



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 23 OF 2013

(Appeal arising from the original conviction and sentencing of the Senior Principal Magistrate's Court at Siaya – Hon. R.B. Ngetich- Ag. Chief Magistrate.)

R M OAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

INTRODUCTION

This appeal challenges the conviction and sentence of 15 years imprisonment passed against the appellant by the Senior Principal Magistrate Siaya. The issue for determination is whether the offence of defilement was proved against the appellant beyond reasonable doubt. This court is of the opinion that the offence was indeed proved against the appellant.

BACKGROUND

The appellant was charged with the offence of defilement contrary to Section 8(1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that between 8/6/2010 and 8th July 2010 [particulars withheld] Siaya District, the appellant willfully and intentionally caused his penis to penetrate the vagina of E A W child aged 17 years.

In the alternative he was charged with committing indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The appellant denied the offence and the prosecution called 5 witnesses to support the charges.

PROSECUTION CASE

E A (PW1) stated that on 8/6/2010, she went to fetch water from river Onyoyo at around 5pm. She was in the company of her sister C. Before leaving the river, B who lives near the river called her to her house. She found the appellant seated. B requested PW1 to marry the appellant but she refused because she was still in school.

In the evening B left PW1 and the appellant in her house and took the water to the PW1's home together with C. The appellant then took the PW1 to his aunt's home where they slept and the following day he took her to his home. At 11pm the appellant removed her skirt and pant and inserted his penis in her

vagina while they were sleeping. She felt pain because it was her first time. The following day they went to the market and while there they were both arrested and taken to Siaya police station and later to the hospital for examination. She denied that she agreed to marry the appellant and contended she was forced by the appellant to go with him.

M A W (PW2) is the mother to the PW1. On 8/6/2010, after PW1 returned from school, she sent her to fetch water from the river. B brought the water container which was with the PW1 and promised to explain the whereabouts of PW1 later.

B (PW3) went to the market and when she returned at around 9.00pm she found her cousin (appellant) and PW1 in her homestead seated. PW3 told PW1 to take water home because her siblings were calling her. However, PW1 and the appellant said they were going to Uyoma and PW1 sent PW3 to go and explain to her parents what had happened. PW3 then took the water to PW1's home and found PW2 making noise. PW3 then invited PW2 to go with her to collect PW1.

Nyamwembe Simon (PW4) is the clinical officer at Siaya district hospital. He produced P3 for the PW1 and the appellant. PW4 stated that PW1 on examination was found to have a normal external genitalia but the hymen was broken. She tested HIV positive. The appellant was also examined and found with a normal genitalia but HIV negative.

PC Kibet Kangogo (PW5) investigated the offence herein and charged the appellant. During investigations he found PW1 in the house but the appellant was arrested at Aram center. PW5 produced health clinic card to prove that the PW1 was 17 years old.

After considering the above evidence the appellant was found with a case to answer and was put to his defence.

DEFENCE CASE

The appellant gave a sworn defence. He denied the offence and contested that he only saw the PW1 in court for the first time when she came to testify. He also maintained that the medical examination showed that PW1 was HIV positive while he was HIV negative.

After the close of the hearing the trial court convicted the appellant and sentenced him to 15 years imprisonment. The appellant was aggrieved and filed this appeal.

GROUND OF APPEAL

1. THAT the trial magistrate erred in law and facts by failing to establish the age of PW1 through age assessment by medical experts.
2. THAT the learned trial magistrate erred both in law and facts by not appreciating that I was underage at the time of the offence.
3. THAT the learned trial magistrate erred in law and fact when she failed to scrutinize and establish whether the offence really occurred or not.
4. THAT the learned trial magistrate erred in both law and fact in not complying with Section 211 of CPC at the time of ruling

APPELLANTS SUBMISSIONS

The appellants submitted that the charge against him was not founded on any law. He further submitted that there was no sufficient evidence to support conviction. In particular the medical reports by PW4 showed that Pw1 was HIV positive while he (appellant) tested negative. He also contended that despite the broken hymen the PW1 was normal. He urged the court to find that the offence was a fabrication.

RESPONDENT'S REPLY

Mr. Magoma learned state counsel opposed the appeal. He urged that the offence was proved by evidence. The health care card proved that the pw1 was 17 years. PW1 confessed that she slept with the appellant who defiled her. PW3 confirmed that on the material date the appellant was with the PW1. PW4 then confirmed that the PW1's hymen was broken, prove that penetration occurred.

ANALYSIS AND DETERMINATION

the first issue to consider herein is whether the offence of defilement was proved against the appellant. Section 8(i) of the Sexual Offences Act identifies penetration and age of minority of the victim as the key ingredients of the offence of defilement. It is without doubt that the PW1 was aged 17 years at the time of the defilement. The medical card produced as exhibit 6 is clear on that. Even if it was a few months to reach age of majority, the PW1 was entitled to the protection of the law.

It was not the defence for the appellant that he genuinely believed that PW1 was over 18 years. He did not also do anything to verify her age. He must have known or had reasons to know from his cousin (PW3) that PW1 was still a student. As regards the issue of penetration, the court believes the evidence of PW1 that she slept with the appellant in his house and had sex with him. Whether she consented or not is immaterial unless there was deception.

The hymen was broken and that is prove of penetration. The PW1 stated that she felt pain during the incidence. She said it was her first penetration.

The question that arises is that if PW1 and the appellant had sex, why were they not all HIV positive. It is now common sense that transmission of HIV does not only arise from sexual intercourse. The PW1 may as well have contracted the disease through other means. The appellant did not rebut the evidence of the PW1 on the penetration which was corroborated by the evidence of PW3 who stated that the appellant went with the PW1.

It was therefore a mere denial for appellant to allege that he saw the PW1 in court for the first time. The defilement, HIV status for the PW1 and the appellant was never raised by the appellant in cross examination to the PW4. In fact the appellant never cross examined the PW4 on the matter. It is therefore not possible for the court to determine whether the issue of HIV status could in any way defeat the consistent evidence of all the prosecution witnesses on the issue of penetration.

This court therefore is satisfied that the ingredients of the offence of defilement was proved beyond reasonable doubt. As regards sentence, the appellant was awarded the minimum statutory sentence and as such this court will not interfere with it.

DISPOSITION

for all the reasons above, the appeal is dismissed for lack of merits.

Signed, dated this 22nd day of November 2013

ONESMUS MAKAU

JUDGE

Delivered this 22nd day of November 2013

ONESMUS MAKAU

JUDGE