



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 327 of 2010

ONESMUS MWANGEMI MWATELA APPELLANT

- Versus -

REPUBLIC RESPONDENT

JUDGMENT

The Appellant was convicted on the alternative count of indecent assault on a female contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 and sentenced to ten years imprisonment.

The trial Magistrate had found that there was insufficient evidence to convict the Appellant on the substantive charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.

The Appellant has appealed on grounds that the charge of indecent assault was not proved beyond reasonable doubt.

Secondly that the age of the complainant was not proved as required in law in that no Birth Certificate, Clinical Card or age assessment report was produced in Court during the trial.

Thirdly on the issue of touching the private parts of the complainant, it is the contention by Counsel for the Appellant that the P3 form produced by the prosecution did not show any injuries to her genitalia.

The complainant – **VM** was at the time of this incident a Standard four pupil at I Primary School. After a voire dire examination she told the trial Magistrate that she had been sent by her mother to the shops to buy sugar and medicine when on her way back she met the Accused whom she knew before and after greetings he wrestled her down and dragged her into a nearby maize plantation whereby he proceeded to remove her pants. He also removed his and proceeded to defile her. When he saw her mother he released her. Subsequently the matter was reported to the parents of the Accused and later to police. She was also taken to Wesu Hospital.

The complainant's mother (PW2) was disturbed when her daughter (PW1) delayed from the shops where she had sent her and decided to go and check her. She did not find her at the shops but on her way back she was attracted by some screams in a maize plantation. She went to check and found the Accused in the company of the complainant. She enquired from the daughter as to what had transpired and she was told that the Accused had wrestled her down and proceeded to defile her after removing her clothes. Both of them appeared dusty. The Accused pleaded for forgiveness from her. Upon examining the complainant she found that she had no pants and there was some discharge from her private parts. The mother of the complainant did give the age of her daughter as eleven years and further stated that she did take her to Wesu Hospital where she was treated and admitted for three days.

The investigating officer PC Mark Oketch (PW3) did visit the complainant at Wesu Hospital where he found her admitted. He recorded her statement while at the Hospital. Her father got information that the Accused had taken poison and was admitted at Wesu Hospital. He later went there and arrested him but did not prefer charges of attempted suicide as he was awaiting the outcome of this case.

The Clinical Officer who examined the complainant noted that she had a bruise on her palm. There was a whitish discharge from her vaginal orifice which was not blood stained. She was of the view that the hymen was broken. She also told the Court that the Accused had been taken to Hospital after he had taken poison that night.

The learned trial Magistrate did find that there was insufficient evidence to convict the Accused for the offence of defilement but found the offence of indecent to have been proved.

The Appellant in this case was known to the complainant as they were cousins. He had accosted her while at a maize plantation on the way to the shops where she had been sent by her mother. After she delayed inordinately the mother went in search of her and found her crying while in the company of the Appellant both had clothes which appeared dusty, meaning that they had struggled on the ground.

The Clinical Officer who examined the complainant found that there was whitish discharge from her vaginal orifice an indication that the hymen had been broken. The mother of the complainant did give her age as eleven years.

The Appellant after the act did attempt to commit suicide as alleged by the Investigating Officer and the Clinical Officer. The deduction is that this was as a result of guilt feelings. The Appellant is lucky that the learned trial Magistrate did not convict the Appellant of defilement.

The evidence adduced before the lower Court was consistent. There was proof of penetration. The age of the complainant was given by the mother as eleven years as at the time of the offence.

The conviction was safe and if I was to interfere would be to enhance the sentence. I have not been asked to do so.

The appeal has no merit and it's disallowed.

Judgement read and delivered in open Court this 14th day of May, 2013.

M. MUYA
JUDGE

In the presence of:-

Mr. Dzumo for the State

Counsel for the Appellant - present

Court clerk – Mr. Musundi