



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NUMBER 161 OF 2012

BETWEEN

ALEX JAMES MUCHANGI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Embu Criminal Case 1917 of 2010 by Lucy Mbugua S.P.M on 30th October, 2012)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(4)** of the *Sexual Offences Act*. He 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*.
2. The particulars of the offence were that on 15th August 200 at [Particulars Withheld] Village, [Particulars Withheld] Sublocation of Embu County, the appellant intentionally caused his penis to penetrate the vagina of ACW, a child aged 16 years without her consent. He was tried and convicted of the main charge and sentenced to a term of 20 years imprisonment. The appellant appeals against conviction and sentence.
3. According to his petition of appeal, the appellant attacks the judgment on two grounds: First, that he was convicted on the evidence of a sole eye witness. Second, that the learned Magistrate did not consider that no DNA test was carried out to confirm that he was the one who had sexual intercourse with the complainant.
4. The complainant, PW 1, was a child aged 16 years at the time of trial gave sworn evidence after the Magistrate certified that she was possessed of sufficient intelligence and understood the need to speak the truth. She testified that at about 7.00 p.m on 15th September 2010, as she was going to the shop to buy medicine, a man grabbed her, covered her mouth, carried her on his shoulders and took her to a house. He threatened to kill her if she screamed. In the dark house, he undressed her and had intercourse with her on the bed. The felonious act continued until morning. He then released her at about 5.00 a.m when it was a bit dark. He escorted her to a place about 50 – 70 meters. It was then that she saw someone delivering milk and asked her for the way to her grandmother's place. The person directed her and upon arrival, she narrated her ordeal to her cousin, PW 2. The matter was then reported to Kangaru Police Station. Her parents had already reported her disappearance that night. She was referred to Embu General Hospital for an examination.

5. PW 2, confirmed that PW 1 was missing the after she had left to buy medicine on the fateful day. As she had over stayed, frantic efforts were made to look for her by calling relatives but to no avail. Her disappearance was reported to Kangaru Police Station. PW 2 confirmed that PW 1 came home the following morning crying and looking stressed. PW 2 also testified that she had seen the appellant in school she used to attend. PW 3 also confirmed that PW 1 was missing and that on the next day she accompanied PW 1 to hospital when she was called by PW 2.
6. PW 4, a police officer, gave evidence that an informer spotted the appellant at Samson Bar. He duly informed Manyatta Police Station from where an officer was sent to arrested the appellant who was subsequently charged.
7. PW 6, Dr Njoka Njiru, produced the P3 form prepared by Dr Dawa, who had left employment. According to the P3 form, the doctor examined PW 1 on 16th August 2010 and he confirmed that the labia majora and minora were inflamed, swollen and red. The hymen torn and the vaginal walls inflamed. There was no discharge or blood. Upon cross-examination by the appellant, PW 6 confirmed that the inflammation was consistent with penetration.
8. The duty of the first appellate court is to re-evaluate the evidence bearing in mind that it did not see or hear the witnesses. I find that PW 1 was indeed defiled. Her evidence of sexual intercourse which included actual penetration was corroborated by the medical evidence of PW 6.
9. The primary question in this appeal is whether the appellant committed the offence of defilement. The learned Magistrate on this issue concluded as follows, ***“Was accused the assailant? I find that PW 1 has stated that she had been able to see accused in the morning when he was escorting her. There is nothing to indicate that PW 1 had set out to implicate accused. What is apparent is that villagers did get wind of what happened and informed police. So when the police eventually arrested accused, PW 1 was able to identify him as the assailant. The evidence of PW 1 regarding identification is given in a simple and forthright manner. I am inclined to believe her.”***
10. What was the evidence of identification? I have scrutinized PW 1's evidence and I find that the evidence of identification does not bear the standard that is required to convict the appellant. PW 1 did not know the assailant. She testified that at the time she was abducted, it was a little dark. During the night, there was no light in the house and the assailant did not illuminate the room. When PW 1 was released in the morning, it was a bit dark. Although, PW 1 states that she had seen the accused well in the morning, no description of the assailant was provided in testimony.
11. PW 2 testified that PW 1 had told her that she did know the assailant but that she saw the assailant clearly in the morning. PW 1 only identified the accused by reason of the fact that he was in the dock although she had not known him before. In cross-examination PW 2 stated that PW 1 gave a description of the assailant. It is noteworthy that neither PW 1 nor PW 2 gave a description of capable of identifying the assailant.
12. PW 4 testified that the appellant was arrested on the basis of information from an informer. PW 4 did not disclose who the informer was or the description given to him by the informer of the person who was alleged to be the perpetrator of the criminal act. He also did not disclose the basis for concluding that the appellant was the person alleged to have defiled PW 1.
13. In the case of ***Simiyu and Another v Republic [2005] 1 KLR 192***, the Court of Appeal held that in every case where there is a question of identity of the accused, the fact of there having been a description given and the terms of description are matters of highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given. In this case, such description of the accused was lacking from the testimony of PW 1, PW 2 and PW 4.
14. I therefore find and hold the identity of the assailant was not proved beyond reasonable doubt and

as a result, I allow the appeal and quash the conviction. The appellant is released unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at EMBU this 30th day of October 2013

D. S. MAJANJA

JUDGE