



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 51 OF 2011

KENNEDY CHIMWANI MULOKOTO:.....APPELLANT

VERSUS

REPUBLIC:.....RESPONDENT

JUDGEMENT

The appellant, KENNEDY CHIMWANA MULOKOTO, was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The learned trial magistrate then sentenced him to Life Imprisonment.

Mr. Okara, the learned advocate for the appellant, submitted that the prosecution failed to prove the case beyond any reasonable doubt.

The Respondent noted that the complainant, who was 3 years old, did not testify. Instead, it is her mother who gave evidence.

The mother of the complainant was not at the scene of crime, at the material time. She only learnt about the incident much later.

PW2 is said to have seen someone running away. However, the respondent's contention was that PW2 did not see the appellant.

PW2 is said to have been told about the incident, by a person whose identity was not disclosed. Although the medical doctor testified that the complainant had been

defiled, the Appellant submitted that the doctor had no idea about the identity of the assailant.

Furthermore, all the tests which were conducted on the appellant were negative. That prompted him to submit that there was no evidence which could connect him to the offence.

Finally, it was submitted that the trial court erred, by summarily dismissing the appellant's defence, and also by not taking note of the mitigation.

Ms. Ruto, learned state counsel, submitted that the mother of the complainant was forced, by law, to testify on behalf of her daughter. She stepped into the shoes of her daughter who was unable to testify.

The respondent went on to summarise all the evidence on record, with a view to demonstrating that the conviction was sound.

I have re-evaluated all the evidence on record, as is required of a first appellate court.

The person against whom the offence was committed was a 3 year old girl. On the day the trial was scheduled to commence, she was present in court. However, the little girl was unable to talk.

PW1 is the mother of the little girl. She produced her daughter's Birth Certificate, which showed that the little girl was 3 years old at the time the offence was committed.

PW2 is the class teacher of the Baby Class, at which the little girl was a pupil.

On the material day at about 2p.m., PW2 was walking home when she saw one of her pupils crying along the road. That pupil informed PW2 that someone had taken the little girl into a maize plantation.

PW2 ran into the maize plantation, where she found a man. The said man was only wearing a T-shirt. He did not have trousers. As soon as the man saw PW2, he started running away.

Meanwhile, at the scene, PW2 found the little girl. Also at the scene there were a pair of trousers belonging to the man who had just run away. A cap and the panty were also recovered from the scene.

PW5 was walking along the road, when he heard screams from a lady. When he inquired from her what the problem was, the lady told him that someone had taken a young girl into the maize plantation.

PW5 entered into the said plantation, and found someone in there. The person started running away. However, PW5 pursued him, until he caught up with him

The man whom PW5 caught up with, and then arrested is the appellant.

PW2 also confirmed that it is the appellant whom she had seen in the maize plantation, wearing only a T-shirt.

PW2 informed PW1 that the little girl had been defiled. The information was relayed to PW1 when the suspect was still being pursued by members of the public.

The little girl informed her mother (PW1) that she was feeling pain in her private parts. At the time, the little girl was not wearing her panty.

The said panty was recovered within the maize plantation, together with the appellant's trousers.

The little girl was examined at the Lumakanda District Hospital. The person who examined her is a clinical officer at that hospital.

The clinical officer testified that the little girl was escorted to the hospital by her mother (PW1) and a police officer (PW3).

The Clinical Officer noted that the little girl's genitalia was reddened and her hymen was torn. He therefore concluded that the little girl had been defiled.

The clinical officer (PW4) also examined the appellant. All the laboratory tests conducted on the appellant, were negative.

PW4 told the court that the laboratory tests conducted on the little girl were also negative. That means that both the appellant and the complainant had no diseases.

When the appellant was put to his defence, he denied committing the offence. He said that he was arrested at his house, where he was preparing lunch.

It is noteworthy that the appellant opted not to cross-examine any of the prosecution witnesses. That implies that the evidence tendered by the prosecution was not challenged at all.

The said evidence proved that the little girl had been sexually molested.

The evidence also placed the appellant squarely at the scene of crime, where he was found wearing only his T-shirt. His trousers together with the panty of the little girl were recovered from the maize plantation where the offence had been committed.

All that evidence proves that it was the appellant, and nobody else, who had defiled the little girl.

Pursuant to the provisions of Section 31 of the Sexual Offences Act, a witness may be declared vulnerable on account of factors such as age, trauma, possibility of intimidation, the nature of the subject matter of the evidence or any other factor the court considers relevant.

In this case, the court noted that the little girl was unable to talk, because of her tender age.

Pursuant to Section 31(5) of the Sexual Offences Act, the learned trial magistrate appointed the mother of the little girl as an intermediary.

When the mother of the little girl gave her evidence, she was deemed to be giving evidence on behalf of that little girl. Section 31(7) recognizes the fact that a vulnerable witness can be allowed to give evidence through an intermediary.

Therefore, for all intents and purposes, when the mother of the little girl gave evidence, she did so as a legally recognised intermediary, for and on behalf of the little girl. Such evidence was admissible.

The said evidence of the intermediary was corroborated by the evidence of all the other prosecution witnesses. Therefore, pursuant to Section 31 (10) of the Sexual Offences Act, the conviction of the appellant was founded upon a sound evidentiary basis.

There is no merit in the appeal. It is therefore dismissed. I uphold both the conviction and the sentence.

DATED SIGNED AND DELIVERED AT ELDORET

THIS 12TH DAY OF NOVEMBER, 2013

FRED A. OCHIENG

JUDGE