



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 39 OF 2008

JULIUS SHIOSOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 814 of 2007 of the Chief Magistrate's Court at Mombasa – Hon. T. Mwangi - SRM)

JUDGMENT

The appellant was Convicted and Sentenced to ten years imprisonment for the offence of defilement of a girl with mental disability contrary to section 7 of the Sexual offences Act No. 3 of 2006.

The particulars being that on diverse dates between the month of February and October 2006 at unknown time at [particulars withheld] in Likoni Location he defiled a girl P.A aged 17 years.

Section 7 of the Sexual offences Act relates to acts which cause penetration or indecent acts committed within the view of a family member child or person with mental disabilities.

It provides,

“A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or person with mental disability is guilty of an offence and is liable upon Conviction to Imprisonment for a term which shall not be less than ten years”.

Doctor Bajaber Abdulla of Coast General Hospital did examine the complainant on 14th March, 2007. He found that she was mentally retarded. She had a whitish discharge from her private parts urine test showed urinary tract infection. A venereal disease. Upon performing a pregnancy test, it was positive.

It is this pregnancy that triggered events leading to the arrest of the Accused. That the complainant was mentally retarded does not appear to be contested. What is in question is whether the evidence adduced before the Court is in conformity with the charge. At page 3 line 10 this is what she told the Court,

“ I know the Accused (he is my neighbour) we used to live in one plot in different rooms. In February 2006 he saw me going to the toilet. I don't know the time.

There is a neighbour who saw me. When the Accused saw me going to the toilet. He touched my private parts. The second day he held me by force and took me to his room “

There is no indication at all whether this was happening within the view of a family member child or a person with mental disabilities.

Indeed it is the complainant herself who was mentally challenged or retarded. The facts do not disclose the offence envisaged under section 7 of the Sexual offences Act.

It is however, observed that the Appellant had been charged with an alternative count of indecent act contrary to section 11(1) of the sexual offences Act No. 3 of 2006.

In that he touched the private parts of the complainant namely the Vagina.

The complainants evidence is that the Appellant started by touching her private parts (Vagina). When she was going to the toilet. She reported this to her grandmother who in turn reported to the landlord and the Appellant was ordered to vacate where he was staying with his brother but this did not stop him from visiting his brothers and gaining access to the girl. She also testified of how on a day she could not recollect the Appellant had sexual intercourse with her without her consent and threatened her not to tell anybody.

Her grandmother (PW 2) did testify of how the Accused had been ordered to vacate the house he was staying after the Complainant reported that he was harassing her by touching her private parts.

On indecent act I do find that Complainants evidence was corroborated by her grandmother PW 2 and the Doctors evidence. Whereas I do find that the substantive charge was not proved I am satisfied that there is sufficient evidence on the alternative count of indecent act which is a lesser offence under section 179 of the Criminal Procedure Code the Court can find for a lesser offence.

The age of the Complainant is variably given as 15, 16 and 17 years. She is an orphan and there was no evidence adduced as to when she was born. No age assessment was done by the Doctor.

I find that there was sufficient evidence to find the appellant guilty of the offence of indecent act contrary to section 11A of the Sexual offences act. I accordingly substitute the Conviction to that under section 11A of the act.

The Sentence is also reduced to that of five years imprisonment.

In the event he has served the five years imprisonment to be released unless otherwise lawfully held.

Judgment dated and delivered this **13th** day of **August, 2013**.

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M. MUYA

JUDGE

13TH AUGUST, 2013

In the presence of:-

Learned State Counsel Miss Ogweno

The appellant present

Court clerk Musundi

M. MUYA

JUDGE

13TH AUGUST, 2013