



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 206 OF 2009

GEORGE MURIUKI MURIITHIAPPELLANT

VERSUS

REPUBLICRESPONDENT

***(From the original conviction and sentence in criminal case No.2707 of 2005 of S. M. Githinji
Principal Magistrate at Principal Magistrate's Court at Nkubu on 06/08/09)***

J U D G M E N T

The Appellant GEORGE MURIUKI MURITHI was tried by Principal Magistrate at Nkubu (Hon. A.K.Kaniaru) on charge of defilement of a girl contrary to Section 145(1) of the Penal Code. The Appellant was convicted and sentenced to serve 10years imprisonment.

The particulars of the charge were that on 15th day of November, 2005 in Meru Central District within the Eastern Province had carnal knowledge of P.M a girl under the age of 16 years.

The evidence adduced was that C.M; PW3 was living at a market with her daughter PW2. That on 15/11/2005 PW2 aged 9years was at home alone as PW3 was in the shamba. PW2 was in the kitchen and had closed the door. The Appellant went and knocked the kitchen door and called PW2 asking her to open the door as he had her mother's message.

PW2 knew the Appellant as a neighbour and recognized his voice. She opened for the Appellant. Appellant immediately held her by the waist. He then held her legs and tripped her to the ground. He removed her pant and pushed her dress upward, PW2 tried to scream and the accused held her mouth. She kicked and fought, but accused subdued her. The Appellant unzipped his trouser and had carnal knowledge. That after he was through he escaped. The girl was left crying. The mother got back home at 7.30 p.m when PW2 told her what the Appellant had done to her. Report was made at a police base. PW2 was attended at a Health Centre that same night and referred to Meru General Hospital. She was taken to Meru General Hospital the following day.

The Appellant was traced and arrested by members of public on 19/11/2005, handed over to the Area Assistant Chief PW4 who took him to the Police Post.

On 24/11/2005 the complainant and Appellant were examined by PW1 a doctor at Meru General Hospital. The doctor noted the clothes of PW2 were torn and soiled. The urine had numerous pus cells which was a sign of an infection.

Her general condition was normal and her external genitalia was normal. The hymen was broken. Her vaginal discharge had a foul smell. The doctor was of the opinion that the girl had been defiled.

The Appellant on examination on his clothes were normal. He had numerous pus cells in the urine, which suggests he had a urinal tract infection.

The doctor filled the P3 forms which he produced in court. The Appellant gave unsworn statement and called no witness. He stated that he was arrested on 19/11/2005 and taken to the police station. He was told that he had defiled C.M. He denied the allegation. The Appellant said C.M was his neighbour and her husband had been sold a parcel of land by Appellants elder brother and that C.M and her husband disagreed. The husband married another woman and kept her in the bought land. That C.M vowed that she would fix those who made her to be evicted from the said land. That C.M had another land at K,M and Appellant was arrested whilst at K where he was working. That on 18/11/2005 he was arrested. That he was fixed and did not commit the offence. That on 16/11/2005 he was in the bank to withdraw the money. That he met C.M and she told him nothing.

The Appellant was convicted of defilement and sentenced to serve 10years imprisonment. He filed this home made petition of appeal dated 18th August, 2009.

The Appellant appealed against both the conviction and sentence setting down the following grounds of appeal.

Memorandum of Appeal

- 1) That I pleaded not guilty to the charge.***
- 2) That the learned trial Magistrate erred in both points of law/facts in accepting the commence with the police charge sheet before or without a need to inquire from them the reason of their failure to comply with the requirements of Section 72 and B and 77(1) of our Constitution the supreme law of the land.***
- 3) That the learned trial Magistrate erred in both points of law/facts in finding a conviction upon the voice identification without or before analyzing that human being has mental powers of changing voices and I could have changed my voice was I the actual offender.***
- 4) That the learned trial Magistrate erred in both points of law/facts in finding a conviction before or without observing that failure to the mother of the victim to have alerted the neighbour immediately was the doubts in their mind on the actual offender.***
- 5) And that I pray for a copy of the trial record and I wish being present whilst the hearing of this appeal.***

The Appellants faults the decision of the court on the grounds that the evidence was insufficient to warrant conviction and that the Appellant was not properly identified.

