



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 12 OF 2010

HAMISI JUMA MWINGA APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 3097 of 2008 of the Chief Magistrate's Court at Mombasa – Hon. Ondieki - SRM)

JUDGMENT

HAMISI JUMA MWINGA hereinafter referred to as the Appellant was Convicted and Sentenced to fifteen (15) years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual offences Act No. 3 of 2006.

The particulars of the charge are that on the 6th day of October, 2008 at [Particulars withheld] Village Mombasa County he unlawfully and intentionally caused his penis to penetrate the vagina of N W a girl aged seven (7) years.

A Voire dire examination was conducted by the trial magistrate before establishing whether she understood the nature of taking an oath. The appellant has attached that examination stating that it was not in the form of question and answer. Though ideally it ought to be in question and answer form a perusal of the proceedings does show that it was in form of narrative which basically captured what transpired in the examination and it was indicative that an inquiry had been made as required.

The appellant takes issue with the Complainants evidence which was to the effect that the appellant inserted his penis into her anus. The particulars of the charge are to the effect that the Accused penetrated her vagina with his penis. The Doctors evidence (PW 4) is to the effect that upon examination of the Complainant he found that her hymen was broken and there was tenderness on the vaginal wall. A vaginal swab was taken and she was found to be suffering from a venereal Disease.

It is noted that the Complainant was aged seven (7) years at the time of this offence and there is a possibility of a language problem. At any rate Section 2 of the Sexual offences Act defines genital organs to include **“the whole or part of the female or male genital organs and for the purpose of this Act includes the anus”**. It is therefore immaterial to argue that the penetration was not in the vagina but in the anus as both orifices are termed as genital organs.

On the issue of age. The Complainants mother (by adoption) did testify that the Complainant was born on 3rd December, 2001 and that she was aged eighth (8) years at the time she was giving her evidence.

As for the weight of evidence before the trial magistrate. Its not in dispute that the Appellant was known to the Complainant as he was their house servant. The incident took place during the day and in broad daylight in a bathroom adjacent to their house.

PW 3 (their neighbour) did testify to have been informed by one J (PW 2) house girl to see what the Accused was doing at the bathroom. She went to check and found him holding the Complainant between his legs touching her breasts. She ordered him to stop what he was doing and sent a lady by the name mama Mariam to go and report to PW 2 what the Accused had done.

The evidence of the Complainant and PW 3 is further corroborated by that of the doctor who found her hymen missing and tenderness on the vaginal walls.

Its apparent that the Complainant was no virgin. She herself testified to have been defiled twice after being given Ksh. 10/= and Ksh. 20/= respectively on 6th October, 2008 and 7th October, 2008.

I do find there was overwhelming evidence that the Appellant had defiled the Complainant.

The Conviction was safe. The appeal has no merit and its disallowed.

Judgment delivered dated and signed this **19th** day of **November, 2013**.

.....

M. MUYA

JUDGE

19TH NOVEMBER, 2013

In the presence of:-

Learned Counsel for the State Mungai

The Appellant present

Court clerk Musundi