



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 31 OF 2013

(Appeal arising from the original conviction and sentencing of the Principal Magistrate's Court Maseno in Cr. Case No. 14/2011 - J. Ongondo – SRM)

JUSTO OKETCH MASAKAAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

INTRODUCTION

This is an appeal challenging the judgment of the Senior Resident Magistrate Maseno dated 20/3/2013 by which the appellant was convicted and sentenced to 20 years for the offence of defilement. The issues for determination is whether the offence of defilement was proved against the appellant beyond reasonable doubt. The opinion of the court is that a lesser offence than defilement was proved.

BACKGROUND

The appellant was charged with attempted defilement contrary to Section 9(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offences were that on 1/1/2011 [particulars withheld] Vihiga county the appellant attempted to cause his penis to penetrate the vagina of E A O a child aged 12 years.

Alternatively, the appellant was charged with committing an indecent act with a child contrary to Section 1(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 1/1/2011 [particulars withheld] Vihiga county the appellant intentionally touched the vagina of E A O a child aged 12 years with his penis.

The main charge however was substituted with a charge of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 1/1/2011 [particulars withheld] Vihiga County the appellant intentionally caused his penis to penetrate the vagina of E A a child aged 12 years.

The appellant denied all the charges and the prosecution called 5 witnesses to support the same.

PROSECUTION CASE

E A (PW1) was at her grandfathers house at 5pm. Her aunt (step mother) was in the same house

sleeping because she was sick. PW1 was bringing dry maize into the house when the appellant came in. He pushed PW1 against the table, tore her skirt and underpants and tried to defile her. PW1 screamed and the appellant held her mouth as PW1 was pushing him. The appellant had unzipped his trouser removed his penis and was pushing PW1 against the wall. Then the aunt came and pulled the appellant and he went away. The aunt took her to Emuhaya district hospital. A P3 was filled and treatment notes prepared. R K N (PW2) is the PW1's aunt (stepmother). On 1/1/2011 she was in her house sleeping when she heard the appellant talking to her son. At 5pm PW2 heard a child crying in her father in-laws house and rushed to check. PW2 met the appellant pulling the PW1 who was crying. He then pushed PW2 and ran away. PW2 saw some "whitish things" rolling down the PW1's thighs. PW1's skirt and underpants were torn. She then took PW1 to Emuhaya District Hospital. PW2 knew the appellant because he was neighbour. On cross examination PW2 confirmed that the appellant was pulling the PW1's hand when met them.

B O (PW3) is the grandfather of PW1 and neighbour to the appellant. On 1/1/2011 he went for a meeting at 13.00 hours and left Pw1 drying maize. When he returned at 6pm he was told that the appellant had defiled PW1. PW3 then reported the matter to village elder and search for the appellant commenced. The appellant was arrested while trying to run away to Busia.

Hajira Nabwire (PW4) works at Teso District hospital. On 3/1/2011 at 4.50pm she filled P3 form for PW1 at Ipale Health Centre. PW1 had earlier been treated at Emuhaya district hospital where it was noted that PW1 had injuries (bruises). Her hymen had been freshly broken and had semen on her thighs. PW4 formed the opinion that forceful penetration had been done.

Samuel Maina (PW5) is the police officer who received the report of the defilement PW1 on 3/1/2011 at 12.30pm. The appellant and Pw1 were brought to the Luanda police station by PW2 and Pw3. He issued P3 to the PW1 and received her torn skirt and underpants. PW5 also produced birth notification to show that PW1 was born on 15/12/1998. after the close of the prosecution case the appellant was found with a case to answer and therefore put on his defence.

DEFENCE CASE

The appellant gave a sworn defence. He denied the charges and contended that he was arrested on 31/1/2011 by 6 youths while walking on the road at Ebulonga sub-location. He was taken to Luanda police station by the PW2 and neighbours. He further contended that the case was a frame up because of a land boundary dispute between his family and PW3. He stated that he was 19 years old.

Despite the appellant's defence the trial court convicted him of the main charge of defilement and sentenced to 20 years imprisonment. The appellant appealed.

