



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.5 OF 2017

(From SPM's Court at Bungoma Cr.333 of 2015 by: Hon. E.N. Mwenda (SRM))

PAUL ATELA MURUNGA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

This is an appeal arising from the judgment of Hon. Mwenda SRM. The appellant **Paul Atela Murunga** was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

The particulars of the charge are that on diverse dates between 15/10/2014 and 5/12/2014 at Kakalet Village in Angurai Division, Busia County intentionally and unlawfully caused his penis to penetrate the vagina of S.A.O, a girl aged 15 years.

In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. It was alleged that on diverse dates between 15/10/2014 and 5/12/2014, at Kakalet village, Busia County, indecently touched the vagina of S.A.O. a girl aged 15 years.

The appellant was convicted on the main charge and sentenced to 20 years imprisonment.

The appellant is aggrieved by the conviction and sentence which has prompted this appeal.

The grounds of appeal are contained in the petition filed on 20/1/2017, they are as follows:

- (1) That the court erred by relying on hearsay evidence;***
- (2) That the appellant's Constitutional rights were violated;***
- (3) That there was no medical evidence linking the appellant to the offence;***
- (4) That the court failed to consider that the charge was fabricated;***
- (5) That no independent witnesses were called;***
- (6) That the charge was not framed to the required standard;***
- (7) That the sentence is harsh and excessive.***

The appellant filed written submissions in which he reiterated the above grounds and adopted them.

The appellant prays that the conviction be quashed and sentence be set aside.

Ms. Njeru learned counsel for the State opposed the appeal contending that the appellant was the complainant's neighbor; that the appellant used to visit the complainant's house as a result of which he lured the complainant into a relationship and they started to engage in sex in the bush; that the complainant became pregnant. The parents realized she was pregnant. After being beaten, she revealed that the appellant was the father. Later the appellant was arrested in Uganda and charged.

A DNA test revealed that there is possibility that the appellant is 99% the father of the child.

This being a first appeal, it is the duty of this court to assess all the evidence tendered in the trial court, analyze it and make its own findings. This court bears in mind that it did not hear or see the witnesses. This is what the court said ***in Kiilu v Republic (2005) KLR 174.***

In this case the prosecution called a total of seven witnesses;

PW1 S.A.O., the complainant told the court that she was 15 years old. She recalled that on 15/10/2014, the appellant went to their home, called her, they went to the bush and he promised to buy her a present. He undressed her and inserted his penis in her vagina; that in November and December, 2014, he sent for her and they did the same act and he promised to buy her a present; that he started bragging that he impregnated PW1; that the appellant's brother heard of it and informed her father PW3 who beat her up and took her to hospital. It was confirmed that she was pregnant and the matter was reported to the police.

PW3 M M O; the father to PW1 said that between 15/10/2014 and 5/12/2014 he heard rumours from his mother that PW1 was it was impregnated by the appellant. He reported to the police, took PW1 to hospital and it was confirmed she was pregnant. The Assistant Chief started to look for the appellant who was arrested in Uganda. PW3 identified the appellant as his cousin.

PW4 Edward Osenger received a report from PW3 about PW1 having been defiled and on 29/1/2015, he received information that the appellant had been arrested and then handed over the appellant to police.

PW5 Pauline Sirengo, a Clinical Officer at Kocholia Hospital produced the P3 prepared by Dr. Ayako who had examined PW1 and found her to be pregnant.

PW6 PC Carolyn Gakuo, the investigating officer in this matter received PW1 at the police station, escorted her for examination and arranged for DNA by the Government Analyst.

PW7 Richard Kimutai a Government Analyst received exhibits from PW1, the appellant for purposes of determining whether they were the parents of a child C A. PW7 found that there was 99.99% chance that the appellant was the father of the child.

The appellant in his unsworn defence only talked of how he was arrested and charged.

I have considered the grounds of appeal, the rival submissions and all the evidence tendered in the trial court. The appellant having been charged with defilement, it was the duty of the prosecution to prove their case beyond reasonable doubt. The prosecution has to establish that:

- (1) ***The complainant was a child;***
- (2) ***There was penetration;***
- (3) ***Positive identification of the perpetrator.***

The complainant, PW1, told the court that she was 15 years old. An age assessment was performed on PW1 and the age was found to be approximately 15 years. By then, she was in standard 6. There is no doubt that PW1 was a child and therefore could not consent to any sexual act.

Whether there was penetration:

PW1 told the court that she was lured into the bush by the appellant three times when he inserted his penis in her vagina. As a result, she got pregnant, a child was born and a DNA test conducted by PW7 confirmed that there was 99.99% chance that the appellant is the father of the said child.

The pregnancy could only come about through an act of penetration.

Whether the appellant is the culprit;

I find that there is overwhelming evidence to that effect. PW1 identified the appellant. PW1 was not a stranger to her. In fact, PW3 identified him as a cousin who used to visit his house. The sexual acts used to take place during the day. Lastly, the DNA test connects the appellant to the act. There is indeed medical evidence linking the appellant to the offence.

Although the appellant alleged that his Constitutional rights were breached, he did not allude to any.

The appellant complained that the prosecution only called witnesses who are relatives. In ***Julius Kalewa Mtunga v Republic CRA.31/2005***, the Court of Appeal held:

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive....”

The prosecution has the discretion to call whichever witnesses are relevant to their case and cannot fail to call a witness just because he or she is a relative. In this case, apart from PW1 & 3, there were three others who are not relatives. There is nothing to show that the prosecution had any oblique motive in not calling any other witness and the fact that they were related to the complainant is no good reason to exclude them.

In his grounds, the appellant alleges that the case was a fabrication. However, he had an opportunity to cross examine the witnesses but he never made any allegations relating to a grudge or a reason why the charge should be trumped up. The appellant had a chance to explain in his defence but never said anything to do with fabricated charges. The defence was evasive and elusive.

In the end, this court is satisfied that the prosecution proved beyond any doubt that it is the appellant who defiled PW1. The conviction is well founded.

The appellant also complained that the sentence is harsh and excessive. Under Section 8(3) of the Sexual Offences Act, upon conviction, the culprit is liable to be sentenced to not less than twenty (20) years imprisonment.

In the end, I find that the appeal lacks merit and is hereby dismissed.

Signed and Dated at NYAHURURU this 9th day of April, 2019.

R.P.V. Wendoh

JUDGE

Delivered by S. Riechi (J) at BUNGOMA this 20th day of May, 2019.

PRESENT:

Ms. Nyakibia - Prosecution Counsel

Wilkister - Court Assistant

Appellant - present