



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 121 OF 2019

MURITHI KATHENYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. T.A Sitati, Principal Magistrate delivered on 30th August 2019 in Chief Magistrate' Court at Kwale S.O Case No. 142 of 2018)

JUDGMENT

1. Murithi Kathenya was charged with the offence of sexual assault contrary to section 5(1)(a)(i) & (2) of the Sexual Offences Act, No. 3 of 2006 in Kwale Chief Magistrate' Court S.O No. 142 of 2018.
2. The particulars were that the appellant on the 5th day of December 2018 at Ngathini village, Lunga Lunga Location in Kwale County within Coast Region, willfully and unlawfully used his fingers to penetrate the vagina of AJN a child aged 4 years.
3. Based on the evidence of the child victim, PW 1, the mother of the complainant – PW 2, the Doctor and investigating officer PW 3 and PW 4 respectively the trial magistrate found the appellant guilty and convicted him. He was consequently sentenced to serve 10 years imprisonment which according to the trial magistrate was the minimum provided for.
4. The appellant was aggrieved by the conviction and sentence and he lodged this appeal on the grounds that:-
 1. **That trial magistrate erred in law and fact by convicting the appellant to ten years imprisonment without considering that the offence of sexual assault was not proved beyond all reasonable doubt.**
 2. **That the learned trial magistrate erred in law and fact by convicting the appellant to 10 years imprisonment without considering that the age of the complainant was not proved as required by the law.**
 3. **That the learned trial magistrate erred in law and fact by convicting the appellant without considering that the matter in question was a made one.**
 4. **That the learned trial magistrate erred in law and fact by convicting the appellant without considering that the prosecution was contradicting.**
 5. **That the learned trial magistrate erred in law and fact by convicting without considering that his defence was reliable to award him the benefit of doubt.**
5. This appeal was canvassed by way of written submissions. The appellant submissions were that the respondent's submissions were that the complainant's evidence was corroborated by medical evidence tendered by PW 3 and appellant was linked to the offence.
6. PW 3 found lacerations on the complainant's labia minora presence of blood stains on the labia and on the child's pantie, infection was also detected in the child's urine.
7. It was submitted that the offence of sexual assault was properly proved.
8. Whether the appellant was accorded fair hearing it was submitted that appellant at page 6 of the proceedings indicated he was ready to

proceed. It was submitted that had the appellant not received statements to prepare for trial and his defence he would have aid so, it was argued that appellant was always ready and cross examined the witnesses.

9. On whether appellant's mitigation was considered it was noted that the trial magistrate considered the appellant's advanced age and the fact that he had worked for the complainant's family for 20 years and sentenced him to 10 years imprisonment instead of life imprisonment.

10. The respondent was of the view that the trial magistrate exercised his discretion judiciously owing to the fact that the complainant was a 4 years old.

11. It was also contested that the trial magistrate failed to take into consideration the appellants defence. The respondent urged the court to dismiss the appeal for lack of merit.

12. The case on trial was that the appellant used his fingers to penetrate the vagina of the 4 years old girl and when the mother saw the child was walking with difficulty and feeling pain when she was unable to urinate because of pain in her genitalia she inquired and the child told her that **"babu"** meaning the appellant who was a worker at the home had inserted his fingers in her vagina. The complainant's mother, who is a nurse examined the child's private part (genitalia) and found her underwear had blood stains. Earlier PW 2 had seen the accused was with the child and the called PW 1 and told her to play near the shop. She was horrified when she found the child had blood stains on her underwear.

13. PW 2 informed the father and grandmother of the complainant and she reported what had happened. That they sat together with accused and when they inquired what he had done and after initially denying he finally admitted he had sexually assaulted the child.

14. PW 1 was taken to hospital and treated and they went to report at Lunga Lunga Police Station.

15. PW 2 produced certificate of birth for complainant showing she was born on 15th July 2014 – Exhibit P3. PW 2 said in cross examination she saw sit on appellant's lap while appellant was at the veranda outside the house. She said the child had difficulty walking and even urinating and when she examined her she found her underwear had blood stains. She said the child was crying. She said the child was not coached to fabricate the appellant as she can speak and explain herself. She said she did not know what drove the appellant to commit the offence.

16. Dr. Jilo Mwasambie of Lunga Lunga Sub County Hospital examined the complainant on 5th December 2018 on allegations of sexual assault. He said the child had difficulty urinating and was bleeding. That on examination and laboratory tests blood cells were seen in her urine which was an indication of infection. He said that high vaginal swabs also revealed blood and yeast cells which was an indication of candida infection. He filled P3 form and produced as exhibit – Exhibit P2. He produced treatment notes also – Exhibit P3 he said the child had lacerations in her labia minora.

17. PW 4 P.C Janet Chemutai investigated the report and preferred charges against the appellant.

18. When the appellant was placed on defence he said he was headman to JN. He denied having committed the offence. He said he was framed up. He said he had lived there for 20 years and the children were born when he was there and they used to play with him. He said he did not insert his fingers in the child's private part. He admitted that local children called him **"Babu"**.

19. Upon re-evaluation of the prosecution's case in lower court records as well as the judgement of the trial court and do find that it was established that the complainant was sexually assaulted.

20. PW 2 noticed the child was walking with difficulties and when she wanted to pass urine she felt pain. When PW 2 examined her genitalia she saw blood stains on the underwear. PW 3 examined the child and found blood stains on the underwear and PW 1 had lacerations on the labia minora.

21. PW 1, told the mother it was **"Babu"** the appellant who inserted his finger in her genitalia. Although appellant claimed that he had been framed it did not emerge that there was reason why he would have been framed considering he had worked for the grandmother of the complainant for over 20 years. Had it also been a frame up, PW 3 would not have made up the blood stains on the underwear and laceration on the child's labia minora. This court therefore finds that the prosecution having established the age of the complainant and that she was sexually assaulted by a person known to her, the grandmother's worker, the charge was proved beyond all reasonable doubt and the conviction was therefore properly reached and cannot be unsettled. The appellant did not point out any contradictions on the prosecution's evidence that he claims the trial magistrate relied as to find him guilty.

22. The trial magistrate in convicting the appellant said that his defence was a mere denial and that the mother of the child saw him holding the minor and told the child to move away and that he was a person well known to the complainant and the prosecution's case was overwhelming.

23. The appellant was therefore lawfully found guilty. The sentence passed against the appellant is also the one provided by the law save that in consideration of his age and in consideration that he was in custody from 5th December 2018 when he was arrested and arraigned in court on 7th December 2018 and remained in custody up until when he was convicted and sentenced to serve jail terms on 30th August 2019, the period from arrest to date should have been factored in his sentence.

24. The conviction and sentence are therefore upheld, but sentence to run from 5th December 2018. That would mean that 2 years and 7 months are deducted from the appellant's sentence before the Prison Authorities can then apply the one third rule as per the Prison's Act,

Order accordingly.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 1ST DAY OF JULY, 2021.

HON. LADY JUSTICE ADWERA ONG'INJO

JUDGE

In the presence of:-

Ogwel – court assistant

Respondent -

Appellant -