GROUND OF APPEAL

1. THAT the learned trial magistrate erred in both law and facts by failing to appreciate inconclusive medical report.
2. THAT the learned trial magistrate erred in both law and facts when he failed to note that a grudge was established in the case.
3. THAT the learned trial magistrate erred in both law and facts by admitting and relying on a family fabricating evidence.
4. THAT the learned trial magistrate erred in both law and facts by not considering independent witness in the matter.
5. THAT the learned trial magistrate erred in both law and facts by failing to note that there was no corroboration in prosecution witnesses.
6. THAT the learned trial magistrate erred in both law and fact by not considering appellant's long stay in remand custody.

APPELLANTS SUBMISSIONS

The appellant submitted that there was no sufficient evidence to support the offence of defilement.

He observed that PW1 never stated that she was defiled. He faulted the conviction because also the evidence of the appellant was not corroborated and a *voir dire* examination was never done before she testified. He concluded by observing that if any offence was established. It was only an indecent act which carries a lesser sentence than 20 years.

On the sentence he submitted that the trial court did not consider the years he had spend in remand during trial.

RESPONDENT REPLY

Mr. Magoma learned state counsel opposed the appeal. He submitted that the offence of defilement was proved by evidence. According to him the evidence of defilement by the PW1 was corroborated by PW4 through the P3 which showed that the PW1's genitalia was bruised and the hymen freshly damaged. That PW2 further corroborated the evidence PW1 when she said that she found the appellant pulling PW1.

ANALYSIS AND DETERMINATION

For the offence of defilement to occur, there must be penetration and the age of the victim must be below the age of 18 years. The age of the PW1 is not in dispute in view of the birth notification which showed that she was 12 years at the time of the alleged offence. The element of penetration is what is in dispute. The appellant pleaded defence of *alibi*. The court does not agree with him because PW1 and PW2 who are his neighbours positively identified him through recognition as the incidence took place in broad daylight. The court is therefore satisfied that the appellant went to the PW3's house on the material date at around 5pm.

This court is however harbouring doubt as to whether there was an act of penetration. PW1 stated that the appellant “**tried to defile her**” but she screamed and pushed him. The appellant then tried to cover her mouth using a hand and that is when the PW2 appeared and rescued the PW1. PW2 in her evidence said that she met the appellant pulling PW1's hand. They were both standing. “PW2 allegedly saw some whitish things rolling on the PW1's thighs”. The said things were never verified scientifically. One wonders where the trial court got the evidence that the whitish things seen by PW2 were fluid. PW2 never mentioned the word fluid in her testimony. This court also noted with concern that the trial court while summarizing the evidence indicated that the PW1 had stated in her testimony that the appellant unzipped his trouser, pushed her against the wall and defiled her. With due respect the PW1 never said that she was defiled. The testimony was clear that the appellant “tried to defile her”. This court also takes issue with the P3 evidence produced by PW4. The qualification of the PW4 was not stated and he or she never examined the PW1.

PW4 relied on notes from another hospital of which the qualification of the medic who treated PW1 is not known. The alleged fresh damage to the hymen was not conclusive evidence because there was no evidence of blood on the vagina. The age of the bruise was also not ascertained. The whitish foul smelling substance on the thigh was not subjected to forensic tests by the PW4. It cannot therefore be said that the evidence of PW4 corroborated anything because the PW1 said she was never defiled. Similarly the P3 only showed that the PW1 was not injured anywhere on her heard, trunk or limbs. This court is therefore of the opinion that the appellant attempted to defile the PW1 but he failed after she resisted and screamed and attracting the attention of PW2.

The PW2 who was sleeping in the same house heard the PW1 scream and intervened. That was the true position and that is why the initial charges were attempted defilement. The substituted charge was therefore not supported by the evidence of PW1 and PW2 who were never recalled to testify after the substitution of the charge.

This court however is satisfied also that during the attempted defilement the appellant touched the PW1 indecently while removing her pants and skirt both of which got torn. Section 2 of the Sexual Offences Act defines indecent act to include causing contacting between the body part of the offender and

the victims genital organs, breasts or buttocks but does not include an act that causes penetration.

In view of the foregoing the appellant is found guilty of the offence of indecent act with a child contrary to Section 1(1) of the Sexual Offences Act..

DISPOSITION

The appeal is allowed by quashing the conviction and sentence by the trial court in relation to the offence of defilement and instead substituting it with a conviction for the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The appellant is to serve 10 years imprisonment effective from 20/3/2013 when he was convicted by the trial court.

Signed and dated this 22nd day of November 2013

ONESMUS MAKAU

JUDGE

Delivered this 22nd day of November 2013