



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 25 OF 2013

(Appeal arising from the original conviction and sentencing of the Principal Magistrate's Court Bondo in Cr. Case No. 350 of 2012 – Hon. D. Wangeci –Ag. Senior Resident Magistrate)

AGGREY LINANDA MWAWAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

INTRODUCTION

This is an appeal from the judgment of the Resident Magistrate Bondo dated 20/2/2013 whereby the appellant was convicted of the offence of defilement and sentenced to life imprisonment. The appeal is against both the conviction and sentence. The issues for determination is whether the offence of defilement was proved beyond reasonable doubt and secondly whether the sentence awarded is excessive. This court is of the opinion that the appeal lacks merits.

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 14/5/2012 at 5 p.m [particulars withheld] Bondo District the appellant, intentionally and unlawfully caused his penis to penetrate the vagina of J A H, a child of 6 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 charges and the prosecution called 4 witnesses to support the charges.

PROSECUTION CASE

Sammy Ombaro (PW1) is the Clinical Officer who examined the complainant,

J A H and filled her P3. Before then the complainant had been treated at the same Health Centre by Faith Moraa According to the treatment notes produced in the court. The complainant's external genitalia was normal but not fully developed. The labia, cervix and vagina were normal but the hymen membrane was broken. PW1 also examined the appellant 3 days after the alleged offence and found the appellants' genitalia normal.

J A H (PW2) gave unsworn statement after a *voire dire* examination. She testified that on 14/5/2012 around 5 p.m, she was playing with her cousin C O when the appellant gave them mangoes and carried her into the maize farm. The appellant then removed her pant and inserted his penis into her vagina. She felt pain and screamed but no one came to rescue her. She bled from the vagina and went home and told her mother who reported the matter to the police and took her to hospital. PW2 knew the appellant before because he was her neighbour 30 metres away.

M A H (PW3) is the mother of PW2. On 14/5/2012 at around 5 p.m she returned home and found PW2 crying. On enquiry, PW2 told her that the appellant had beaten her. The appellant changed the story after being jailed for 8 days after being declared refractory witness. She told the court that the on 15/5/2012 she came back home and found PW2 sleeping under a tree. She was bleeding and on enquiry she remained mute. Then C O told her that the appellant found him and PW2 playing and gave them 2 mangoes each.

On cross examination she stated that she had given a different story before being declared refractory witness after receiving threats from her in law Mr .J O. C O (PW4) was 6 a years nursery school pupil who did not know his age. He gave unsworn statement after a *voine dire* examination. He knew both PW1 and the appellants.

On 14/5/2012 he was playing with the PW2 when the appellant came and inquired about their names. The appellant then gave each of them a mango and carried the PW2 to the maize plantation. He heard PW2 making noise from the plantation after which she came back bleeding from between her legs. She then told PW4 that the appellant had done bad things to her. PW3 then took to hospital. After considering the above 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 and called no witnesses. He denied the offence and pleaded alibi defence. He stated that on 14/5/2012 he was away at the lake working where he was a fisherman until evening when he returned home at 7 p.m. On arrival at his house a lady called him to her house where he found the Beach Chairman and the village elder who tied him up and took him to Usenge police station. The following day he was taken to hospital and later charged before the court.

After considering the evidence adduced by both the prosecution and the defence the trial court found the appellant guilty of defilement and sentenced him to life imprisonment. The appellant was aggrieved and filed this appeal.

GROUND OF THE APPEAL

1. THAT the weapon that was alleged to be an exhibit wa not produced in court during the hearing.
2. THAT the trial magistrate erred in law and facts when she disregarded the appellants defence exhibit that was tabled in court.
3. THAT the learned trial magistrate erred in both law and facts when she failed to consider the appellants sworn defence.
4. THAT the learned trial magistrate erred in both law and fact when she failed to scrutinize and establish whether the offence really occurred or not.
5. THAT the learned trial magistrate erred in both law an fact when she failed to consider that a grudge existed between the appellant and the complainant.
6. THAT the learned trial magistrate erred in both law and fact when she failed to consider that the first report at the police station was just a “third party report” and failed to establish the time when the alleged offence took place.

Both parties made very brief submissions. The appellant urged this court to review the lower court proceedings and the sentence.

Mr. Magoma, learned State Counsel opposed the appeal. He submitted that the offence was proved beyond reasonable doubt. According to him the PW2's broken hymen was the evidence to prove penetration. He further submitted that the evidence of PW3 corroborated the evidence of PW2 which was also supported by the evidence of PW4 who knew the appellant very well.

ANALYSIS & DETERMINATION

The offence of defilement under Section 8 (1) of defilement is proved if the prosecution proves that penetration occurred and that the age of the victim of such penetration was below 18 years. Penetration is defined under Section 2 of the Sexual Offences Act as the complete or partial insertion of a persons genital organ into the genital organ of another person.

In the present case the PW2 stated that the appellant took to a maize farm, removed her pants and inserted his penis into her vagina. She felt pain and bled. PW4 saw the PW2 bleeding from between her legs. PW3 so saw the PW2 bleeding and the blood stained clothes being washed by the children.

PW1, the clinical officer confirmed that the PW2's hymen was broken. All the above evidence corroborate the PW2's evidence that she was penetrated by the appellant using his penis.

To seal the prove of the offence, PW3 (mother of PW2) produced a Notification of Birth dated 26/1/2004 serial number [particulars withheld] which was marked [particulars withheld]. The same was never produced as exhibit as investigating officer did not testify. Notwithstanding the foregoing lapsed, the trial court was not in any doubt that she was dealing with a child aged below 10 years. This is because she read the Notification of birth and recorded its details including the date of birth. Even without the notification of birth, the evidence of the mother in relation to the age of her child is *prima facie* true unless the contrary is proved by documents or medical assessment.

Consequentially this court finds that the trial court⁶ never erred in convicting the appellant because the evidence adduced by the prosecution proved the offence beyond reasonable doubts.

As regards the sentence, the trial court correctly awarded the prescribed sentence under section 8 (2) of the Sexual Offences Act. The law is worded in mandatory terms and as such there is no alternative sentence is available. This court agrees with the respondent that the trial court never erred in convicting and sentencing the appellant.

DISPOSITION

The appeal is therefore devoid of merits and is hereby dismissed.

Signed, dated and delivered this 21st day of November 2013.

ONESMUS MAKAU

JUDGE