



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 182 of 2009

D.M.M.APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 4305 of 2006 in the Chief Magistrate's Court at Thika – L. W. Gicheha (SRM) on 16th

January 2008)

JUDGMENT

1. The appellant D.M.M., 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 3 of 2006**, and in the alternative, with performing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**, in **Cm Cr. Case No. 4305 of 2006 at Thika**. He was subsequently convicted on the main charge and sentenced to serve 15 years imprisonment.
2. The appellant being dissatisfied with the verdict of the trial court, filed an appeal against both conviction and sentence, advancing four grounds of appeal.
3. The state opposed the appeal through learned state counsel Mr. Mulati stating that the minor's evidence on how the appellant defiled her was not contradicted. That **PW3**, the doctor who examined her, confirmed that she had contracted trachomonas vaginalis and had spermatozoa. That her hymen had been breached. The Dr. concluded that the minor had been defiled.
4. The learned state counsel Mr. Mulati also urged that the judgment shows that the appellant's defence was duly considered, contrary to the appellant's assertions in his submissions. Further, that the offence with which the appellant was charged did occur, and that he could have been charged under **Section 20 Sexual Offences Act** or **Section 8(1) and (2) Sexual Offences Act**.
5. I have scrutinized and reassessed the evidence pursuant to my mandate as the first appellate court, to draw my own conclusion and make my own findings. In doing so I bore in mind that I neither saw nor heard the witnesses as they testified.
6. On the **first ground** of appeal in which the appellant urged that the prosecution did not prove its case beyond reasonable doubt, a summary of the prosecution's evidence is necessary.

7. **PW1**, an 11 year old minor, testified that she was at home alone with the appellant who is her father, on the morning of 29th August 2006. The appellant called her to the bedroom, pulled her onto the bed and defiled her. Her first report was to her grandmother who dismissed it as lies. It was **PW2**, the minor's maternal aunt who came to the house and upon getting the report escorted the minor to Kandara Police Station to make a report. Thereafter she took the minor to Thika hospital, where she was examined, treated and a P3 filled on her behalf. The appellant was subsequently arrested and charged as read in the charge sheet.

8. **PW2** confirmed that she visited the appellant's home to check on the children on 29th August 2009 because their mother had been chased away. She found the minor who immediately reported the defilement to her. She took the minor to the police to make a report, and to the hospital for treatment. She also testified that the minor's mother was mentally retarded.

9. On the question of the identity of the assailant, I am satisfied that from the evidence on record, the appellant was the minor's father with whom she lived. He was therefore well known to her prior to the assault. He summoned her into the bedroom and sexually assaulted her in broad daylight. There is therefore no question of mistaken identity.

10. On the question of whether or not the minor was defiled, **PW3**, Dr. Bahati of Thika hospital testified that at the time of examination on 29th August 2006 the minor was aged 10 years. The Dr. observed that upon examination the minor had a discharge, and some scratches on her vulva. Her hymen was open and she had contracted trichomonas vaginalis which is a sexually transmitted disease. She also had spermatozoa and pus cells. The Dr. formed the opinion that she had been defiled, and produced a P3 form on her behalf.

11. The appellant urged in his **second ground** of appeal that the charge was defective, for the reason that being the father of the minor he should have been charged under **Section 20** of the **Sexual Offences Act**, instead of **Section 8(1)** as read with **subsection (2)** thereof.

The Sections referred to above provide as follows:

Section 20(1) "Any person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and provided that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

Section 8(1) "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

Section 8(2) "A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to presentment for

12. From the reading of the two sections it is evident that whereas the appellant could have been charged under **Section 20 (1)** of the **Sexual Offences Act**, which specifically deals with sexual assault by male persons, in incestuous relationships, there was nothing to preclude him from being charged under **Section 8(1)** and **(2)** of the **Sexual Offences Act** as he was. Both sections were applicable in this case, and carry the same punishment.

13. The appellant urged in his **third** and **fourth grounds** of appeal, that the court did not consider the grudge that existed between him and his wife, and that his defence was not adequately considered. The record shows that the learned trial magistrate did consider the defence statement. In addressing herself to

the defence put forward by the appellant, she rendered herself thus;

“I have considered the accused (sic) defence that the allegations are as a result of the domestic differences with his wife, which I believe should be taken into consideration when reaching a decision, but the evidence form P3 from the confirms that the child was defiled, therefore even if they wanted to implicate him does this mean that they also compromised the doctor and police? I do not think so. The child appeared honest and even if the differences between accused and her mother affected her, I do not think that she made up this story to implicate him.”

14. I have analysed and re-assessed the evidence on record, and find that there is no other reasonable conclusion to be drawn from the evidence before me, other than that which was drawn by the learned trial magistrate. The minor gave defamed testimony and weathered cross examination from the appellant very well. The conviction of the appellant was therefore based on sound evidence.

15. On sentencing the appellant was upon conviction condemned to serve 15 years imprisonment. **Section 8(2)** under which he was convicted provides, in mandatory terms, that upon conviction a person shall be sentenced to imprisonment for life. Mr. Mulati the learned state counsel did issue Notice of intention to seek for enhancement of sentence before the appeal was argued. I did explain the options available to the appellant in view of the notice. The appellant indicated that he understood the import of the said notice, but wished to exercise his right to be heard on appeal. Having therefore determined that the evidence on record was sufficient to sustain conviction and that the appeal was properly entered against him, I must do that which must be done by substituting the proper sentence as provided for by the law.

The appeal is therefore found to be lacking in merit and is hereby dismissed. I confirm the conviction entered by the trial court and substitute the sentence on record with one of imprisonment for life as provided under **Section 8(2) of Sexual Offences Act No. 3 of 2006**.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **31st** day of **October 2012**.

L. A. ACHODE

JUDGE