REPUBLIC OF KENYA

High Court at Malindi

Criminal Appeal 15 of 2011

BAKARI NDORO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant has preferred an appeal against the conviction and sentence of the trial court. He had been charged with the offence of defilement contrary to section 8 (2) of the Sexual Offences Act. The Particulars of the charge against the Appellant were that on the night on 19th and 20th June, 2009. There was an alternative count of Indecent Act with a child contrary to section 11 of Sexual Offences Act No. 3 of 2006 the particulars of which were that the Appellant on the night of 19th and 20th June, 2009 at about 0900 hours at Chakamba, Kipini division of Tana Delta District within the Coast Province caused his penis to touch the Vagina of E.M a girl under the age of eleven years.

2. The Accused was found guilty of the offence and convicted and sentenced to serve 21 years imprisonment. He raised grounds of appeal reproduced verbatim as follows:

1. That the learned hon. trial magistrate erred in law and in fact by convicting and sentencing me on reliance of evidence adduced by the prosecution witnesses without seeing that my constitutional rights as entrenched under Article 49 (1) (f) of the Constitution of Kenya.

2. That the learned hon. trial magistrate erred in law and in fact by convicting me without finding that section 36 (1) of the Sexual offences Act was not adhered to.

3. That the learned hon. trial magistrate erred in law and in fact for convicting me without seeing that some of the mentioned witnesses were not summoned during trial to clear doubts of my arrest which was contrary to Section 150 of the c.p.c

4. That the medical evidence was non sensical and dubious.

5. That the learned hon. trial magistrate erred in law and in fact by convicting without seeing that the evidence adduced was full of contradictions which was contrary to section 163 (1) (c) of the evidence act.

6. That the learned hon. trial magistrate erred in law and in fact by adequately rejecting my defence statement which was firm and un-challenged.

3. The Appellant relied upon his written submissions. The State was opposed to the appeal. This being the first appeal,the court is bound by the principle in ***Okeno vs Republic (1972) EA 32.*** ,to evaluate the evidence on record and make its own conclusions and inferences. The court in doing so will take into account the fact that the appeal court does not have the opportunity to see the witnesses testify so as to determine their demeanour.

4. The Victim was taken through a *voire dire* examination before testifying and the trial court deemed her intelligent enough to give sworn evidence.

5. The evidence of the Prosecution was that the Appellant worked for the victim's neighbour. This neighbour testified as P**w6** and confirmed this fact. At the material time, the victim went to visit a neighbour and on her way there, she was intercepted by the Appellant who took her to his house and made her wait until night fell then he defiled her and sent her off after giving her a mango and some money.

6. **Pw3,** the mother of the Victim confirmed that she was 8 years of age. She testified that the Victim informed her that the Appellant had defiled her and on examination of her private parts found that she was 'dirty'. She reported to her husband who told the neighbour and subsequently the police. The victim was then taken to hospital. **Pw4** , the father of the victim confirmed that the victim was his child and that she told them she had been raped by Ndolo, **Pw6**'s employee.

7. **Pw5**, the doctor, produced a p3 form Mpeketoni sub-District Hospital. He testified that the Victim was examined and was found to have a torn hymen, vaginal tear and had a whitish discharge. He indicated that there was evidence of intercourse.

8. The prosecution was required to demonstrate the age of the victim was and secondly that there was penetration as defined in section 2 of the Sexual Offences Act**.**

9. The Victim during the *voire dire* said that she was eight years old. **Pw3,** her mother confirmed this. The trial court took the apparent age of the victim as a child of tender years as it conducted a *voire dire.* The prosecution therefore demonstrated the apparent age of the Victim which the trial court took as fact hence an age assessment was not necessary to determine if the victim was a child.

10. The next hurdle to overcome is the issue of penetration. The p3 form is indicative of the Victim having hymnal tear. The germane issue is was there penetration as defined under section 2 of the Sexual Offences Act and who was responsible?

11. The Victim was categorical in her testimony that her skirt and panties were removed and a penis was placed in her vagina and she felt a lot of pain and she cried. **Pw5** testified that there was evidence of intercourse. This court finds that it is evident that there was penetration.

12. To reach a conviction against the Appellant, the trial court would therefore have had to establish who was responsible for the act. The Victim testified that she was accosted by the employee of **Pw6,** who took her to his house. **Pw4**, stated that the Victim told them that Ndolo had raped her. **Pw6** confirmed that the Appellant was her employee. The victim was able to recognise the assailant who was not a stranger to her. In identification, the court has hitherto established that recognition of an assailant is by far more reliable than identification of a stranger **Anjononi vs. Republic [1980] KLR 54**.

13. It follows that the Victim competently identified her assailant enabling the conclusion that the Appellant was responsible for the act. The trial court believed the Victim's testimony. The trial court was in order to warn itself that the witness was a minor but found her to be *" very honest and straightforward."* This was in tandem with the Evidence Act, Cap 80, Section 124. The Court indicated that *" Though a minor there was nothing to indicate that she was not telling the truth."*

14. Upon re-evaluation of the evidence this court finds that it was overwhelming against the Appellant thus discharging the onus of the prosecution to prove the case beyond the shadow of doubt. The conviction reached by the trial court was therefore accurate.

15. The Appellant was thereafter sentenced to serve 21 years in jail, a sentence he terms as excessive since no age assessment/ or proof of the age of the Victim. It is true that there was no age-assessment report produced in court. Under the Children Act Section 2 'age' is defined as the apparent age. The trial court deemed the apparent age of the Victim to be a child below the age of 11 years. The victim had at the *voire dire* stated that she was eight years and **Pw 3** her mother confirmed this, the P3 form the age is indicated as eight. The trial court took the victim through a *voire dire* as per **section 19** of the **Oaths and Statutory Declarations Act Cap 15** and this is telling of the fact that the victim was a child of tender years. Section **8(2)of the Sexual Offences Act** provides that a person guilty of defilement of a child of below the age of eleven is liable to imprisonment for life. This Court therefore finds that the sentence by the trial court was not excessive.

16. In conclusion, the evidence points to the culpability of the Appellant and hence the appeal is without merit and is dismissed. I uphold both the conviction and sentence.

Delivered and Signed this 19th December,2012 at Malindi in the presence of the Appellant, Miss Mathangani for the State, Court Clerk

C. W. Meoli

JUDGE