



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CRIMINAL APPEAL CASE NO. 99 OF 2015

RICHARD NGUNZI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

An Appeal from the Original conviction and sentence in criminal case no. 698 of 2012 in the Chief Magistrate's Court at Kitui Hon. E. Boko-P.M- Judgement delivered on 9.09.2015

JUDGEMENT

1. Richard Ngunzi, the Appellant herein, was charged with the offense of defilement Contrary to **Section 8(1) (2) of the Sexual Offence Act Number 3 of 2006 vide Kitui Chief Magistrate Criminal No. 698 of 2012**. He also faced a 2nd count of escape from lawful custody Contrary to **Section 123 of the Penal Code** as read with **Section 36** thereof.
2. The particulars of the first count are that, on the 19th December 2012 at 0300 hours at [Particulars Withheld] Village, Kitui Central within Kitui County, he unlawfully and intentionally caused his penis to penetrate the vagina of (name withheld), a girl aged 9 years.
3. In the 2nd count, the particulars were that, on the 24th December 2012 at Itoleka Police Station, being in the lawful custody of No. 91699 PC Benjamin Kinyamal, escaped from the said custody.
4. The Appellant denied all counts but after trial, he was found guilty of the main count of defilement and escape from lawful custody. In the first count, he was sentenced to imprisonment for life while in Count 2, he was sentenced to serve one-year imprisonment. The two sentences were to run concurrently. This means that, by the time this appeal was heard, he had already served the one sentence for the 2nd count. This appeal is therefore against the conviction and sentence of the first count.
5. A summary of the evidence presented to the trial court going by the proceedings from that court shows that the victim and her other siblings were sleeping alone in their home when the Appellant reportedly sneaked into the house at around 9 PM and broke into the house and repeatedly defiled her. The girl managed to sneak out of the house after the ordeal and sought help from her grandmother DMM (PW2) who lived nearby the home of the victim. The rescuers went to check to the scene but did not find the assailant. The victim was in pain and bleeding from her private parts was taken to hospital the following day and a report was made to the police who later swung into action and arrested the Appellant.
6. Dr. Patrick Mutuku (PW6), who testified on behalf of one Dr. Miriam, testified and confirmed that the minor has been defiled, going by the treatment and P3 form tendered as P. Ex 3 and 4 respectively. He also tendered the age assessment report (P.Ex 5) showing that the minor (victim) was aged 10 years at the time (29/05/2013) when the age assessment was done. This meant that when the victim was defiled, on 19th December 2012, she was 9 years old.
7. When placed on his defense, the Appellant stated that he was arrested on 22nd December 2012, while working at his farm weeding maize. He further told the trial court that, he was surprised to see a minor testifying that she was defiled. He also wondered why the report of defilement was made to the police after the victim had been taken to hospital and treated. He faulted the police for not producing the blood stained mattresses, bedsheets, and damaged door to prove that he broke into the house and defiled the minor.
8. The trial court evaluated the evidence tendered and found that the prosecution had proved its case to the required standard. It found that, penetration had been established and that the Appellant had been positively identified. On that basis, the Appellant was convicted of both the 1st and 2nd Count and sentenced to serve life imprisonment for the first count and one year imprisonment for the 2nd count.
9. The Appellant was aggrieved by both conviction and sentence and though the memorandum of Appeal does not specify that it is in respect to the 1st Count, the body of the memorandum indicates that it is in respect to the conviction and sentence imposed on the 1st Count.

10. The Appellant has raised the following five grounds in his appeal namely:-

(i) That the evidence against him was not corroborated.

(ii) That there was no eye witness called to testify even though the victim testified that she was defiled while sleeping with two other children.

(iii) That the learned trial Magistrate erred in both the law and facts when he convicted him relying on recognition without considering that there was no light to identify the culprit.

(iv) That the trial court did not consider his defense and the grudge between him and the victim's grandmother.

11. In his written submissions, the Appellant contends that the age of the victim was not established and claims that there was no document tendered to prove the age of the victim. He submits that the sentence meted out is pegged on the age of the victim. He submits that the sentence meted out on him was not proper in the circumstances.

12. The Appellant further submits that; the mother of the victim gave contradictory evidence concerning the age of the victim. He alleges that, while the victim stated that she was 11 year old, her mother to him stated that she was born on 2nd March 2008. He submits that, he should be given the benefit of doubt due to the aforesaid contradiction and given a lesser term sentence rather than the life sentence.

