



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 1 OF 2017

BENSON MWANGI MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against both conviction and sentence from the judgment of Hon.V.O.Ochanda

Resident Magistrate at PM's Court, Mukuruweini delivered on 9th January, 2017

in Criminal Case No. 166 of 2016)

JUDGMENT

FACTS

1. The Appellant **Benson Mwangi Muriithi** was charged with the offence of defilement of a girl contrary to **Section 8 (1)(2)** of the **Sexual Offences Act**; the particulars of the charge are that on the 26th day of May, 2016 at around 14.30 hours within [particulars withheld] Village in Mukuruweini sub-County within Nyeri County, the appellant intentionally caused his member to penetrate the genital organ of **JWN** a child aged two (2) years.
2. The alternative charge was that of Indecent Act with a child contrary to **Section 11(1) of the Sexual Offences Act**; that on the same date and at the same place hereinabove mentioned the appellant intentionally touched the private parts of **JWN** with his member.
3. The prosecution called a total of four (4) witnesses in furtherance of its case; the appellant was convicted on the main count and was sentenced to life imprisonment;
4. Being aggrieved by the conviction and sentence, the appellant filed a Petition of Appeal on the 23rd January, 2017 and listed six (6) Amended Grounds of Appeal as summarized hereunder:-
 - (i) The trial court erred by relying solely on circumstantial evidence to convict the appellant;
 - (ii) There was no direct evidence and no nexus between to connect the appellant and the offence; there was no direct evidence to support the charge;
 - (iii) The trial court wholly disregarded the appellant's defence;
 - (iv) The conviction was based on a non-existent charge in the Sexual Offenders Act; the sentence imposed was on a non-existent conviction;
 - (v) The trial court failed to follow proper procedure at the hearing.
5. At the hearing hereof the appellant was represented by Ms Mukuha whereas the State was represented by Prosecuting Counsel Mrs Gicheha who made oral submissions; hereunder are the parties rival submissions;

APPELLANTS SUBMISSIONS

6. The appellant submitted that there was no direct evidence to connect the appellant to the crime; the evidence of **PW1** was that the minor was with the appellant but the time was not stated; neither does she state the time she took the child from the appellant; she did not tell the court that between the time she took the child till the time of discovery in the evening whether the child was with anyone else; **PW1** did not also state specifically that it was the appellant who committed the offence; no proper investigations were done; it was upon the prosecution to prove the offence;
7. The prosecution case relied heavily on medical evidence and it was not in doubt that the offence was committed but there is no evidence to connect the appellant to its commission;
8. That there was nothing for the appellant to controvert if the prosecution had not proved its case to the required threshold; there were many gaps and it was not upon the appellant to fill the gaps;
9. The appellants defence was that there were many people at the home on that date; and it was not indicated that the appellant segregated himself from the others; the record is clear that the trial court disregarded his defence;
10. The Section 8(1)(2) is a non-existent section of the law; the conviction and sentence were based on this non-existent section of the law; there was also an alternative count; the trial court failed to state the specific count on which the appellant was convicted; that both counts carry different sentences and it was not possible for him to be convicted on both;
11. The language of the court was only indicated on the date of the plea which was Kiswahili; for the rest of the proceedings this was not indicated; that there was the possibility that the appellant did not understand the entire proceedings and was greatly prejudiced;
12. Counsel urged this court to re-assess and re-evaluate the evidence and prayed that the appeal be allowed in its entirety; that the conviction be quashed and sentence be set aside.

