



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL NO. 9 OF 2013

*(Appeal arising from the original conviction and sentencing of the Senior Resident Magistrate's Court -
Tamu – Hon. C.A Kutwa – Senior Residnet Magistrate)*

MUSA OKOTH SAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

INTRODUCTION

This is an appeal against conviction and Life imprisonment sentence for the offence of defilement. The issues for determination is whether the offence of defilement was proved against the appellant beyond any reasonable doubt and if so whether the sentence ought to be interfered with. 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 18/1/2012 at about 7 p.m [particulars withheld], Kisumu county, the appellant, intentionally caused his penis to penetrate the vagina of R R A a child aged 7 years. In the alternative the appellant was charged with Indecent Act with a child contrary to section 11 of the Sexual Offences Act No. 3 of 2006. The appellant denied the offence and the prosecution called 4 witnesses to support the charge.

PROSECUTION CASE

G A O (PW1). Was at home on 18/1/2012 and at around 6.30 p.m she went outside her house to relax. While outside her house she saw the complainant (her daughter) in the appellant's house. The appellant was their shamba boy. She called the complainant and on enquiry she replied that she was alone in the appellants house. PW1 went to check and found the complainant with the appellant in his house. She took the complainant to her house where the complainant confirmed that the appellant sent another child to tell her to go for sweets from the appellant. The appellant then removed her pants and defiled her.

PW1 removed the complainant's pants and found it dirty. The appellant denied the offence of defilement and she was advised to report the matter to the police. The complainant was thereafter examined by a doctor. R R A (PW2) was the complainant. On 18/1/2012 at 4 p.m, she was playing at home when Musa

(appellant) sent her friend to call her to go for sweets from the appellant. When PW2 went to the appellants house, he pushed her on the mattress and removed her trouser and pants and he removed his clothes and slept on top of her. She felt pain in her vagina. She screamed and the appellant released her to go. She dressed up but the appellant ordered her to sit down in his house but she ran away and saw her mother sitting outside her house.

When PW1 called her she first concealed that she was defiled because the appellant had threatened her with beating if she revealed. After PW1 insisted PW2 revealed that she was defiled by the appellant. She was taken to the police and later to hospital. The PW2 knew the appellant very well as Musa who was employed by Grace's father.

Geoffrey Cheruiyot (PW3) was the police officer who investigated the offence. On 18/1/2012 he received a report of defilement and gave the PW2 P3. He also produced the PW.2's birth notification to prove that she was 7 years old. Fredrick Kipkoech (PW4) is the clinical officer who examined PW2 and filled her P3 on 19/1/2012. The minor had discharge with a foul smell on his pants. The genital organs were bruised and the hymen torn. She has no infection. After considering the above evidence, the trial court found that the appellant had a case to answer and put him to defence.

DEFENCE CASE

He gave an unsworn statement. On 18/1/2012 he was in the house with the PW2 and her mother (PW1) came and took her away. Later he was arrested by the PW2's father and taken to the police station. He denied ever defiling the PW2. After considering all the evidence adduced the trial court convicted the appellant and sentenced him to life imprisonment. The appellant was however aggrieved and brought this appeal

GROUND OF THE APPEAL.

1. THAT the learned trial magistrate erred in law and facts when he convicted the appellant notwithstanding that there was no first report given to authority.
2. THAT the learned trial magistrate erred in law and facts when he admitted the prosecution evidence without considering that forensic report was necessary.
3. THAT the learned trial magistrate erred in law and facts when he failed to consider evidence of the doctor who examined the complainant.
4. THAT the court failed to consider alibi defence that was not challenged by the prosecution.

The appellant argued that the offence was not proved while the respondent insisted that the offence was proved beyond doubts.

ANALYSIS & DETERMINATION

The duty of this court is to reevaluate the evidence and see whether it can sustain the conviction. The court should also consider whether the sentence ought to remain. After evaluating the evidence on record, this court finds that the offence of defilement was proved. Firstly the age of the victim (PW2) was proved by the Birth notification.

Secondly, penetration was proved by the P3 produced by the PW4 which corroborated PW21's evidence of pain on her vagina. PW4 found that the PW2's genital organ was bruised and the hymen broken. The only person who had the opportunity to do the offence was the appellant who admitted that he was with the PW2 in his house from where PW1 took her. To that extent the offence was proved beyond reasonable doubt. The court also finds that the sentence imposed by the trial court was within the provisions of Section 8(2) of the Sexual Offences Act No. 3 of 2006..

DISPOSITION

The appeal is therefore without merits and dismissed

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

ONESMUS MAKAU

JUDGE