



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HCCRA NO. 10 OF 2017 AS HEARD WITH HCCRA NO. 11 OF 2017

MM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant MM, was charged with offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act. Particulars being that on 2/5/2015 at about 9pm at [Particulars Withheld] village, intentionally caused his penis to penetrate the vagina of KK, a child aged 12 years.
2. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. That on 2/5/2015 at around 9pm at [Particulars Withheld] village, intentionally touched the vagina and breast of KK a child aged 12 years with his hands.
3. The appellant pleaded not guilty and matter went into full trial.
4. The prosecution called 5 witnesses .The prosecution case in brief was that on 2/5/2015 at night, the victim was sleeping on her bed in her family house in which appellant was also sleeping but on a different bed. That appellant was staying with the victim's family with the victim's mother as a husband after the demise of the victim's father.
5. Her mother had travelled to her parent's place therefore it was only appellant, the victim and a small child that were sleeping in that house. That her bed and appellant's/her mother's bed were separated with a curtain. That at around 9pm appellant went to her (victim's) bed and started touching her inappropriately. He then removed her clothes and had sex with her. On the next day when her mother came in the morning she told her.
6. A report was made to the police, she was treated at Mbitini Health Centre on 4/5/2015 and referred to Kitui District Hospital where she was examined further and P3 form was filled. Appellant who had disappeared from home from the time the issue was disclosed to the victim's mother was later arrested by relatives of victim's mother and was taken to the police station where he was charged with this offence.
7. In his defence while sworn appellant claimed that on 2/5/2015 he left [Particulars Withheld] village at around 7pm to his homestead at Kabati where he stayed for a whole week. He made a call to Ali (PW3), the victim's mother and told her that he was going to visit her. He stayed upto 3pm at Alice's place and that was on 10th. Alice's sister came in company of other people, they arrested him and took him to Kutui Police Station. The next day he was charged with a case he did not know anything about.
8. After full trial he was found guilty, convicted and sentenced to serve 20 years' imprisonment.
9. Being aggrieved by the above decision the appellant lodged instant appeal. He complains that:-
 - ***He was not given facilities to prepare for his defence including witness statements and documents and time.***
 - ***The voire dire was irregular and contrary to the principles of law.***
 - ***There were contradictory and uncorroborated evidence relied on by trial court.***
 - ***There was no prove of prosecution as provided by law.***
10. The parties were directed to file submissions to canvass appeal.

APPELLANT'S SUBMISSIONS:

11. The appellant submits that the evidence was full of confusion and didn't warrant conviction.
12. The rights of the appellants were violated by not being given essential document to counteract the opponent.
13. The appellant contends that the investigating officer said he recorded statement contradicting to other evidences. The mother to the complainant said she didn't see anything on the victim as against the doctor who says there were physical bleeding and stained pant.
14. The appellant argued that, the clinical officer who checked the complainant at first said everything was intact and he treated and filled documents which he was reading before the court.
15. It is contended that, the trial magistrate failed to conduct voire dire to the victim before she testified to ascertain whether he understood the solemnity of taking an oath.
16. The clinical officer conducted high vaginal swap and other necessary examination. While the doctor before the court did not tell the kind of examination he conducted.
17. It is contended that, he also stated that the complainant was about 12 years and other place says that the complainant was 12 years old. The mother to the victim and prosecution side didn't produce birth certificate to ascertain the exact age of the complainant.

RESPONDENT'S SUBMISSIONS:

18. **PW1 KKK** testified that she was sleeping with her siblings on the night of 2nd May 2015 since her mother was a way but they had been left under the care of the appellant who was their step father being that their biological father was deceased.
19. She testified that they were sleeping on one bed while their stepfather was sleeping on the bed where they normally share with their mother. That while the lights were still on, the stepfather moved and put it off before beginning to touch her inappropriately and warned her that he will beat her up if she screamed.
20. She testified that he proceeded to uncloth her before he went ahead to defile her and that once he was through, he left soiled with what looked like mucous. It was her evidence that fearing for her own safety, she waited until the mother returned and informed her of the ordeal.
21. **PW2 Dr. Patrick Mutuku** testified that he examined the minor at the Kitui District Hospital where she had been referred to from Mbitini Hospital. He stated that he noticed minimal bleeding with some laceration on the vaginal wall of the minor. That she had small tear on the edge of the vagina with her hymen completely broken and her pants were stained with blood.
22. He also noticed some discharge with foul smell and there was clear evidence that there was penetration. He produced the treatment card as exhibit 1, the P3 form exhibit 2, the PRC form exhibit 3 and the age assessment report exhibit 4.
23. **PW3 ASM** testified that on the 3rd May 2015, she arrived home at about 6pm when the complainant informed her of the defilement. That she examined the minor but noticed nothing but when she told the appellant who they were staying together as husband and wife to help in taking the minor to hospital, he pretended to get outside the house and disappeared.
24. It was her testimony that she took the daughter to hospital where she was advised to report the matter to the police. That she was issued with P3 form at the police station.
25. **PW4 Cpl. Paul Rotich** testified that he was at the Mbitini police post on the 3rd May 2015 they returned to the station before the appellant was arrested and charged.
26. **PW5 Sylvester Ngei** stated that being a clinical officer at Mbitini hospital, he examined the minor on the 4th May 2015 on the allegations of defilement but then referred the complainant to Kitui District Hospital for further examination.
27. In sum prosecution submitted that, the age of the complainant was proved and so is the penetration. The appellant was also positively identified since the minor was his stepdaughter.