13. The Appellant further submits that the circumstances obtaining did not favour positive identification. He submits that, the light emitted by mobile phone was insufficient and blames the police for not producing the sweater he was reportedly seen wearing to confirm identification. He submits that the prosecution's case was not proved beyond a reasonable doubt.

14. He contends that the evidence tendered during the trial was insufficient to sustain a conviction. He submits that the color of the blood-stained dress tendered in evidence, was not clear as the victim stated that it was light blue, while the investigating officer stated that it was grey. He contends that it was not possible that the victim, could have been wearing 2 dresses at the same time.

15. This court has considered this appeal. For the record, the Respondent, through the Office of the Director of Public Prosecution, filed no submissions in opposition to this appeal. That notwithstanding, this court is obligated to determine this appeal on its merits.

16. This court will begin with the first grounds raised which on contradictions. The Appellant claims that the age of the victim was not established beyond doubt. I have considered the evidence tendered and find that the claim is untrue. The victim testified that she was 11 years old but that was on 17th February 2014, when she was testifying. The incident occurred on 19th December 2012, which means that the victim's evidence in respect to her actual age was not contradictory at all. The mother (PW4) told the trial court clarified that while her daughter (the victim) was then aged 11 years at the time of giving evidence, she was 9 years old at the material time of defilement. Her evidence was in tandem with the P3 form tendered as P. Exhibit 4 and the age assessment report tendered as P Ex. 5.

This court notes that the mother (PW4) indicated in her evidence that the victim was born on 2nd March 2008, the same could have been either due to some inadvertence on her part or the trial court while recording her testimony. This is because she was clear in her mind that her daughter was aged nine years at the time of the incident.

17. The other contradiction pointed out is the apparent color of the blood-stained dress worn by the victim during the incident. While the victim (PW1) stated that the dress was "faded blue", the Investigating Officer Joram Gichuhi (PW7) described the colour as light grey. Both witnesses however agreed that the dress had visible bloodstains. In my considered view, there was no significant contradiction in respect to the color because to some people a faded light blue dress may appear grey. Furthermore, the fact that the dress was tendered in evidence cured any apparent inconsistency in respect to the actual color of the dress. In my considered view, what was more significant was the presence of bloodstains which showed that the victim bled during or after the ordeal. The grandmother (PW2) confirmed that the girl was bleeding from her private part when she woke her up and reported to her that she had been defiled. The victim (PW1) identified the dress she was wearing at the material time and the said dress was tendered as P.Ex 4. There is no significant contradiction that could have created doubt in the mind of the trial court. The appellants cannot, therefore, claim any benefit of the doubt because none existed in any view.

18. On identification, while it is true that the incident took place at night, the circumstances in my view were well considered by the trial court. The victim told the trial court that she was defiled 3 times that night and that the Appellant went out each time and came back. The girl stated that the 4th time she hid under the bed and saw the Appellant ransacking the bed looking for her using the light of his mobile phone. The girl told the court that she saw the Appellant clearly and identified him as the neighbor. She stated in part in her evidence in court.

“.....The person was holding a phone which was lit on the screen and I identified him with that light. I saw it was Ngunzi. He was wearing a green and white sweater. I knew the sweater was his and I saw his face and recognized him..”

The victim saw the Appellant 3 times and identified him on each occasion and in my view, that identification was positive.

19. The Appellant's claims that there was a grudge between the victim's grandmother and him in my view could not hold any water as the grandmother (PW2) told the trial court during cross-examination by the Appellant that the issue which involved a cow had long been settled before the incident and there was no boundary dispute between them. The Appellant on his part tendered no evidence to prove that there was bad blood between him and the victim's family. He cannot, therefore, blame the trial court for not considering that issue because, in my view, the same was a non-issue. There was no evidence of bad blood between the Appellant and the victims or the victim's family.

This court finds that the prosecution's case against the Appellant was overwhelming.

All the ingredients of the offense were established and proved beyond doubt by the evidence tendered by the prosecution. The conviction was safe in the circumstance given the strong evidence tendered.

On sentence, indeed, the sentence prescribed by law under *Section 8(2) of the Sexual Offence Act* is harsh but it is intended to be deterrence and protect young and vulnerable children from sexual assaults by sexual predators. The courts' hands upon/conviction are tied.

In the end, this court finds no merit in this appeal. The same is disallowed. The conviction and sentence for the aforestated reason are upheld.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 6TH DAY OF OCTOBER 2021.

HON. JUSTICE R. K. LIMO

JUDGE