



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 353 of 2008

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 353 OF 2008

(From Original Conviction and Sentence in Criminal Case No. 5884 of 2006 of the Chief Magistrate's Court at Makadara)

JOSHUA MUTYOTA MUINDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with the offence of Defilement contrary to Section 8 (1) (3) of Sexual Offences Act No. 3 of 2006 and with Alternative charge of Indecent Act with a child contrary to Section 11 (1) of Sexual Offences Act No. 3 of 2006 and sentenced to 20 years imprisonment.

The child 12 years voire dire was tested and gave evidence sworn as PW1. PW1 was at her father's home in Kwa Njenga. On 26/9/2006 at about 9 pm at the gate she saw the Appellant with her little sister aged 10 years. Appellant called them to his place to eat bread and milk. He pushed them inside his house and locked the door and left.

He told them to sleep in his bed. He undressed the complainant and had sex with her until midnight. In the morning she went and reported to her father. The father took her to Embakasi Police Station. She was taken to Hospital. The accused was arrested and charged. Her father was PW2. He received the report and he reported the matter to police. He was given P3 form to take the child to hospital. PW3 was the younger sister of complainant. On 26/9/2008 at 8 pm the Appellant found them outside their home. She corroborated what PW1 said. Appellant gave them bread with milk.

However the witness PW3 fell asleep immediately and did not follow what happened. PW4 went with the child to Police Station. Also PW5 was a coworker with the father of the complainant who escorted the Appellant to Police Station.

Dr. Zephania Police Surgeon was PW6 who examined complainant. It was 8 months after the offence was committed. She had no physical injuries. No discharge in her private parts. She had small hymen tears. There was time lapse. She had been treated at Nairobi Women's Hospital. Dr. Ketara Muhome of Nairobi Women Hospital also gave evidence. She examined the complainant on 2/10/2006. Her hymen was broken. No bruises or other tears, no spermatozoa or infection. She came to hospital 72 hours after the event. She was

treated on 30/9/2006 A report of lost children was received by Police Officer at Embakasi Police Station. The Appellant was called to defend himself and made an unsworn statement. He said the child found him eating bread and milk. He gave them the remaining bread. He was taken to police and was shocked when told he defiled the child. He asked the court to forgive him. He called a witness DW2 who said he was away and only came to learn of Appellant on 31st. This evidence was of no value.

The Appellant complains that:

- (1) Trial Magistrate erred in forming pillars of his conviction on evidence of PW1 and PW2 which was of full doubts and (
- (2) and in appreciating the evidence of PW3 and PW4 which was hearsay and materially contradicts
- (3) Misdirected herself in holding that the prosecution had proved the case beyond reasonable doubt.

He had other grounds that

- (1) his Constitutional rights were violated contrary to Section 72 (3) (b).
- (2) that the Trial Magistrate erred by considering prosecution evidence which was full of contradiction and uncorroborated evidence
- (3) the prosecution failed to bring vital witnesses in court contrary to Section 180 of Criminal Procedure Code.
- (4) prosecution did not prove the case beyond doubt.
- (5) no medical evidence prove against him.

Section 73 (3) (b) of Constitution I was kept for 27 days before being taken to court. No explanation was offered. The 27 days is a long period. However the same section provides remedy in damages at Sec. 72 (6).

The offence occurred on the night of 26/27 September. It is clear the father found the complainant in the morning of 27th. There complainant said she and her sister was called by Appellant to eat bread. The Appellant said he was eating the bread at his place and the child took the remaining portion. It is clear the two were together and this is corroboration. PW2 said she drunk milk and ate bread and fell asleep. It looks as if she was drugged by Appellant. There is no such evidence. All the court can say is that these additional grounds are afterthought.

The State opposed the appeal and said 20 years is minimum sentence. Medical evidence taken 72 hours after event is corroborative. The hymen was broken 72 hours afterwards. The Appellant added that the family was not paying for water they drunk on credit from him. That is not a defence. Considering everything I find that it is proved the Appellant played sex with the complainant all night after feeding her with milk and bread and he is the one who invited them to his bed. There is sufficient corroboration.

I find no merit in appeal. The sentence is the minimum prescribed. It is lawful. I see no reason to interfere with the Trial Magistrate's decision. I dismiss the appeal.

Dated and delivered at Nairobi this 19th October 2010.

J. N. KHAMINWA

JUDGE