



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 113 of 2012

EVANS MUHATIA APPELLANT

V

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with the offence of defilement contrary to **section 8(1)(2)** of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that the appellant on the 25.9.2010 at *{particulars withheld}* in Butere District within Western Province, intentionally caused his penis to penetrate the vagina of **F. M.** a child aged 3 years and 4 months. The appellant was also charged with an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act No.3 of 2006. The particulars of that offence were that on the same date and location as per the main count the appellant intentionally touched the buttocks and vagina of **F. M.**

The appellant was found not guilty of both counts but was found guilty of the offence of sexual assault contrary to **section 5(1)** of the Sexual Offences Act. He was convicted and sentenced to serve 10 years imprisonment. His grounds of appeal before this court are that the prosecution did not prove its case beyond reasonable doubt, the prosecution evidence was full of contradictions and without corroboration, no proper medical evidence was adduced, the complainant's age was not proved, the charge sheet was incurably defective and the sentence was harsh and excessive.

Mr. Osango, counsel for the appellant filed written submissions and made oral submissions. Counsel submitted that there was no penetration and if there was then the penetration was caused by an object not managed by the appellant. The complainant testified that she was injured on her knee by a stick. The appellant was not identified and the complainant testified that she was injured by one **MBATIA**. Since the complainant testified that she was injured on her knee then there was no penetration on her genital organs. The written submissions raises the same three issues which counsel submitted on that is to say whether there was penetration of the complainant's genital organs by the appellant, whether the penetration was unlawful and whether the penetration was caused by an object manipulated by the appellant.

The State opposed the appeal, Mr. Orinda, State Counsel submitted that the court can convict on a

cognate offence if the charge the accused is facing is not established but another offence is proved. Counsel submitted that the victim was 3 ¼ years old and she was bleeding from her private parts. Medical evidence established that there was penetration. When the complainant testified she pointed at her vagina as the place that was injured.

I am duty bound to evaluate the evidence before the trial court. **PW1, A. O.**, was the mother of the complainant PW2. Her evidence is that the complainant was born on the 31.5.2007 and she was attending Baby class. The appellant was her neighbor at *{particulars withheld}* living on rental houses. On the 25.9.2010 she went back home from the market and the appellant told her that the complainant was sleeping at the appellant's home. The appellant left after passing that information. PW1 continued doing her other work and later decided to go and wake up the complainant. She found the complainant sleeping on a sack that was lying on the floor in the appellant's home. The child tried to relieve herself and PW1 saw blood coming out of her private parts. PW1 saw the complainant's pant that was blood stained. She notified her husband (PW4) who advised her to take the child to hospital. PW1 had on other occasions left her children with the appellant. She was informed by her neighbour's house girl (PW3) that she heard the child crying while in the appellant's house. The appellant was arrested and charged with the offence. The incident occurred at about 4.30 p.m.

PW2, F. N. M., was the complainant. The court conducted a *voire dire* examination and found that she could not testify under oath. Her evidence was that she knew the appellant by the name **MBATIA** and knew where his house was. The appellant injured her by taking a stick that was near a paw tree and put it at her private part then he threw it away. They were on a blanket. **PW3, RUTH WETENDE**, testified that she was a neighbor and on the 25.9.2010 she was at her place of work washing clothes. PW2 and her other siblings started crying when their father was heading to the market. The complainant's father told the appellant to stay with the children as he was going to their mother. The appellant took the complainant who was the older child to his house and pushed the other ones outside. The appellant then closed the door. PW3 went to the window and called the appellant three times but he did not respond. She heard the crying from inside. The appellant had locked the door from inside. When PW1 reached home the appellant told her that the complainant was asleep. The child was found bleeding from her private parts and she was taken to hospital.

PW4, S. M. O., is the complainant's father. He testified that he was a businessman and the complainant was his first born child. On the material day he stayed at home with the appellant up to 4 p.m. He left his children with the appellant as he went to the market to relieve his wife PW1. When he left the children were okay. At about 5 p.m. the appellant went to the market and told him that the complainant was asleep. Shortly PW1 went to the market and informed him that the complainant was bleeding from her private parts. PW4 did not notify the appellant as he thought he would run away. When they reached home PW1 locked the appellant's house from outside. The police were informed and found the appellant had locked himself inside his room and he refused to open his door. The police forced the door open.

PW5, DR. BERNARD ODUOR OWINO, was based at the Butere District Hospital. He filled the P3 form for the complainant and testified that PW2 was about 3 years. PW5 further testified that the complainant was too young and she could only be examined at the theatre under anesthesia. PW5 concluded after his examination that there was penetration as the complainant's hymen was torn. **PW6, PC INVOLATA LUMATI** was based at Butere Police station being in charge of the Children and Gender desk. She investigated the matter. PW1 went to report the matter to the police station on 25.9.2010 at about 9 p.m. The complainant was referred to Butere District Hospital and the appellant had been arrested. She was given the blood stained under pant by PW1. She took the appellant to Butere

District Hospital where he was examined and his age assessed. According to her the P3 form showed that there was penetration and she charged the appellant with the offence. **PW7, OLIVER MAKHASO**, was a clinical officer based at Butere District Hospital. He produced a P3 form for the appellant. The appellant was medically examined and was found to be normal. His age was assessed to be between 18 and 22 years old.

The appellant was put on his defence and he gave unsworn testimony. He testified that he was a Form One student at *{particulars withheld}*. On the material day he had been sent home for school fees and it was a Saturday. He went home and found his parents were not there. He then went to the market where he stayed with the complainant's father PW4 from between 11 a.m. to 5 p.m. He then went home and while preparing his supper PW1 locked his door from outside. He was later arrested and charged with the offence. His further evidence was that he is **17** years old and he produced his Birth Certificate.

