



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL NO. 26 OF 2013

JOSEPH OWUONJEAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentencing of the Senior Resident Magistrate Court at Tamu in Cr case No. 138 of 2012 – Hon. M C Nyigei - RM)

J U D G M E N T

INTRODUCTION

This is an appeal against the judgment of the Resident Magistrate Court at Tamu whereby the appellant was convicted and sentenced to life imprisonment for the offence of defilement. The question for determination is whether the prosecution proved the offence beyond any reasonable doubt. This court however finds in favour of the appellant.

BACKGROUND

The appellant was charged with the offence of defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on 8/7/2012 at *[particulars withheld]*, Muhoroni District, the appellant intentionally caused his penis to penetrate the vagina of V A , a child of 6 years.

The appellant denied the charge and the prosecution called 6 witnesses to support the charge.

V A (P.W.1) gave a sworn testimony after a *voir dire* examination showed that she understood the nature of oath. On 8/7/2012 she was walking home from the shop when she met the appellant who grabbed her and pulled her into a nearby sugar cane plantation. The appellant then removed her pant and clothes and placed his penis on her vagina. She screamed but he shut her up by placing his hand on her mouth. He injured her private parts and left her in the sugar plantation bleeding. She then managed to go home but found no one. When her mother came home she told her about the ordeal and the mother took her to hospital where she was admitted and later discharged. She identified the offender by his clothes and pointed the appellant at the dock.

On cross examination, P.W.1 confirmed that she was defiled on a Sunday around 8.00 at a place where there was no shop or house nearby.

M A O (PW2) is the P.W.1's mother. She sent P.W.1 to the shop to buy some items. When it reached 11 a.m without P.W.1 returning, she became concerned and went to look for her. She met P.W.1 on the way walking slowly and on enquiry, P.W.1 told her that she met the appellant on her way from the shop. P.W.1 did not know the name of the appellant. She examined the P.W.1's private parts and found the pant bloody.

She reported the matter to the father and took P.W.1 to the hospital. The P.W.1 was admitted for one week and then discharged and went to the police station for a P3.

Later the appellant was arrested at his house in PW2's neighborhood. On cross – examination P.W.2 stated that C saw the appellant grabbing P.W.1 and told her.

F O O (PW3) told the court that on 6/7/2012 she was at home when P.W.1 came for milk from her house. After giving the milk, P.W.1 went to a shop and never returned to P.W.3's house.

On the same day PW3 heard people working at a nearby farm and the appellant was among them. Later P.W.3 heard from P.W.3 that the appellant had defiled P.W.1. P.W.3 confirmed that the appellant was arrested while weeding by a mob.

C O O (P.W.4) , 9 years old gave a sworn testimony after a *voir dire* examination. On 8/7/2012, he was playing near his home when he saw somebody carrying P.W.1 to a nearby sugar cane plantation. He never heard P.W.1 scream while being carried away. P.W.4 had never seen the said man before 8/7/2012. He did not see the man's face but only his clothes namely a stripped T – shirt.P.W.4 only saw the said man in court,

Dr. Okal Ochola Epharaim (PW5) examined PW1 and filled her P3 on 24/7/2012. He found her external genital normal. There was a perineal tear at the 6 o'clock. There was no hymen and the vaginal wall had bruises. The rest of her body was normal but a vaginal swab showed red blood cells.

Sgt. Pascal Nabongo (PW6) was the investigating police officer. On 8/7/2012 the PW1 was brought to the station by her mother (PW2) on allegation of defilement. PW1 was bleeding from her private parts. He gave her P3 which was filled by the doctor. On 9/7/2012 members of the public brought the appellant to the station after PW1 described the physical appearance of the assailant to her parents and he was recognized. He booked the appellant and later charged him in court.

After considering the forgoing evidence the trial court found that the appellant had a case to answer and put him to his defence.

DEFENCE CASE

The appellant gave a sworn defence. He stated that on 9/7/2012 a woman in company of 3 children and 2 other people found him working and asked him where he was on 8/7/2012 and whether he met some children. He denied meeting any children on 8/7/2012 because it was not a school day but a Sunday.

He was then arrested by members of the public who told him that his clothes resembled those of a person who defiled a child on 8/7/2012. They took him to police station where he was booked and after two weeks (22/7/2012) an identification parade was done on him but the minor did not identify him as the assailant.

The appellant stated that he was not new at the area since he had lived there for 3 years before the arrest. He was therefore shocked that the PW1 identified him at the dock meaning that she was coached after she failed to identify him at the parade.

