



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLANTE SIDE

CRIMINAL APPEAL NO. 182 OF 2003

(From Original Conviction and Sentence in Criminal Case No.653 of 2003 of the Senior Resident Magistrate's Court at Kwale – L.N. MBATIA – SRM).

MATANO BEKANGA HAMISI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

This is a defilement case. The appellant was convicted of defilement of a girl aged 9 years. She is complainant called E.N. She told the court that she was going to the shop, which is near the home of accused. The appellant admitted that they were neighbours. Her evidence is that as she walked to pass at the gate of the home where the appellant lived she found he was standing at the gate. He talked to her and then pulled her inside a room where there was a bed. He placed her on a bed removed her clothes and raped her. The complainant said that she felt pain and that she saw a whitish discharge and also blood from her private parts. Later she went home she did not tell anyone but she seems to have sustained some urinary infection. After sometime the pain did not improve and she was found by P.W.4 crying with pain and after inquiry and examination of the complainant's private parts the complainant told of how she had been raped by the appellant. The matter was taken up and the father of complainant came to know of it. He took the complainant to Police Station where they reported the matter. They were given P3 form to take to Msambweni Hospital. The doctor's examination was done 8 days after the day of defilement. P.W.1 a medical doctor testified that the complainant was defiled, this conclusion he reached by reason of his own examination and lab tests. He produced P3 form His opinion was that she would not have had urinary infection if she was not raped or sexually assaulted. The doctor's evidence was confirmed by PW4 who physically examined the girl.

I have examined the defence of the appellant. It is clear he was well known to complainant therefore there is no problem of identification. The appellant alleged that there was a grudge between him and the father of complainant (K) and that is why the child was accusing him of defilement. This story is not true. In his cross examination of the Prosecution witnesses he did not suggest that there was such a grudge. However the appellant confirms the complainant's story that she informed the police that he was the one who raped her. In fact she mentioned his name to the witnesses who gave evidence.

I find the fact of defilement of the complainant is proved. As to whether the appellant is the one who committed offence consideration has to be given to his fabricated story of a grudge against the father of the complainant. Why did he find it necessary to tell such a story which is a false. The other factor to be considered is that he was well known to the complainant. This is admitted in his defence. The offence was committed during the day and the complainant was able to tell his name easily. I find the evidence as told by the complainant although young to be truthful. I find that the circumstances surrounding the offence points to the appellant as the offender.

On the issue that critical part (taking of plea) was prosecuted by a PC Yegon. The taking of evidence was conducted by a prosecutor of the rank of Inspector. I find that the appellant has suffered no injustice by that fact. He has had a full trial and at no stage were his rights prejudiced. I therefore do not declare a mistrial. The upshot is that the trial Magistrate based conviction on sound evidence and the offence was proved beyond reasonable doubt. The sentence given is not excessive or harsh. The offence of defilement, as are all other sexual offences, is serious. The victim is always exposed to the risk of contracting the deadly infection HIV/AIDS. I therefore do not find sentence excessive or harsh in the circumstances.

The appeal is therefore dismissed.

Dated this 19th day of January 2004.

JOYCE KHAMINWA

JUDGE

Read in open court in the presence

Appellant

Mrs. Mwangi

JOYCE KHAMINWA

JUDGE