



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 152 OF 2010

K. R. K APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal arising from the Judgment of Hon. H. M. Nyaga (Principal Magistrate) in Kabarnet Principal Magistrate's Court Criminal Case No. 352 of 2010 delivered on 7th October, 2010)

JUDGMENT

The Appellant was charged in the main count with the offence of defilement in violation of Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006.

Particulars of the charge are that on the 24th day of April, 2010 at about 4.00p.m. in Marigat District within Rift Valley Province intentionally and unlawfully did cause his penis to penetrate the vagina of J. C a girl aged 11 years in violation of the said Act.

In the alternative he was charged with indecent act contrary to Section 11 (1) of Sexual Offences Act No. 3 of 2006.

Particulars of the charge are that on 24th day of April, 2010 at about 4.00p.m. in Marigat District within Rift Valley Province did intentionally and unlawfully cause his penis to come into contact with the breast of J. C a girl aged 11 years contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The Appellant was convicted in the main count and sentenced to life imprisonment.

He has appealed to this court both against conviction and sentence. He has raised seven (7) grounds of appeal contained in the memorandum of appeal filed in court on 21st February, 2013.

Suffice it to say, the Appellant had filed a memorandum of appeal containing six grounds of appeal on 13th October, 2010. On 1st November, 2012, he was granted leave to amend the grounds of appeal, hence the memorandum of appeal filed on 21st February, 2013.

The appeal was canvassed before me on 23rd May, 2013. The Appellant relied on written submissions filed in court on 21st February, 2013 while the prosecuting counsel, Mr. Wainaina made oral submissions.

I will deal with ground 1, 3, 4 and 5 separately but combine grounds 2, 6 and 7.

Under ground of appeal No. 1, the Appellant states that he was convicted on strength of a medical report with errors and omissions which should not have been admitted as an exhibit.

He submitted that the reference number of the doctor who filled the P3 form was not indicated in the P3 form, that the P3 form falsely showed that he (the Appellant) was examined of injuries which were three hours old and that the P3 form failed to disclose that the minor's hymen was broken hence there was no prove of penetration.

The medical expert testified as PW4, one Leonard Chirchir a Clinical Officer at [Particulars withheld] Hospital. He examined both the Appellant and the Complainant on the same date the offence was committed. Upon examining the complainant, he noted as follows:-

“There was perforation of the hymen. Both libias were inflamed and swollen. They were tender on palpation. There was blood on the vaginal wall Vaginal swab revealed red blood cells. The urine had blood proteins and bacteria I concluded that there was traumatic vagina penetration.....”

came

On examination of the Appellant, PW4 noted the following:-

“I also examined one K R on the same day. He under police escort. The corona of his penis was inflamed. He had seminal discharge in his urethra. I found that he was using anti-retroviral drugs for HIV as he was HIV positive. Other tests were negative. Urinalysis showed blood in the urine. I concluded that there was intercourse.....”

In respect of the complainant, the P3 form was produced as P. Exhibit 1 and in respect of the Appellant as P. Exhibit 2.

I have scrutinized the two P3 forms and both corroborate the testimony of PW4. PW4 testified as the maker of the two documents. They bear the stamp of the hospital where he worked. There was no need or requirement that his reference number appears on both documents. After all the Appellant has not doubted that the maker of the documents is the witness who testified as PW4.

As to the time of examination of the Appellant, it is clear from the testimony of PW3, the witness who said that the Appellant walked into his room followed by the Complainant, that the offence was committed at any time between 3.00 p.m. and 4.00 p.m. The two P3 forms indicate that the complainant was defiled at about 3.00p.m. and that the Appellant was examined on the same date. According to PW5 who was the investigating officer, immediately the Appellant was taken to the police station by members of the public, he had him escorted to hospital for examination.

In my view, what matters is whether there was inordinate delay between the time the offence was committed and the time of examination. Given the results of the examination, it is clear that the Appellant was examined within reasonable time. Further, the results of the examination were a clear testimony that the Appellant had had sexual intercourse not so long before he was examined. It therefore matters not that the clinical officer did not state the exact time within which he was examined after he had had the sexual intercourse. What is crucial is that, the results of the examination, corroborated by other evidence, proved that the Appellant had indeed had an intercourse before he was escorted to hospital.

The examination of the complainant revealed there was traumatic penetration into her vagina. It is immaterial whether or not the hymen was broken, as long as there was penetration, the same is sufficient prove of defilement.

Under ground of appeal number 3, the Appellant argued that the court denied the complainant the right to testify without giving good reasons.

The trial commenced on 12th August, 2010. The prosecutor addressed the court before any witness was called to testify. He informed the court that although the complainant was in court, she was mentally challenged and could not communicate. The trial court then ruled:-

“I have seen the complainant. Physically she appears to be about 9 – 10 years. She is not able to respond to any questions. I see no need to place her on the witness box.”

Clearly therefore, the trial magistrate addressed himself as to the inability of the complainant to testify. He also gave reasons as to why he thought it was fruitless to place the complainant into the witness box. It is not therefore factual to say that the trial magistrate did not give reasons on why he found it inappropriate to have the complainant testify.