RESPONDENTS SUBMISSIONS

13. In response the respondent made the following submissions; the victim was two (2) years and four (4) months and therefore due to her tender age the evidence was tendered by her mother;
14. **PW1** worked as a labourer at the appellants grandmother's homestead; the child was with the appellant but the time was not indicated; the mother only noticed in the evening that the child was agitated and when she bathed her she noticed that she was bleeding and pus coming out from her private parts; she called the appellants grandmother to witness who then advised **PW1** to take the child to the hospital; the hospital confirmed that the child had been defiled so she was directed to report the matter to Mukuruweini Police Station;
15. Under cross-examination she stated that there were 3 persons at home at that time that is **PW1**, **PW2** and the appellant; being the only male in the compound and the strong circumstantial evidence was what informed the court to arrive at its decision; the prosecution evidence was scanty on the details on who else was at the home;
16. Never-the-less the evidence of **PW3** confirmed that the hymen was broken and that there were tears to the labia and vagina coupled with bleeding; penetration was proved by the witness; the age was proved by the production of the Birth Certificate;
17. The appellant's defence was unsworn; he confirmed that **PW1** worked for his grandmother and that she had left the child with him and that the child having no diapers may have injured her private parts; the problem was that when he noticed that the child had injured herself he made no effort to raise the alarm or report or communicate this to anyone;
18. His defence was that there were other people present and mentioned his grandfather; **PW1** states that they were the only three, her evidence was circumstantial evidence and points to the guilt of the appellant as he didn't deny he was at the homestead which places him at the scene and he confirmed having interacted with the child;
19. The trial court disregarded his defence as a mere denial; the child was defiled and all the evidence pointed to the appellant; his defence was found not to have displaced the prosecution's evidence against him;
20. The appellant prayed that his appeal be allowed and that the conviction be quashed and the sentence be set aside; and he be set at liberty.

ISSUES FOR DETERMINATION

21. After taking into consideration the foregoing submissions made by the appellant and those of the Counsel for the State, this court has framed the issues as set out hereunder for determination;

- (i) Whether the prosecution proved its case to the desired threshold;

ANALYSIS

22. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Reference is made to the case of **Okeno vs Rep (1972) EA 32**.

Whether the prosecution proved its case to the desired threshold:

23. The offence of defilement has three (3) key ingredients that the prosecution must prove; the key ingredients are identification of the perpetrator, penetration and age;

24. **On proof of penetration;** the evidence of **PW3** confirmed that the hymen was broken and that there were tears to the labia and vagina coupled with bleeding; penetration was proved by this witness; **On the age of the minor;** the age was proved by the production of the Birth Certificate;

25. **As for the identification of the perpetrator;** the appellant in his unsworn defence contended that there were other people present and mentioned his grandfather; **PW1** under cross-examination stated that they were the only three (3) persons who were present in the homestead; that is herself, **PW2** and the appellant;

26. Prosecuting Counsel for the State acknowledged the fact that the evidence was circumstantial evidence and that it was a pointer to the guilt of the appellant as he didn't deny he was at the homestead and that this placed him at the scene and he had also confirmed having interacted with the child; but further acknowledged that the prosecution evidence was scanty on the details on the timing and who else was at the homestead;

27. Indeed it is blatantly clear from the evidence that the appellant had every opportunity to commit the crime being the only male in the compound; and no doubt this circumstantial evidence threw a strong suspicion upon the appellant and that this was what informed the court to arrive at its decision; but it is trite law that suspicion no matter how strong cannot be a substitute of proof in a criminal case; it is indeed sad that the perpetrator took advantage of such tender years and being of such a tender age she was unable to assist in the identification of the perpetrator of such a heinous crime; it is therefore with a heavy heart that this court gives the appellant the benefit of doubt as identification was not proved to the desired threshold;

28. The court finds that the prosecution failed to prove identification to the desired threshold;

FINDINGS

29. For those reasons this court makes the following finding that the prosecution failed to prove the identification of the perpetrator to the desired threshold;

DETERMINATIONS

30. The appeal is found to be meritorious and is hereby allowed;

31. The conviction is hereby quashed; and the sentence is hereby set aside;

32. The appellant to be set at liberty forthwith unless otherwise lawfully held;

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 9th day of January, 2019

HON.A. MSHILA

JUDGE