and his witness (PW2) told the Court that the Appellant was drunk, yet it is this same drunk woman who is alleged to have held a knife on the throat of the complainant forcefully covered his mouth undressed him and forced him to have sex with him. That is the kind of evidence that cries for corroboration. There is no medical evidence to the effect that the complainant did sustain any injuries

during the struggle. There is no evidence to the effect that any sexual activity took place between the Appellant and the complainant.

The Appellant herself was not taken for medical examination. Upon evaluation of the evidence on record, I do find that the conviction of the Appellant was unsafe. This appeal is conceded and with good reasons. The appeal succeeds and it's allowed on both conviction and sentence.

The conviction is quashed and the sentence set aside accordingly. The Appellant is set at liberty unless otherwise lawfully held.

Judgement read and delivered in open Court this 12th day of April, 2013.

M. MUYA
JUDGE

In the presence of:-

Mr. Gioche for State

Appellant in person

Court clerk – Mr. Mbaka