



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL NO. 68 OF 2013

(from the original conviction and sentencing of the Principal Magistrate's Court Bondo – Hon. P W Mutua – Principal Magistrate.)

CORNEL OGUTUAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

This is a first appeal challenging conviction and sentencing of 20 years for the offence of defilement. The issue for determination is whether the offence was proved beyond reasonable doubt against the appellant and if yes whether the sentence ought to be reduced. The opinion of this court is that the appeal lacks merits.

BACKGROUND

The appellant was charged with defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. the particulars of the offence were that on 17/1/2013 [particulars withheld] in Siaya county, the appellant intentionally caused his penis to penetrate the vagina of P A a child aged 15 years.

In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. the appellant denied the charges and the prosecution called six witnesses. P A O (PW1) gave a sworn statement after a *voir dire* examination by the trial court. Initially she denied the alleged defilement but after being remanded at the juvenile home at the request of the prosecutor she confirmed that she was defiled by the appellant (her step father). She recalled that on 17/1/2013 at 6pm she was at home with the appellant and her young sibling. The sibling was playing outside, PW1 was in the sitting room while the appellant was in the bedroom. The appellant called her into the bedroom and threatened not to scream. He removed her pants and removed his clothes and inserted his penis into her vagina. PW1 felt pain.

C O and J came in and the appellant rose from her went to the door where the said two people were knocking. C and J asked where PW1 was and the appellant lied that PW1 had gone to fetch water. C and J went away but returned when PW1 had left the house. She later narrated the issue to the assistant chief and then went to the police and then to the hospital. On cross examination PW1 confirmed that the appellant had also defiled her on 16/1/2013.

B A A (PW2) is the mother to the PW1. On 17/1/2013 at 7.30pm she as int eh market when her

neighbour I called her to meet M and O (neighbours also) because there was an emergency. The two neighbours told her about the defilement of PW1. PW2 confirmed that the appellant was her husband for 15 months and that the PW2 was 15 years old. The matter was reported to police.

Japheth Oduor (PW3) is the clinical officer who examined the PW1. He found no laceration or bruises but the hymen was freshly broken. There was a whitish discharge from the vagina. Highly vaginal swab showed presence of yeast cells and spermatozoa to prove that there was penetration. PW3 also examined the appellant and noted no injury on his genitalia. His pubic hair however had whitish stains.

J O N (PW4) was going home through rented house on 17/1/2013 at about 7pm when he heard C O calling him. C told him that he found the appellant defiling PW1. He went to check and found the appellant dressing up and the PW1 lying down without underpants. The appellant left and the PW2 told them that that was the second time she was defiled by the appellant.

David barno (PW5) was the investigating officer. He produced birth certificate showing that PW1 was a minor born on [particulars withheld]1997. C O (PW6) was at home on 17/1/2013 at 5.30pm and went for a drink (alcohol) at the appellants' house. He entered the house without knocking only to find the appellant having sex with PW1. The PW1 was naked while the appellant had no shirt. He went out and called PW4. The appellant came out and told them that he had not done anything bad and then disappeared.

The PW1 told them that the appellant had defiled her twice. They called the mother and took the matter to the police and then to the hospital. Relying on the foregoing evidence the trial court put the appellant to his defence.

DEFENCE CASE

The appellant gave an unsworn defence. Eh recalled that on 17/1/2013 at 6pm he was at home from work when two people arrested him. He was later charged with the offence he knew nothing about and he denied them. He denied knowledge of the PW1 and maintained that he saw the PW1 for the first time in court. He also stated that he had grudges with PW1 because her mother was his aunt.

After considering the evidence adduced, the trial court found the appellant guilty and sentenced him to 20 years imprisonment. The appellants was aggrieved and brought this appeal.

GROUND OF THE APPEAL

1. THAT the learned trial magistrate erred in law and in facts when relying and basing his conviction while putting such reliance on the sole evidence made by PW1 and PW3 under difficult and uncondusive circumstances.
2. THAT the learned trial magistrate erred in law and in facts when he failed to consider that forensic evidence report was necessary in this case.
3. THAT the learned trial magistrate erred in law and in facts by not complying with the provisions of Section 324 as read with Section 329 CPC.
4. THAT the learned trial magistrate erred in law and in facts by not considering my alibi defence statement that was strong enough to secure an acquittal.

APPELLANTS SUBMISSIONS

The appellant submitted that there was no sufficient evidence to support conviction. The PW1 was not defiled but was forced to state that she was defiled. Evidence to prove that the appellant defiled the PW1. The age of the PW1 was not proved as such age assessment was required.

RESPONDENT'S REPLY

Mr. Magoma learned state counsel opposed the appeal and supported the conviction. He submitted that

birth certificate was produced as exhibit to prove that the PW1 was 15 years. In addition a P3 was produced as exhibit to prove penetration. A broken hymen and presence of spermatozoa after a high swab test proved penetration.

PW6 caught the appellant in the act of defiling the PW1 and called PW4 who found PW1 lying down without pants and the appellant dressing up. In view the above evidence, the learned state counsel urge that the appeal be dismissed for lack of merit.

ANALYSIS AND DETERMINATION

The duty of this court is to reevaluate the evidence and see whether the trial court was in error for convicting and sentencing the appellant for the offence of defilement to be proved, the prosecution must adduce evidence to show that the victim of the offence was aged below 18 years and that there was penetration.

This court like the trial court is satisfied that there was penetration perpetrated by the appellant and the victim of the said penetration was aged between 12 and 15 years. The evidence of penetration by the Pw1 was corroborated by evidence of PW3, PW4 and PW6. PW4 and 6 were the eye witnesses who reported the matter to PW2, and the police. PW3 was the clinical officer who saw the freshly broken hymen and a whitish discharge coming out of the PW1's vagina. A high vaginal swab revealed presence of spermatozoa. All the above corroborative evidence was consistent within the act of penetration.

As regards the age of the PW1, the birth certificate produced as exhibit P.3 indicated that she was born on 6/10/1997. a simple calculation of the age as at 17/1/2013 gives the answer as slightly above 15 years. To that extent the offence of defilement under Section 8(1) &(3) of the Sexual Offences Act was proved.

The conviction was therefore proper. As regards the sentence, the age of the victim is the key element to consider. Section 8(3) of the said Act provides for a sentence of 20 years imprisonment where the victim of the defilement is between 12 and 15 years. The Act does not provide for any sentence for the offence if the victim is above 15 years bit less than 16 years. In my view that leave space for court to exercise discretion. In the present case the trial court awarded 20 years jail sentence. It shall remain the sentence to be served by the appellant.

DISPOSITION

The appeal is dismissed and the appellant ordered to complete the sentence passed by the lower court.

Signed this 22nd day of November 2013

ONESMUS MAKAU

JUDGE

delivered thisday of2013

JUDGE