ISSUES, ANALYSIS AND DETERMINATION

28. After going through the evidence on record and submissions by the parties, I find the issues are; **whether the trial was fair? whether prosecution proved its case as required by the law?**
29. On issue of fair trial, the appellant participated in trial without complaints nor seeking supply of any specific documents from the prosecution. The issue being raised now is an afterthought and court does not see any unfairness in the trial.
30. Regarding the issue on prove of case, PW2 Dr. Mutuku from Kitui District Hospital testified and produced P3 form and PRC form he filled on 5/5/2015 after examining the victim and they showed that the victim had been defiled because the hymen was broken, there was a small tear in her vagina and there was also minimal bleeding or laceration.

31. The clinical officer PW5 told the court he examined the victim on 4/5/2015. He stated that there were no signs of defilement as the hymen was intact and the vagina was also intact. He however told the court that he referred PW1 to Kitui District Hospital for further examination.

32. Though he did not disclose why he had referred the victim to Kitui District Hospital for further examination and yet he had already examined her, Dr. Mutuku confirmed that the victim was referred to Kitui from Mbitini Hospital and he told the court what his examination revealed, that the victim had been defiled.

33. The trial court did not understand why the clinical officer (PW5) did not notice any defilement and in any case, he did not produce any document that he filled to show that he did not find any signs of defilement. It thus left the issue to be weighed with other evidence to confirm if there was defilement or not.

34. The victim as PW1 narrated to court while in tears how appellant defiled her. That appellant was living with her mother (PW3) as husband and wife after their father passed away. She was sleeping in a house which is a single room but has a bed for herself and another bed for appellant being shared with her mother. That her bed was separated from appellant's with a curtain.

35. That on the material day her mother had gone to visit her parents so it is her and appellant person together with a small child that were sleeping in the house. She was sleeping in her bed when appellant came to her bed and started touching her thighs and vagina. He removed her clothes and defiled her. That there was a lamp on but he put it off when he started touching her. He then threatened her not to scream.

36. That on the next day it was a Sunday. She did not tell anyone and went to church. Her mother came back. She told her and when her mother asked appellant, he told her that maybe she was dreaming. Then appellant left or escaped from their home after that disclosure to her mother. She also told the court that she was taken to hospital on that day 3/5/2015 but they arrived at 11pm and were told to go back on the next day 4/5/2015.

37. The mother (PW3) told the court what she was told by PW1 against the appellant and also confirmed that appellant was living with her after the death of her husband and that the victim and three other children were sired by her husband but the 5th child that is the child she got after the victim was sired by the appellant.

38. Appellant in his defence told the court that he left the village on 2/5/2015. He however did not tell the court whether or not it is true that he was living at the home of the victim. He also said that he went to his home at Kabati and on 10th after staying at Kabati for a week, he called the victim's mother on phone that he was coming to visit her. He came and stayed there till 3pm but her sister came with other people and arrested him. He did not tell the court why he was being arrested.

39. When compared appellant's story with the story of the victim, It left no doubt in trial magistrate mind that appellant was the person who knows very well that the victim was telling the truth that he defiled her that night, that is why he was avoiding to talk of what they say that he did or said.

40. He was also avoiding telling the court whether or not he was living with PW1's family. His defence did not challenge the evidence of PW1 at all. He did not even tell the court why PW1 would lie against him and the court did not see any reason even in PW3's evidence.

41. The court thus finds no merit in the appeal and makes the following orders:

i) The appeal is dismissed, the conviction is upheld and sentence confirmed.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE