



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 136 OF 2012

CHARO MWAKAMSHA KAZUNGU APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 70 of 2011 of the Senior Resident Magistrate's Court at Kaloleni – Hon. Wewa - PM)

JUDGMENT

CHARO MWAKAMSHA KAZUNGU hereinafter referred to as the Accused was Convicted and Sentenced to twenty (20) years imprisonment for the offence of defilement of a child contrary to section 8(1) as read with section 8(3) of the Sexual offences Act No. 3 of 2006.

The particulars being that on the night of 5th and 6th March, 2011 at Kaloleni – Kilifi County committed an act which caused penetration of the male genital organ namely the penis into the female genital organ namely vagina of G N a child aged fourteen (14) years.

The brief facts of this case are that on the 5th day of March 2011, the Complainant and her sister by the name S had gone to Kaloleni market to buy shoes and a blouse after they had been given money by their mother (PW 2). At about 6: 00 p.m. the two girls met the Accused who was known to them before.

S (PW 5) decided to leave the two when she saw that they were not in a hurry to leave each other. When she went home she informed her sister F (PW 4) of what had transpired. F in turn decided to check out with her elder sister C (PW 3). Whether the complainant had decided to put up at her place at Kaloleni. When this did not yield any fruit PW (4) decided to report the matter to police.

A search commenced and the Appellant and the complainant were found at a Guest house at Kaloleni trading centre going by the name of *[particulars withheld]* Lodging. This was on 6th March, 2011 at 3:00 p.m.

The complainant in her evidence had told the Court that when she met the Appellant they went to look for a room to spent the night. They found a room at *[particulars withheld]* Lodging at about 10:00 p.m. And they proceeded to have sexual intercourse till morning. The following day they could not leave since they had not paid.

The Accused/Appellant did not deny having met the complainant on the 5th day of March, 2011 and having spent the night with her at a Lodging called *[particulars withheld]*. His defence is that she is the

one who seduced him.

At page 25 line 21 he says,

“5th March, 2011 I did not have sexual intercourse with G on 6th March, 2011 I did not touch her private parts. Its true we were found at [particulars withheld] Guest House. She forced me to get room to have sex. I did decline. She gave me money to pay because she had no identity card. She had forced me. I had no otherwise. I did tell her I was married. There was no sexual intercourse, she slept on the bed. I sat on a seat. I did not kiss her. I did not touch her private parts. She cried because what she wanted I did not fulfill”.

What I understand the defence to be saying is that though the appellant was found in near uncompromising situation, indeed nothing happened between the sheets (there was no penetration).

The evidence of the clinical officer who filed the P3 form was that she had no physical injuries on the outer genitalia but the hymen was broken. She had taken a bath so vaginal swab could not show any deposits. The penetration was not fresh for that day. It is this evidence of the clinical officer that the defence relies on to maintain that there was no penetration.

Section 2 of the Sexual offences Act defined penetration thus,

“the partial or complete insertion of the genital organs of a person into the genital organs of another”.

The issue of deposits is not mandatory requirement as there would be none if proper use of a condom is applied as it was argued in this case – that the witness found condoms in the room though they were not produced as exhibits.

Secondly, the complainant is said to have taken a bath and a vaginal swab examination would not be reliable.

Upon a careful evaluation of the evidence adduced before the lower court I am inclined to find that the complainant was a truthful witness.

She had gone to the local trading centre in the company of S (PW 5) to buy shoes. S left her being held by the Appellant. The appellant knew that the complainant was a student and in standard eight (8). He is the one who booked the room as she couldn't on account of being a student and lacking an identity card.

The defence by the Appellant that its the complainant who forced him to book the room is a farce. By what stretch of imagination can a standard eight pupil aged fourteen (14) years force a married man with three children to book a room in a lodging?

It is absurd for the Appellant to argue that the complainant was found crying the following day because he had not had sexual intercourse with her as per her intentions.

I find that there was overwhelming evidence to the effect that the appellant booked a room at [particulars withheld] Lodging Kaloleni while in the company of the complainant who he knew to be a standard eight (8) pupil. They were found by the complainants relatives and police the following day in the evening after a search had been commenced the previous day.

The evidence of the clinical officer corroborates that of the complainant to the effect that there was penetration.

The girl was aged fourteen (14) years. The mother did testify that her daughter was born in December, 1996. An age assessment report was also produced in Court indicating that the complainant was aged fourteen (14) years old.

The appellant himself knew that she was a standard eight pupil who had no identity card as she could not be allowed to book a room in a Lodging. The appellants evidence that the complainant forced herself into him is incredulous and far fetched. He booked the room to have sex with her and he did it while knowing her age.

The Conviction was safe and there is no need to disturb it. The sentence is legal.

The appeal is disallowed.

Judgment delivered dated and signed this **17th** day of **December, 2013**.

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M. MUYA

JUDGE

17TH DECEMBER, 2013

In the presence of:-

Learned Counsel for the applicant Mr. Cheruyot

Learned Counsel for the state Miss Ogweni

Court clerk Mr. Chepkwony.