



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CRIMINAL APPEAL NO. 40 OF 2009

JULIUS CHERUIYOT.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from the sentence of the Senior Resident Magistrate at Bomet, Hon. T. Okello given in Bomet Cr. Case No. 1053 of 2009 on 7/7/2009)

JUDGMENT

JULIUS CHERUIYOT, the appellant herein, was convicted on 7/7/2009 by the Senior Resident Magistrate at Bomet in Criminal Case No.1053 of 2007 of the offence of defilement of a girl of 7 years contrary to **Section 8 (2)** of the **Sexual Offences Act, No.3 of 2006** and was after mitigation sentenced to life imprisonment. The particulars of the offence were that the appellant:

“on the 17th day of September 2007 in Bomet District of the Rift Valley Province had unlawful and intentional carnal knowledge of M. C, a girl aged 7 years”.

The trial Magistrate after hearing evidence of the prosecution witnesses and the appellant’s defence found that the Complainant had been defiled and that the appellant was the offender as he was positively identified by the Complainant and the Complainant’s companion who witnessed the defilement.

Aggrieved by the conviction and sentence, the appellant filed appeal which he argued without counsel.

The main thrust of the grounds of the appellant’s appeal is that the evidence adduced was insufficient to justify a conviction, that there was insufficient evidence of identification and that the prosecution witnesses were not credible.

The appellant filed written submissions which the Court allowed. In the written submissions, the appellant amplified his grounds of appeal.

I have duly perused the record of appeal and carefully considered the evidence adduced at the trial and the submissions made by the appellant. I am alive to the need as the first appeal court to re-examine, evaluate and assess the evidence adduced at the trial with a view to give the appellant a fresh reconsideration of the case.

The trial took place between September 2007 and July 2009. The offence was alleged to have been committed on 17th September 2007. The Complainant testified on 11/11/2008 when she was 8 to 9 years of age. She was in class 4 at the time and she said in evidence that she was 9 years. She was attending St. Michael Primary School in Bomet and she went there on foot.

On 17/9/2007, she was heading home at 4pm in company of her 3 fellow school-mates, namely, F, R, and D. They were all lured into the thicket near a river by the appellant who spoke to them when they met him. It was broad daylight. It was while they were in the bush that the appellant told the Complainant to lie down which she innocently and naively did. Denis was there watching. The others were at a distance. The Appellant removed her underpant and defiled her. On reaching home that day, the Complainant told her mother about it. The latter took her to T Hospital where she was examined by a clinical officer, Wycliff Ruto, who testified as PW4.

In his evidence, PW4 told the Court that he examined the Complainant and found that she had blood stains and blood in the external genitalia. Her hymen was torn and had fresh blood. The Complainant was examined by the clinical officer barely two hours after the defilement. A P3 form was completed and produced as an exhibit.

On identification, all that the complainant remembered is that the assailant was a black person whose face the complainant did not see.

Denis, PW2, the Complainant's schoolmate was aged 11 years. He was in class 3. He described the assailant as a man in a black shirt. He said he did not know him.

On his part, R, PW3, who was in class 4 and was aged 11 years testified that he had seen the assailant prior to 17/9/2007. He said that he was an employee at his (R's) home.

In his defence the appellant gave an unsworn statement to the effect that he knew nothing about the charge.

This is a case in which identification parade ought to have been held. The only evidence was that of R, PW3, who told the trial Court that the assailant was employed at his home and that he knew him. In effect, the case was based on the evidence of recognition by a single witness. Before basing a conviction on such evidence, the Court must be left in no doubt that the witness clearly recognized the suspect and that the circumstances in which he did so leaves no room for doubt. The duty of the Court is to ensure that the accused was the person seen by the witness and that conditions obtaining at the time of seeing the accused were conducive to proper recognition, and that there was no mistake as regards the identity of the person who the witness saw.

In the present case, R saw the appellant during broad light. The appellant was known to him. He worked as an employee in his home. There were no circumstances that would have created conditions to undermine proper recognition.

I have come to the conclusion that the appellant was properly seen and was the person who defiled the Complainant. I find no merit in the appeal. I hereby dismiss it.

DATED at KERICHO this 1st day of February, 2011

G B M KARIUKI, SC

RESIDENCE JUDGE

COUNSEL APPEARING

Mr. N. M. Idagwa, State Counsel

Appellant, in Person

Mr. R. Koech, Court clerk