REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 148 of 2011

JONATHAN MUTUKU NZEVE…….....……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal against both conviction and sentence in Senior Resident Magistrate Cr. Case No. 31 of 2011 in Judgment delivered on 21st day of July 2011 by Hon J. Karanja, Senior Resident Magistrate at Makueni Law Courts)

JUDGMENT

The appellant, **Jonathan Mutuku Nzeve** was charged with the offence of Defilement of a girl under the age of 11 years contrary to section 8 (2) of the Sexual Offences Act and an alternative charge of indecent assault of a girl contrary to section 11 (1) of the same in Criminal Case No. 31 of 2011. The particulars of the main charge were that on the 16th day of January 2011 in Makueni District within the Eastern Province, he unlawfully caused penetration with his male genital organ to **E.M.S** a girl aged eleven (11) years. In the alternative charge, the particulars were that on the material day the appellant unlawfully and indecently assaulted the complainant by touching her private parts. The appellant denied both counts and was soon thereafter tried.

In order to prove its case against the appellant, the prosecution called a total of four (4) prosecution witnesses.

The first witness to testify as PW1 was **Juma Njenjewa** a clinical officer at Mukuyuni Health Center. He examined **E. M**, the complainant and found that she had a peeling on the outer genitalia, reddening of the labia majora and minora, bruising on the vaginal walls and a foul smelling discharge. There were few pus cells and red blood cells and no spermatozoa. On cross examination he stated that he only examined the girl.

It was the evidence of PW2, the complainant, **E.M.S**, that on the material day, she was on the road playing with other children. The appellant who is her cousin called her to go to his house which is not far from her home. When they reached the door, he grabbed her neck and pulled her inside the house and removed her panties and skirt. He then put her on the bed and spread her legs. He told her that he will kill her forcing her to keep quiet. He penetrated her. When he was done, he gave her Kshs 100/=. She added that she was in pain. She declined the money and he told her to go home and keep silent. She wore her panty and skirt and left. Her panty had blood on it, she put it in water together with the skirt so as to wash them. Her mother walked in and saw her washing and asked her why the panty had blood stains. The next morning she told her mother what had happened. They reported the matter to the police.

On cross examination, she stated that the appellant chased his children who were cleaning the house. He took a knife forcing the complainant to be quiet. He removed his clothes and thereafter removed hers.

PW3, **S.M.S** stated that on the material day she was on the market and later on headed home. She had dinner with her family and they went to sleep at around 9:00 p.m. Her daughter, the complainant removed her panty and she realized it had a foul smell. She looked at it and noted that it had blood stains and was soiled. The next morning she asked her what had happened three times and on the fourth time she explained to her that the appellant had defiled her. When she confronted the appellant about allegations he denied saying he did not know the complainant. She added that the appellant is her cousin. They reported the matter to the police.

PW4, PC **Wilson Mumba** testified that on 17th January 201, he was at the station when PW3 and the complainant came and reported that the child had been defiled. He arrested the appellant and collected the panty.

The prosecution thereafter closed their case.

The appellant was put on his defence after a prima facie case was established against him. He elected to give an unsworn statement without calling any witnesses.

In his defence the appellant claimed that on 10th January 2011, he woke up and met his brother and later met M when he had sent for clothes. At about 9:00 a.m, he went to the farm with his mother, brother and two children. They proceeded to harvest beans until 1:00 p.m. He later left with his brother and came back at about 5 p.m. and found the clothes that he had been sent for. He told his children to clean the house, as he washed their clothes until 6:00 p.m.

The learned magistrate having considered and evaluated the evidence on record was satisfied that the prosecution had proved its case against the appellant to the required standard. Accordingly he convicted him and sentenced him to life imprisonment.

The Appellant was aggrieved by the conviction and sentence aforesaid and hence preferred this appeal on the grounds that the prosecution failed to prove their case beyond reasonable doubt, that the origin of the blood stains and whether they were was actually blood on the panty was not established and that the evidence of PW2 was not credible.

When the appeal came before me for hearing on 27th June 2012, the appellant opted to canvass the same by way of written submissions.

On his part, **Mr. Mukofu,** learned State Counsel orally submitted that the appellant was positively identified. The offence was committed at around 1:30 p.m. There was sufficient light enabling the complainant to identify the appellant. The appellant and the complainant were in close proximity during commission of the offence and this afforded the complainant opportunity to see the appellant sufficiently to be able to identify him. This was a case of recognition as opposed to mere identification. He was a cousin to the complainant and he was well known to her. She even referred to him by name. This was the basis upon which the trial court found that the evidence of the complainant was cogent and firm despite her age and cross-examination. The medical evidence further confirmed that there was defilement.

I have considered the evidence on record, the judgement of the learned Resident Magistrate, grounds of appeal, written and oral submissions of the appellant and the learned State Counsel respectively. This is a first appeal, the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyze it, evaluate it and come to its own independent conclusion. In the case of **Okeno vs R Criminal Appeal No. 75 of 1971** the Court of Appeal sitting at Nairobi held that:-

"It is the duty of the appellate court to reconsider the evidence evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."

The main issue of determination here is whether the appellant defiled and or sexually harassed the complainant.

The complainant gave evidence that she was playing when the appellant called and went with her to his house, chased away his children who were cleaning the house and proceeded to defile her. She added that she did not call for help as the appellant had threatened to kill her with a knife. The complainant narrated the events of the material day in detail, stating how the appellant removed her clothes and thereafter removed his clothes and went on to spread her legs **"removed his thing that he uses to urinate with and inserted into her thing."** The complainant was very outspoken in her narration of the events as they transpired that day hence convincing the court that she was indeed defiled.

In the voire-dire examination, the complainant seemed to understand the importance of telling the truth and even on cross examination by the appellant she stated that **"I have lifted the bible and I cannot lie."** Nonetheless, the complainant in her testimony stated that she removed the panty and put it in the water together with the skirt in order to wash them when her mother chanced on her and noticed that the panty was soiled with blood. On enquiring why it had blood, she declined to tell her. In contrast, PW3, testified that when going to bed, there was a foul smell when the complainant removed her panty and she took it and noticed the blood on it. The two testimonies do not tally casting doubt as what really transpired on that particular night. In **Republic vs Naphtaly Kaunjuta Arayason, Criminal Appeal no. 53 of 2005,** the good judge expressed himself thus,

"I have consistently placed the prosecution case which is marred by inconsistent versions of the same incident. This court cannot take their evidence as the whole truth simply because more than reasonable doubt has arisen as a result of the contradiction in the relevant part of their testimonies."

PW1 on the other hand stated that, he examined the complainant and found that she had a peeling on the outer genitalia, reddening of the labia majora and minora, bruising on the vaginal walls and a foul smelling discharge. There were few pus cells and red blood cells and no spermatozoa. In his evidence, he affirmed that indeed the complainant had suffered some sort of injuries. However, he did not tell the trial court whether there was penetration or not. **Sec 8. (1)** of the Sexual Offences Act is very clear, it provides that a person who commits an act which causes penetration with a child is guilty of an offence termed as defilement. There is no defilement if there is no evidence of penetration of the complainant's private parts. See, **Ben Maina Mwangi vs Republic, Criminal Appeal Number 471 of 2001.**

I need not go any further. Contrary to the learned magistrate I find that the prosecution failed to prove their case to the required standard. Accordingly the appeal has merit and is allowed. The appellant's conviction is quashed and sentence imposed set aside. The appellant should be set at liberty forthwith unless lawfully held.

JUDGMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS,** this **15th** day of **OCTOBER 2012.**

ASIKE- MAKHANDIA
JUDGE