On cross examination he maintained that the farm he was working on is near the home of the PW1. After considering all the evidence advanced by both sides the trial court convicted the appellant and sentenced him to life imprisonment. The appellant was however aggrieved and brought this appeal.

GROUND OF APPEAL

1. THAT the learned trial magistrate erred in law and facts by not finding that the prosecution failed to prove their case beyond any reasonable doubt.
2. THAT the learned trial magistrate erred in law and in facts by not considering evidence adduced which showed that the appellant was not the one who defiled the complainant.
3. THAT the learned trial magistrate more marked erred in law and in facts when he failed to find that forensic examination report was necessary in this case.
4. THAT the learned trial magistrate erred when he failed to comply with article 49(f) (i) (ii) of the constitution.
5. THAT the learned trial magistrate erred in law and in facts by not upholding provision of section 324 as read with Section 329 CPC.

ANALYSIS AND DETERMINATION

The issues for determination are whether the prosecution proved the offence of defilement against the appellant beyond any reasonable doubt and whether the sentence awarded should be reviewed.

In answer to the first question this court must consider whether all the ingredients of defilement were established and then ascertain whether the evidence pointed to the appellant as the perpetrator of the offence. Section 8(i) of the Sexual offences Act identifies penetration and the age of minority as the ingredients of the offences of defilement. Penetration is defined in Section 2 of the Act as the complete or partial insertion of a person's genital organ to the genital organ of another person. In this case, PW1 stated that the appellant placed his penis on her vagina and she felt pain followed by bleeding. PW2 and PW5 corroborated the PW1's evidence on the bleeding. PW5 (doctor) examined the PW1's genitalia and found no hymen, bruises on the vaginal wall and a perineal tear at the 6 o'clock. The foregoing observation by the PW5 were consistent to penetration.

On the other hand PW6 produced a Birth Certificate which proved that the PW1 was a minor aged 6 years. That was consistent with the P3 and treatment notes on the issue of age. To that extent this court is satisfied that the primary ingredients of defilement were proved.

The question that remains is whether the appellant was the defiler. PW1 never identified the assailant but only saw his short and striped T-shirt. She never identifies the appellant during the identification parade on 22/7/2012. She only identified the appellant at the dock during her testimony.

PW4 was playing near his home when he saw a man in striped shirt carrying PW1 into the sugarcane plantation. He could not state how far he was from the man. It means he was far because he never heard PW1 screaming from the scene of crime. He did not see the assailant's face but he looked to be a stranger because he had never seen him before in that area.

PW1 never identified the appellant in any identification parade although the description he gave to the PW2 and others is what led to the arrest of the appellant. The evidence of the PW1 and PW4 on identification was not corroborated by any adult witness or any forensic evidence. It was a shaky evidence because the appellant was their neighbour for 3 years which means that they should have identified him. Instead of corroboration, their evidence was completely destroyed by the evidence of PW3 when she stated that on the 8/7/2012 the appellant was working the farm in the company of other people. That cast more doubt as to whether the appellant was the only person in that area with the opportunity to defile the PW1.

In dealing with the issues of identification, the trial court properly found that the crucial issue in the case before her was the identification of the assailant. The trial court then proceeded to find that of all the

witnesses lined up, the PW1 was the only one who positively identified the assailant by face. PW1 also identified the clothes of the assailant which matched those the appellant. The trial court then proceeded to find that the scene of the crime was on the same land where the appellant was working on the day of the offence and also the day when he was arrested. Based on the foregoing observation, the trial court found that the appellant had been positively identified by the PW1 and PW4. This court however is of a different view in relation to the identification of the assailant. The court did not consider the uncontested evidence that there was an identification parade on 22/7/2012 where the PW1 did not identify him. That was barely 2 weeks after the offence when the memory of the Pw1 was fresh.

The prosecution dishonestly concealed the fact that an identification parade was done and the PW1 failed to identify the appellant. Desperate to secure a conviction, the prosecution or PW2 obviously coached the PW1 to identify the appellant at the dock. This court will not deem dock identification as a safe mode of identifying an offender. It is not safe evidence to form the basis for a conviction. It is therefore the finding of this court that the trial court fell into error when she found that the PW1 had positively identified the appellant as the person who defiled her on 8/7/2012. This appeal must therefore succeed despite the serious physical and mental injury suffered by the PW1.

DISPOSITION

The appeal is allowed and the appellant set at liberty unless otherwise lawfully held.

Signed, dated this 22nd day of November 2013

ONESMUS MAKAU

JUDGE

Delivered this 22nd day of November 2013.

ONESMUS MAKAU

JUDGE