



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
Criminal Case 87 of 2011

ERICK MAINA MBULELE

.....**APPELLANT**

VERSUS

REPUBLIC

RESPONDENT

(Arising from the conviction and sentence of E.H. Keago – S.R.M. delivered on 22nd August 2011 in Busia C.M.C.Cr. Case No.823 of 2010)

J U D G M E N T

The appellant, Erick Maina Mbulele, was charged with the offence of **defilement of a girl** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 12th May 2010 at [particulars withheld] Bunyala district, the appellant intentionally and unlawfully committed an act which caused his penis to penetrate in the vagina of B.A., a girl aged 6 years. The accused was alternatively charged with the offence of **indecent act** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the appellant intentionally and unlawfully committed an indecent act by rubbing his penis to the vagina of B.A., a girl aged 6 years. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged on the main charge of **defilement**. He was sentenced to life imprisonment. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the appellant raised several grounds of appeal challenging the decision of the trial court in convicting him. He was aggrieved that he had been convicted on the sole identifying evidence of the complainant which did not establish that he was indeed the one that had defiled the complainant. He took issue with the fact that the trial court had failed take into consideration the fact that there was a lapse of three (3) days between the date of the offence is alleged to have been committed and the date the appellant was arrested. It was the appellant's appeal that he was not properly identified by the complainant. The appellant was aggrieved that he was convicted on the basis of the evidence of identification of a minor that was not corroborated and was not watertight to the required standard of the law. In essence, the appellant faulted the manner in which the trial court treated the evidence of

identification of the minor to convict him. He urged the court to allow the appeal, quash his conviction, and set aside the sentence that was imposed on him.

During the hearing of the appeal, the appellant presented to the court written submission in support of his appeal. He also made oral submission urging the court to allow his appeal. The thrust of his submission was that he was framed with the offence after he had a disagreement with the mother of the complainant over house rent. He was emphatic that he was innocent of the charge and urged the court to favourably consider his appeal and allow the same. Mr. Obiri for the State opposed the appeal. He submitted that the prosecution had established to the required standard of proof that it was indeed the appellant who had defiled the complainant, a girl then aged six (6) years after luring her to his house. He stated that the prosecution had adduced watertight evidence which placed the appellant at the scene of crime, and further, medical evidence which established that indeed the complainant had been defiled. He urged the court to disallow the appeal.

What are the facts of this case? B.A. was born on 15th November 2003. Her mother died soon after her birth. At the material time, she was living with her grandmother PW2 G.O. According to the testimony of the complainant, on 12th May 2010 at about 5.00 p.m as she was playing outside her grandmother's house at [particulars withheld], the appellant approached her, held her by her hand and took her to his house. He then removed her pants before having sexual intercourse with her. The complainant testified that she felt pain and screamed. The appellant threatened her with a knife. She described in detail how the appellant caused his penis to penetrate her vagina. After the ordeal, the appellant started bleeding from her vagina into her pants and trouser. The blood-stained trouser was produced in evidence as an exhibit. The complainant reported the incident to her grandmother and to PW3 P.A.

The complainant was taken to [particulars withheld] sub - district hospital where she was treated by PW 7 Nathan Mbwabi, a clinical officer based at the said hospital. He told the court that when he saw the complainant, he noted that her vaginal wall was torn, the vaginal canal had blood, there was tenderness on the hip joint, and the complainant complained of pain on the lower part of the abdomen. He was of the opinion that the complainant had indeed been defiled. He produced a P3 form into evidence. He also examined the appellant and noted that the appellant was in good health with no injuries.

PW2 asked the complainant to identify the person who defiled her. The complainant led PW2, PW4 John Agolla a village elder and PW5 Martin Odwala, the assistant chief of the area to the house of the appellant. The house of the appellant was about 500 metres from the house where the complainant lived with her grandmother. The appellant was arrested and taken to the police. PW6 Margaret Osogo is the owner of the house where the appellant was arrested. She testified that she had earlier in the month of April 2010 rented the house to the appellant. The case was investigated by PW8 PC (W) Irene Chepkonga. She testified that upon concluding the investigation, she made the decision to charge the appellant in the offence that he was convicted.

When the appellant was put on his defence he denied having defiled the complainant. It was his case that the grandmother of the complainant lodged the complaint against him when he went to demand the payment of rent from the houses which his father had constructed. He told the court that the grandmother of the complainant threatened him with dire consequences leading to his subsequent arrest and charge for a crime that he did not commit.

This being a first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced by the prosecution witnesses, in light of the grounds of appeal put forward by the appellant, so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (see **Njoroge vs. Republic [1987] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution proved its case against the appellant on the charge of **defilement of a girl contrary to Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

Having re-evaluated the evidence adduced and the submission made on this appeal, it was clear to this court that the prosecution did indeed prove to the required standard of proof beyond any reasonable doubt that it was the appellant who defiled the complainant. The appellant was positively identified by the complainant. She pointed the house of the appellant to PW2 and PW3 about an hour after her defilement. There was no doubt that it was the appellant's house because PW6 testified that she had rented the same to the appellant. The complainant testified that the appellant forced her into his house, before removing her trouser and pant after which he defiled her by causing his penis to penetrate the vagina of the complainant. That the complainant was defiled was established by medical evidence which was adduced by PW7 who examined the complainant about two hours after the defilement.

After analyzing the evidence, this court formed the opinion that the appellant had been positively identified by the complainant, and further that the prosecution proved that it was the appellant who defiled the complainant. Although the evidence of identification of the appellant was by a child, applying **Section 124** of the **Evidence Act**, it was apparent from the evidence that the testimony of the complainant was in fact the truth. The evidence adduced by the appellant in his defence of an alleged existence of a grudge was not supported by the evidence of the actual facts that transpired on that particular day. The appellant had the opportunity to cross-examine the grandmother of the complainant. He never raised the issue of the existence of a grudge during that cross-examination. This court is of the considered view that the defence raised by the appellant of the existence of a grudge is an afterthought and was brought up by the appellant specifically in a desperate attempt to exonerate himself from culpability.

The upshot of the above reasons is that the appeal filed by the appellant lacks merit and is hereby dismissed. The sentence was legal. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

DATED AT BUSIA THIS 26TH DAY OF JULY 2012.

L. KIMARU
J U D G E