The prosecution evidence does show that the complainant was sexually assaulted on the 25.9.2010. PW1 produced a Baptismal Card from the Anglican Church of Kenya, Butere Diocese. The card shows that the complainant was baptized on the 28.10.2007. The card gives the date of birth as 31.5.2007. It is the evidence of PW5 Dr. Bernard Oduor Owino that he assessed the complainant and found her to be about three years old. From the evidence on record I do find that the complainant's age was established. By the time the offence occurred she was three years and four months old.

The prosecution evidence does show that no one saw the appellant defiling or sexually assaulting the complainant. It is the evidence of PW4 that he left the complainant with the appellant at about 4 p.m. It is also the evidence of P3 Ruth Wetende that PW4 left his homestead at about 4 p.m. and left his children with the appellant. PW1 was relieved by PW4 at the market and went back home. PW1 found the appellant at home and he told her that the complainant was sleeping in the appellant's house. The complainant was found to be sleeping in the appellant's house and she was found to be bleeding from her private parts. It is the evidence of PW3 that she saw the appellant chasing away other children and locking himself in his house with the complainant. It is also the evidence of PW3 that she heard the complainant crying while inside the appellant's house.

Although there is no direct evidence against the appellant, I do find that the circumstances of the case cannot be explained in any other way other than the fact that it was the appellant who caused the penetration on the complainant. There is no evidence that there was somebody else at PW4's home. The evidence point out to the fact that the complainant and other children were left under the care of the appellant. He was found to be at the homestead by PW1 when she came from the market. PW4 left the appellant with the children and PW3 saw the appellant with the children. I am satisfied that it is the appellant who caused the penetration on the appellant's vagina.

Counsel for the appellant submitted that the object which caused the penetration was not controlled by the appellant. The complainant testified that the appellant took a stick and injured her private parts. It is the evidence of PW7 that if the appellant had used his penis to penetrate the complainant then he would have sustained injuries on his genitalia. That evidence corroborates the complainant's evidence that the appellant used a stick to sexually assault her. Although the appellant was charged with defilement and indecent act with a child the court lawfully concluded that what was proved was a case of sexual assault. The court was within its right to convict the appellant on the offence of sexual assault.

The appellant produced his Birth Certificate which shows that he was born on the 26.11.1994. At the time he committed the offence he was below 18 years old. The trial court noted that at the time of conviction the appellant was over 18 years old and could not have been sentenced to borstal institution. The trial court sentenced the appellant to serve **10 years** imprisonment which is the minimum sentence provided for under **Section 5(2)** of the Sexual Offences Act. I do find that the appellant was a child when he committed the offence. The Sexual Offences Act defines a child to have the meaning assigned to it in the Children Act. The Children Act No. 8 of 2001 in **Section 2** defines a child as any human being under the age of 18 years. **Section 191** of the Children Act provides for methods of dealing with offenders who are still children. The section provides that where a child is tried for an offence and the court is satisfied as to his guilt the court may deal with the case in one or more of the several ways provided for under that section. That section does not provide for imprisonment of the offender in the same manner an adult would be sentenced. It is true that the appellant could not have been taken to a borstal institution as he was already above 18 years old. Under **Section 191** of the Children Act the court can suspend the sentence, discharge the offender on his entering into a recognizance with or without sureties, the court can order the offender to pay a fine or commit him to probation. The appellant was sentenced to serve 10 years imprisonment. The record of the trial court shows that the appellant did his Kenya Certificate of Primary Education exam (KCPE) on the week of 11.11.2010. This is by way of a letter from {*particulars withheld*} dated 9.11.2011. The appellant testified on the 9.9.2011 and informed the court that he was in Form One. His Birth Certificate gave his date of birth as 26.11.1994. He was sentence to serve 10 years imprisonment on the 30.11.2011 and he has been in custody since then.

The trial court before sentencing the appellant called for a probation report. The court considered the report but sentenced the appellant to **10 years** imprisonment. The report seems to be favourable to the appellant. Given the circumstances of the case, I do find that the **10 year** imprisonment meted out on the appellant was not lawful. What is to be considered is the offenders' age at the time of committing the offence and not at the time of sentencing. The appellant ought to have been put on probation. In the case of **DENNIS ABUYA V REPUBLIC [2010] eKLR** the appellant was convicted of defilement of a girl aged 5 years. At the time the offence was committed the appellant was a Form Three student and informed the trial court that he was 18 years old when he was testifying. The Court of Appeal had this to say-

*“We do not understand the provisions of the Sexual Offences Act to authorize the imprisonment of minors and we are unable, on the material on record, to rule out the possibility that the appellant was under 18 years on 19th June, 2007 when the offence was alleged to have been committed. **Section 8(7)** of the Sexual Offences Act specifically provides that where the person charged with an offence under this Act is below the age of 18 years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institution's Act and the Children Act. The question of imprisoning a minor does not, therefore, arise under the provision of the Sexual Offences Act”.*

Since the appellant's age at the time he committed the offence is already known I do find that the age assessment as provided by the prosecution evidence does not disprove the fact that the appellant was below the age of 18 years when he committed the offence. In the end, the appeal on conviction is dismissed. The appeal on sentence is hereby allowed. The 10 year imprisonment sentence imposed by the trial court is hereby set aside. The appellant has already served a prison sentence of more than 1 ½ years. I will sentence the appellant to serve **two (2)** years' probation under the care of the Butere District Probation office. The appellant shall be set free from prison and serve his probation sentence.

DELIVERED AT KAKAMEGA THIS 29TH DAY OF MAY 2013

SAID J. CHITEMBWE

J U D G E