



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 484 of 2010

MWAHUI NYAMAWI MWACHIRAMBAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 306 of 2009 of the Senior Resident Magistrate's Court at Mariakani: W.F. Andanyi – PM)

JUDGMENT

The appellant was Convicted and Sentenced to fifteen (15) years imprisonment for the offence of defilement.

Having been dissatisfied with both the Conviction and the Sentence he now appeals to this Court.

The grounds are that there was no evidence to the effect that the Complainant was defiled and if so by whom.

Secondly that the learned trial magistrate relied on the evidence of the Complainant who was a child without corroboration.

The charge is also said to be defective and the Sentence passed by the magistrate to be unlawful.

The appellant had been charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(3) of the Sexual offences Act No. 3 of 2006.

The particulars being that,

“On the 8th day of November 2009 at [particulars withheld] - Kwale District he unlawfully and intentionally committed an act which caused penetration of his male genital organ namely penis into the female genital organ namely vagina of B.C.C. A girl under age of fourteen (14) years”.

Two girls PW 1 and PW 2 left their home claiming to be on their way to draw water. According to their evidence the Accused and a colleague of his one Ngoro were waiting for them in the bushes. PW 1 was left, with Ngoro to train her how to ride a bicycle belonging to the Accused. The Accused and the Complainant meanwhile ventured further into the bushes where they spent a considerable time together. It is the Complainants' evidence that she had Sexual intercourse with the Accused while in the bushes and she was given Ksh. 100/= as a token for appreciation.

PW 1 M C had told the Court that they later proceeded to Samburu town where they spent several

days without going home.

PW 3 had also told the trial Court that his children PW 1 and PW 2 left home at 8th November, 2009 and did not return. He got, concerned and made a report to police. He later got rumours that they were being seen at Samburu trading Centre. They were later traced by one of his daughters by the name N and they were taken to police station on 13th November, 2009. Where upon interrogation they mentioned the Accused who was sought for and arrested for defilement.

In this case the learned trial magistrate did observe that the Complainant had testified on oath that she was born on 24th July, 1993 meaning that at the time of the alleged offence she was aged sixteen (16) years old. The clinical officer had in the P3 form indicated her age as fourteen (14) years. That is the age given in the charge sheet. The Complainant had told the Court that this was the age indicated in her clinic card but this clinic card was not produced in Court. Clearly there is inconsistency on the evidence regarding the age of the Complainant.

The Courts have insisted that the assessment of age in Sexual offences is very important as it determines the punishment to be meted out on Accused if found guilty. In the present case age was not assessed and there was no evidence from the Complainants parents or guardians as to age.

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This Court is alive to the fact that its the trial magistrate who had the opportunity to observe the demeanor of the witness but in evaluating the evidence before it if there is lacuna and or inconsistency, this has to be borne in mind while arriving at a finding.

It is noted that these two girls left their parental houses on 8th November, 2009 and acted truant till they were arrested at Samburu trading center on 13th November, 2009 close to a week. The Complainant did not explain in whose house they were staying for the length of that period for all the Court knows she could have been staying at another persons house. She has not explained what she was doing at Samburu trading Center for close to a week whereas she was required to be at home or at school. I do not think she was a reliable witness and the trial Court should not have relied solely on her evidence without corroboration more so when there was none from the clinical officer who could not ascertain when her hymen was broken.

This is a serious offence whose punishment is quite stiff.

I find the Conviction was not safe on the circumstances of the case before the trial Court .

I accordingly quash the Conviction and set aside the Sentence.

The appellants is set at liberty unless otherwise lawfully held.

Judgment dated and delivered in open Court this **5th** day of **December, 2012**.

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M. MUYA
JUDGE

In the presence of:-

Mwawasi holding brief Asige for the appellant

Mr. Gioche for the State

Court clerk – Musundi

M. MUYA
JUDGE