



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU.

CRIMINAL APPEAL CASE NO. 144 OF 2014.

SAMUEL BARAZA OBUKUL....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Resident Magistrate Hon. AMWAYI R. delivered on 26TH OF JUNE 2014 in NAKURU Court Criminal Case No. 43 of 2013.)

JUDGMENT

1. The Appellant was charged before the Nakuru Chief Magistrate's Court with the one count of defilement of a child aged less than twelve years contrary to Section 8(1) as read with Section 8(2) of the Sexual offences Act no. 3 of 2006. The particulars of the offence as per the charge sheet were that on the diverse dates between January 2013 and 25th March 2013 in Nakuru District within the Rift valley province unlawfully and intentionally caused his penis to penetrate the virgina of EWK a child aged 6 years.
2. The Appellant also faced an alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual offences Act No. 3 of 2006. The particulars of the offence is that on the diverse dates between January 2013 and 25th March 2013 in Nakuru District within the Rift valley province unlawfully and intentionally touched the vagina, buttocks and stomach of EWK a child aged 6 years.
3. After a fully-fledged trial, the Trial Court convicted the Appellant and sentenced him to serve life imprisonment as mandatorily stipulated in the law.
4. The Appellant is dissatisfied with the conviction and sentence and has appealed to this Court. The grounds of appeal are that:
 - i. The trial magistrate erred in law and in fact by failing to appreciate that the prosecution failed to prove the case beyond reasonable doubt.
 - ii. The trial magistrate erred in law and in fact in holding that the penetration was proved whereas the P3 form and PRC do not allude to any masculine intervention.
 - iii. The learned trial court erred in law and in fact in convicting the Appellant on inconsistent evidence that lacked probative value.
5. The Appellant submitted that the trial court erred in law and in fact to have convicted and sentenced him while the prosecution had failed to prove its case beyond reasonable doubt. He submits that the prosecution failed to explain the prolonged delay by PW1 in reporting the alleged defilement since it occurred January to march 2013, being the complainant's neighbor and calling PW1 and PW2 into his house would not warrant him to be guilty of defilement. The investigations conducted by PW 7, the Investigation officer, was shoddy and not sufficient to warrant him a conviction as she heavily relied on the witness statements and did not conduct any independent investigations to establish whether the Appellant actually committed the offence. He further went ahead to submit that this case has been brought against him as he refused to marry PW 4, the complainant mother a fact that the prosecution failed to rebut.
6. In ground two the Appellant submits that no penetration was proved as the doctor, did not collect any specimen to show that the complainant was defiled or produce any treatment note to show that the complainant was treated for defilement he only testified to have examined the minor and found hyper pigmentation of labia majora and outer genitalia, inflamed vagina and broken hymen, the magistrate thereon went to convict him even when penetration had not been proved and relied on inflamed vagina and broken hymen while no spermatozoa was seen in the minor.
7. He further states that the evidence adduced was obtained in a manner that violates his fundamental rights and freedom thus rendering the trial unfair.

8. In ground three, the Appellant submitted that he was convicted on the evidence of PW1 and PW2 who are children of tender age 6 years and 10 years respectively who testified to be defiled at the Appellant house for 3 months without anybody noticing in broad daylight. He submits that he is a character in the prosecution well staged melodrama as sexual offences are nowadays being used to frame innocent persons with a certain motive. He therefore concludes that the evidence adduced by the prosecution was not sufficient to warrant him a conviction and prays that the said conviction be squashed, set aside the sentence of life imprisonment and acquit him or give him a retrial.

9. Mr. Chigiti for the prosecution submitted that the conviction was proper and safe. The Appellant was sentenced to life imprisonment which is within the law as per Section 8(2) of the Sexual offences Act. He further added the magistrate did not error in facts or laws as the ingredients of defilement were proved beyond reasonable doubt as follows;

a) Age of the child was proved both orally in the testimony of PW1 and PW4 and in production of the P3 form, PRC form and the birth certificates.

b) Penetration was also proved both orally and by way of document evidence.

c) Identification of the Accused, the Appellant was a neighbor and the PW1 knew him by name and well recognized him.

10. As a first appellate Court, my duty is to look the evidence adduced at the trial court afresh, re-evaluate and re-assess it and reach my own conclusion (**Okeno v R [1972] EA 32**). **As the Court stated in Kariuki Karanja v R [1986] KLR 19:**

This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that.

11. In the Court below, the following evidence emerged. The prosecution called 7 witnesses in total, in support of its case. It was PW 1 and PW 2 testimony that on diverse dates between the month of January and March 2013, the Appellant used to call them to their house after school and it was then that he would have sex with PW 1 on a mattress on the floor, they would thereafter be bought mandazi and leave for home. PW 2 further testified to have told PW 3 of the defilement of PW1 by the Appellant who in turn told PW 4.

