



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 92 OF 2012

VINCENT ASHIANO MUHATI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with the offence of defilement of a child contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act No. 3 of 2006 Laws of Kenya. The particulars of the offence were that the appellant, *on the 20.10.2010 at Ilesi, Mukomari within Kakamega East District, the appellant intentionally and unlawfully inserted his penis into the vagina of S I a girl aged 1 year and 3 months.*

The appellant was convicted and sentenced to serve Twenty (20) years imprisonment. The grounds of appeal are that the appellant pleaded not guilty to the charge, the evidence of PW3, a minor, was not tested and proved beyond doubt, that the sentence was too harsh, the trial court did not consider the fact that the appellant was not committed for DNA examination and that the essential witnesses were from the same family.

During the hearing of the appeal, the appellant relied on his grounds of appeal and submitted that the sentence is harsh. Mr. Oroni, State Counsel, opposed the appeal and relied, opposed the appeal and relied on the evidence on record. Counsel further submitted that PW2 saw the appellant leaving the place where the child had been raped and the incident occurred during the day.

The record before the trial court shows that five witnesses testified for the prosecution. **PW1 DUNCAN MIWIGWA** was a clinical officer based at the Kakamega General Hospital. His evidence was that on the 20.10.2010 the child aged one year was taken to the hospital on a blood stained Kikoi and blood stained dress. Her clitoris was torn and hymen broken. There was partial penetration of the vagina which was injured. PW3 produced a P3 form and concluded that the child had been defiled.

PW2, M K is the child's mother. On 20.10.2010 at about 4.00 p.m. she was preparing food in her house when she heard the child crying. She had left the child with her other daughter who was seven (7) years old. PW2 went out to check what was happening and her elder daughter emerged from a pit latrine. The baby had been left alone. According to PW2, she saw the appellant leaving the place where the baby was. The baby continued crying and PW2 covered her with a Kikoi. She saw the child bleeding from her vagina and the Kikoi became blood stained. The baby's dress also got blood stained. PW2 noted sperms, urine and blood on the child's genitalia. She informed her husband and they went to report the matter at Khayega AP camp. The child was taken to hospital and the appellant was arrested. It is the evidence of PW2 that the appellant is called by the name "**LOTI**" at home and he works for PW2's in law.

PW3, N E I was a minor aged 7 years old. She gave unsworn testimony and informed the court that she was a class two student at *[particulars withheld]* Primary School. On the material day she was with the baby and she went to the toilet leaving the baby alone. Her mother told her to get the baby and she saw LOTI the appellant leaving the place where the baby was. She saw the baby bleeding from her private part.

PW4, O J M S is the child's father. He was telephoned by PW2 and went home. He took his child to hospital after having been informed that she had been defiled. PW4 took the appellant to Khayega AP Camp.

PW5, PC KIPKORIR BII investigated the case. He was based at the Kakamega police station. On the 21.10.2010 PW2 and PW4 reported the incident at about 4.00 p.m. He issued a P3 form and recorded witness statements. He produced the exhibits which included the blood stained Kikoi and dress. No DNA test was done. He caused the appellant to be charged with the offence.

In his sworn defence, the appellant denied committing the offence. The appellant's evidence is that he is a jua kali artisan. He used to work for PW4's brother. On 20.10.2010 he met three people whom he knew one of them had a grudge with him for about 5 years and he was taken to Khayega AP camp. His further evidence is that at one time PW4 was charged for setting on fire his brother's cows.

The prosecution evidence does prove that the minor was defiled. According to the medical evidence by PW1, the child's clitoris was torn and hymen broken. The main issue for consideration is whether it is the appellant who defiled the child.

It is the evidence of PW2 that she heard the child crying and went out of her house. She saw the appellant walking away from where the child was. It is her (PW2) evidence that there was no other person at that time and it was about 4.00 p.m. The evidence of PW3 is that she went to the toilet and when she came out, she saw the appellant who she referred to a "Loti" leaving the place where the baby was. Although PW3 gave unsworn testimony, I do find that her evidence corroborates that of PW2 and there was no need for PW3 to testify under oath as she didn't know the meaning of taking an oath.

The appellant's evidence is that there was a grudge between the family of his employer and that of PW2. PW2 testified to the effect that she is not in good terms with the appellant's employer. According to the appellant, he was arrested by three people and he had a grudge with one of them.

According to the evidence on record, no one saw the appellant committing the offence. The evidence is circumstantial in the sense that PW2 and PW3 testified to the effect that they saw the appellant walking away from where the baby was. The baby was crying and when PW2 placed the baby on a kikoi, the clothe was soaked in blood as the child was bleeding from the private parts.

The evidence proves that the appellant was working in the neighbouring homestead. PW2 & PW3 saw the appellant walking away from where the child was crying. According to PW2, there was no other person that time and it was 4.00 p.m. Both PW2 and PW3 knew the appellant. I do find that the appellant had the opportunity to commit the offence. The circumstances of the offence points to nothing else other than the appellant's guilt. There was no other person at the scene. Both PW2 and PW3 saw the appellant leaving from where the child was. There is no any other explanation to raise doubt as to who could have defiled the baby other than the appellant. I do find that the prosecution proved its case beyond reasonable doubt against the appellant.

Under **section 8(2)** the sentence for defiling a child below 11 years is life imprisonment. The trial court imposed a **20 year** imprisonment sentence. I will not disturb the sentence imposed by the trial court. The State Counsel did not complain about the sentence. The court has powers to correct the sentence and convict the appellant to life imprisonment. I will not impose life imprisonment upon the appellant and will leave the **20 years** imprisonment as it is.

In the end, the appeal lacks merit and the same is disallowed. The appellant shall continue serving his

sentence.

Delivered, dated and signed and Kakamega this 4th day of December 2013

SAID J. CHITEMBWE

J U D G E