With regard to ground of appeal No. 4, the Appellant submitted that incriminating exhibits such as the complainant's under pants were not produced. He argues that the liquid found on the complainants thighs by her mother (PW2) was not tested and proved to be seminal fluid.

I have already analysed what evidence PW4, the clinical officer who examined both the complainant and the Appellant was. The same leaves no doubt in my mind that the complainant was defiled. Moreover, P. Exhibit 1 was conclusive of this fact. P. Exhibit 2 did also confirm that the Appellant had had sexual intercourse before he was taken to hospital for examination.

In addition, PW2 and 3 were witnesses who saw the Appellant open the door of his house where he had locked up the complainant while defiling her, and thereafter open the door and run away after a mob surrounded his house.

PW3, while watching from a distance, saw the Appellant walk into his house followed by the Complainant. She knew the complainant was mentally handicapped. After the Appellant closed himself and the complainant in the room, she ran to call PW2. She testified that even after knocking the room, the Appellant failed to open and when he did, he stepped out and started running away.

In corroborating the evidence of PW3, PW2 further testified that when the Appellant ran away, he was without a shirt and his zip was half way opened.

The only other person who came out of the Appellant's house was the complainant. She was examined by her mother, PW1 who said she saw liquid resembling semens on her thighs. Upon examination by PW4, it was confirmed that she had been defiled. No other person, in the circumstances could have defiled her except the Appellant. It is unfortunate that the Complainant could not testify due to her disability. Accordingly, I find that the prosecution proved beyond all reasonable doubts that indeed it is the Appellant who defiled the complainant.

As regards ground of appeal number 5, the Appellant submitted that key prosecution witnesses were not called to testify which, as a result led to the investigations being conducted in a shoddy manner. He however failed to disclose who these key witnesses who did not testify were.

The decision on the number and type of witnesses to be called squarely lies with the prosecution. They will call the witnesses they think will be crucial in proving their case beyond all reasonable doubts. It makes no sense to call an avalanche of witnesses who may not add value to their case. As few as one or two witnesses could prove a case. In this respect, the five prosecution witnesses who

testified gave corroborative evidence, each giving an account of what they knew about the case. All the evidence combined was relevant and remained unshaken and it sealed the fate of the Appellant.

Grounds of appeal 2, 6 and 7 combined fault the trial magistrate for convicting the Appellant without sufficient evidence to do so.

With regard to ground of appeal No. 2, he submits that the age of the complainant was not ascertained. In particular, he submitted that no birth certificate or birth immunization card was produced in court in this regard.

PW1 the mother of the complainant who testified on 12th August, 2010 told the court that the complainant was then aged 9 years. The trial court on its part assessed her age at between 9 and 10 years. PW4 the medical officer assessed her age at 11 years.

It is trite that under section 8 of the Sexual Offences Act, the penalties prescribed are determined by the age of the complainant. And where the age of the complainant is doubtful, it is important that court is given sufficient information that guides it in determining the age of the complainant. However, it is not in all instances that documents such as a birth certificate or an immunization card may be available. In those instances, court will be guided by other evidence on record in arriving at a decision determining the age of the complainant. The documents may only be necessary when the age of the complainant is in the borderline, making it difficult for the court to make a conclusive finding as to her age.

In the instant case, evidence shows that the complainant was aged between 9 and 11 years which necessitated the charge to be drafted under S. 8 (2) of Sexual Offences Act. In particular, I am minded that the highest age given was by a medical personnel, PW4, whose evidence I would have no reason to doubt.

Hon. Justice Njagi (as he then was) in **FAPPYTON MUTUKU NGUI –VS- REPUBLIC (2012) e KLR** was of a similar view and he held thus;

“I am aware that our case law requires that the age of a child to be conclusively proved before any conviction can arise from an offence under the Sexual Offences Act. The Courts are strict about this requirement because the penalty once found guilty is dependent on the age of the victim.... I would be prepared to clarify that “conclusive” proof of age in cases under Sexual Offences Act does not necessarily mean that there has to be a formal age assessment report or the production of a birth certificate. Such formal documents might be necessary in borderline case, but other modes of proof of age are available and can be used in other cases. In this particular case, I am prepared to hold that available evidence shows that the victim was less than eleven years old, which is the threshold for triggering a charge under section 8 (2) of the Sexual Offences Act.

Although this holding is from a court of concurrent jurisdiction, I hold the same view and have no reason to depart from it.

As regards grounds of appeal 6 and 7, on the whole and from the foregoing, I find that the prosecution discharged its burden, of proving the case beyond all reasonable doubts. The trial magistrate did not misdirect himself on any issues of law or fact nor did he misapprehend the evidence tendered before him. He arrived at the decision he did based on concrete evidence tendered before him.

The Appellant deserves no mercy. He knew he was HIV positive and was on treatment for the sickness. With this knowledge in mind, he undertook to destroy the life and future of the helpless child. Although the complainant could not express herself, the Appellant having taken advantage of her disability, will live with the trauma for the rest of her life.

In the result, I find that this appeal lacks merit. I uphold both the conviction and the sentence and order that the Appellant continues to serve the jail term imposed against him.

It is so ordered.

DATED and DELIVERED at ELDORET this 11th day of July, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Appellant in person

Mr. Munene for the State/Respondent