12. PW3 testified to have been informed of the defilement by PW 2 and in return asked PW 1 about it and after gathering information went ahead to inform their mother PW 4 who later took action by taking PW1 to hospital and reported the matter to the police station and the Appellant was arrested by the members of the public.

13. PW6 was the doctor, Dr. Zipporah Kemunto Mwebi. She testified that she examined PW1 on 28/03/2013. She found that PW1 (the Complainant) had inflammation of labia majora and the vagina. The hymen was also broken and, in her words, was "not normal". There was no discharge and both the HIV and Pregnancy tests were negative. The doctor filled out the P3 Form; the PRC Form which she produced as evidence. She also produced the Lab Reports.

14. In his defence the Appellant denied having defiled the minor in totality and blamed the mother of the complainant as having fabricated him after he declined her offer of marrying her

15. As Mr. Chigiti suggested, it was incumbent upon the Prosecution at the Trial Court, to prove three elements of the offence of defilement beyond reasonable doubt:

a. That the victim was below eleven years old;

b. That there was penetration; and

c. That it was the Appellant who caused the penetration.

16. The first element is penetration. Penetration is defined in Section 2(1) (d) of the Sexual Offences Act as "*The partial or complete insertion of the genital organs of one person into the genital organs of another person.*"

17. PW1, in her testimony, stated that the Appellant used to remove her clothes plus her pant and tells her to sleep on a mattress that was on the floor and then inserts his penis into her vagina and after sex she would feel pain. The testimony of PW6, the doctor, also confirmed penetration. She stated that on examination of PW1 on 28/3/13, two days after the defilement, she observed PW1's genitalia had inflammation of labia majora and the vagina. She also found a broken hymen – a clear indication that the PW1 had been defiled. The doctor produced as evidence the P3 form, PRC form and lab report forms to back up the prosecution testimony as Pexh 2, Pexh 3 and Pexh 4. The production of these documents was not challenged by the Appellant and no reasonable doubts were raised about their veracity or authenticity. Based on this evidence, I have easily reached the conclusion that penetration was positively proved.

18. The second element that the prosecution is required to prove is the age of the complainant. Under Section 2 (1) of the Sexual Offences Act, the definition of a child is the one assigned thereto in the Children Act. This means any human being of less than eighteen (18) years. In this case, PW 4 who is the mother to PW 1 testified that she was born on 10/11/2012 and produced a birth certificate as Pexh 1 which indicates the age of the minor to be 6 years at the time the offence was committed. This evidence was not challenged by the Appellant

19. On the basis of the birth certificate and the testimony of the mother (PW4), I am satisfied that the learned trial magistrate came to the right conclusion on the age of the complainant.

20. The Third element that the prosecution was required to establish is the identity of the perpetrator. The complainant testified that she very well knew the Appellant prior to the sexual assault and between the months of January 2013 to March 2013 the Appellant herein used to call her and PW 2 into his house where he allegedly committed the offence. Indeed, the Appellant is her neighbor and he at one point was employed by one of her uncles. She knew him by the name Sammy and it was not the first time he allegedly committed the act.

21. PW 2 also clearly identified the Appellant by his name as Samuel Baraza. She testified that he used to call her and PW 1 in broad daylight to go to his house. Based on this clear evidence by PW1 and PW2 which was largely unchallenged on cross-examination, I am satisfied that the learned trial magistrate came to the right conclusion of identification of the Appellant as the person who had sexual intercourse with the complainant.

22. From the above analysis I am satisfied that the prosecution proved the three key elements of defilement and from the evidence on record the prosecution proved their case beyond any reasonable doubt and meet the threshold of a defilement case.

23. The Appellant contends he was convicted on inconsistent evidence that lacked probative value. However, the Appellant fails to state the particular inconsistencies as alluded in the prosecution case. Having looked at the entire Trial Court record, I am unable to find any material inconsistencies which would warrant reasonable doubts about the veracity of the Prosecution case.

24. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes that all the elements of the offence of defilement of a child under the age of eleven years have been proved beyond reasonable doubt. The conviction was safe and free from error and it is hereby affirmed. Since the statute provides for only one sentence for the offence – that of life imprisonment – the appeal against sentence is also not sustainable.

25. The orders that the Court shall give, therefore, are as follows:

a. For the reasons stated above, the appeal is dismissed and the conviction is hereby affirmed.

b. The sentence imposed by the Trial Court of life imprisonment is affirmed.

26. Orders accordingly

Dated and delivered at Nakuru this 17th day of January, 2019

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JOEL NGUGI

JUDGE