The learned State Counsel opposed the appeal and submitted that the Appellant was convicted on sound evidence. The only eye witness was the complainant. PW2 in her evidence she stated that she knew the Appellant and that he is a neighbor. That at 7.00p.m. she was in the kitchen and there was no lamp. That the Appellant came and knocked the door and told PW2 to open the door. PW2 said she knew the Appellant and recognized his voice as a neighbour and that he talked with PW2.

The trial court found that PW2's testimony was consistent and firm and she revealed she had known the Appellant for a long time and that was time when Appellant had helped PW2's mother in some work and trial court found that the evidence showed that PW2 knew Appellant's voice very well and could not have made a mistake of it.

I have gone through the evidence and I have no doubt in my mind that PW2 correctly identified the Appellant through his voice and court's finding on that point is based on sound evidence.

The evidence of PW2 was buttressed by evidence of PW1, the doctor who examined the complainant and

Appellant. PW1 testified the complainant's clothes were soiled and torn and that on the examination of her urine it had numerous pus cells. That her hymen had been broken. That she had foul smell discharge from vagina and his conclusion was that she had been defiled and produced P3 form to that effect.

He also testified on examination of the Appellant he was found to have numerous pus cells in the urine suggesting urinal tract infection. The trial court found that the evidence narrowed down to the accused person. The trial court also took into account that the complainant told her mother of the incident immediately she got home the same night and disclosed the name of the Appellant.

PW3 testified on arrival at home at 7.30 p.m. she found complainant crying and on being requested why she was crying she said the Appellant had defiled her.

The trial court found the complainant to be a firm and sure witness about the person who defiled her. The evidence is clear that there was penetration by the Appellant and the doctor's evidence corroborated PW2's evidence as the doctor noted the clothes were torn and soiled, and the complainant's hymen was broken. The trial court came to the right conclusion when it held that it had no doubt that there was penetration into the PW2's vagina.

The trial court considered the Appellant's defence and found it to be far-fetched. The trial court found and quite correctly that if C.M had any problem about her marriage with anyone it was her husband and if she wanted to fix anyone other than her husband, most likely she would have gone for the other woman, allegedly married by her husband or even the Appellant's elder brother who had sold the alleged land to C.M's husband.

The trial court found the Appellant was too far in the claim of those who PW3 would probably want to fix. The court did rightly find there was cordial relationship between the Appellant and PW3 prior to the incident consisting the offence in this case.

The Appellant had even helped PW3 in some work and at the material date of this offence PW2 opened the door for Appellant in trust that he had a message from her mother. Appellant tricked PW2 to gain access of her and on doing so defiled her.

I have also noted the trial court warned of itself of the danger of convicting on evidence of PW2 alone and after diligently doing so he found it safe to rely on it to arrive at the conviction.

I have re-evaluated and analyzed the evidence before the trial court and considered the relevant law and find the conviction was based on sound evidence.

The Appellant was known to the complainant, talked to the complainant, had been to the complainant's home assisting in some work and there is no evidence of any grudge as analyzed by the court herein above.

The sentence of 10 years is not manifestly excessive in the circumstances and the Appellant should count himself lucky that he was charged under the old law and not under the new law of The Sexual Offences Act No. 3 of 2006.

In the result the appeal against the conviction is dismissed. The sentence was lawful, and so the appeal against the sentence fails and is dismissed as well.

Right of Appeal 14 days.

DATED AND DELIVERED THIS 7TH DAY OF DECEMBER, 2011

J. A. MAKAU

JUDGE

Delivered In Open Court In The Presence Of:-

1. Appellant

2. Mr. Musau for State

J. A. MAKAU
JUDGE