



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 31 OF 2012

BETWEEN

KAUNI GICHOVI MUGO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Embu Criminal Case 538 of 2007 by E.K. Nyutu R.M on 24th October, 2008)

JUDGMENT

1. The appellant was charged on 30th March 2007 with the offence of defilement of a girl contrary to **section 8(1) (3)** of the *Sexual Offences Act*. The particulars of the offence were that on 25th March 2007 he intentionally and unlawfully had carnal knowledge of SKK, a girl aged 15 years. He was also charged with assaulting one SKK thereby occasioning her actual bodily harm contrary to **section 251** of the *Penal Code*. He was convicted on both charges and sentenced to 30 years in prison of the first count and two years in prison for the second count with both terms running concurrently.
2. The particulars of the offence and facts can be gathered from the prosecution witnesses and are as follows. The complainant, PW 1, testified that she was aged 15 years at the material time. She had been left home by her mother on 25th March 2007. At about 5 pm, while she had gone to the back of the house to collect the baby's clothes which had been put out to dry, she was grabbed by the neck and her mouth covered. She was dragged and pushed into the nearby house. The door was locked. The appellant then proceeded to have sexual intercourse with her. She struggled but to no avail as he was stronger. She could not scream as her mouth was covered. She however continued to struggle until she was able to scream.
3. The screams alerted PW4, a neighbor, who alerted PW1's mother that her daughter was screaming from a neighbour's house. PW 4 went to the complainant's mother house. Both of them went to the appellant's house, where the screams were coming from. They found the door locked and pushed it open. According to PW 1's mother, PW 2, the appellant came out naked. PW 2 screamed and her screams attracted the neighbours who caught and arrested the appellant.
4. PW3, the investigating officer, testified that on 25th March 2007, at around 7 pm, the complainant and her mother came to report the incident at Kathangariri Police Station. He went to the suspect's house with PW 1 but did not find him there. Later at 9.00 pm, he returned to search the house. The appellant was found and during the search a biker and dress (exhibits 1 and 2) were recovered under the bed. PW1 confirmed that these were her clothes. PW2 also confirmed that the

- clothes belonged to PW 1.
5. PW1 was taken to Embu Provincial General Hospital on 27th March 2007. She was examined by the doctor, PW 5, who noted that there was tenderness on the anterior aspect of the neck. He did not see any obvious tears on the labias but noted that the hymen was perforated. The vaginal swabs taken did not reveal any spermatozoa as two days had lapsed since the incident.
 6. The appellant was put on his defence. In his unsworn testimony, he denied having committed the offence. He stated that after spending the day in Embu Town, he came home at 5.00 pm and found that it had been broken into. He then proceeded to sleep until officers came to arrest him alleging that he had defiled PW 1. He stated that the charges were intended to frame him as he had money.
 7. Having considered the evidence, the learned Magistrate in her judgment dated 24th October, 2008 found that the prosecution had proved its case beyond reasonable doubt. The appellant now appeals against the judgment on three main grounds:
 - a. The learned Magistrate erred in not considering the doctor's evidence that no spermatozoa was found hence the act of defilement had not taken place.
 - b. That his constitutional rights were violated and he was held in police custody for a period longer than 24 hours from the time of his arrest.
 - c. The sentence is harsh and excessive in the circumstances.
 8. This being the first appeal, the court is entitled to examine the evidence of the trial court and make its independent conclusion bearing in mind that it did not see or hear the witnesses. I have considered the evidence and I find that the Magistrate properly dealt with the evidence before her.
 9. The offence of defilement as defined in **section 8(1) (3)** of the ***Sexual Offences Act*** refers to an act which causes penetration. It is not necessary for there to be ejaculation or any release of bodily fluid to complete the offence. Penetration is the necessary act which the prosecution bears the burden of proving. The fact that the doctor did not find any spermatozoa does not exculpate the appellant. The doctor also confirmed the use of force. The appellant's act of forcibly taking PW 1 to his house and thereafter having intercourse was proved by the testimony of the complainant and corroborated by the doctor's evidence that the hymen was perforated. The evidence of PW 2 and PW 5 who reacted to PW 1's screams and came to rescue her and found the appellant in the act lend credibility to PW 1's testimony. Further, the evidence of the PW1's clothes being found in the appellant's house further implicated him and completed the cycle of corroboration.
 10. The appellant's unsworn testimony confirms that he was in his house at least the time the offence was proved to have taken place and the time he was arrested. Like the learned magistrate, I dismiss the allegations of a frame up in light of the clear evidence presented by the prosecution.
 11. The Court of Appeal in the case of ***Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008 [2010] eKLR***, settled the issue that the breach of an accused's constitutional rights relating to pre-trial detention is not a ground to invalidate a proper trial. The remedy for the appellant lies in filing separate case to vindicate his rights. This ground accordingly fails.
 12. Upon conviction, the appellant was sentenced to serve 30 years imprisonment for the offence of defilement and 2 years on the assault count. No mitigation was offered and in light of the seriousness of the offence of defilement, I do not find any error in the learned magistrate's decision to warrant interference with the sentence.
 13. The conviction and sentence were proper. Accordingly, the appeal is dismissed.

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

D. S. MAJANJA

JUDGE