



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO.7 OF 2019

BERNARD KYALO MAYOLI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate

Honourable C. A Mayamba dated 5/9/2018

in Kilungu SRMCR No. 46 of 2018.)

JUDGMENT

1. Bernard Kyalo Mayoli the Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.

The particulars were that the Appellant on the **13th day of April 2014** at [particulars withheld] sub-location Mukaa district within Makueni County intentionally and unlawfully caused his male organ namely penis to penetrate to the female organ namely vagina of **DKM** a child aged 12 years.

2. He faced an alternative count of committing an indecent act with a child contrary to Section 11(A) of the Sexual Offences Act, No. 3 of 2006.

The particulars were that on the **13th day of April 2014** at [particulars withheld] Sub-location in Mukaa district within Makueni County intentionally touched the vagina of **DKM** with his penis against her will.

3. The Appellant denied the charges and the matter proceeded to full hearing after which he was convicted and sentenced to 20 years' imprisonment.

4. The Appellant being aggrieved with the judgment filed this appeal raising the following amended grounds of appeal;

1. That the Hon. Trial Magistrate erred in matters of law and fact by accepting the voire dire of Pw3 without noting that the same was badly conducted.

2. That the Hon. Trial Magistrate erred in matters of law and fact by failing to find that Pw3 was not a credible witness worth of belief.

3. That the Hon. Trial Magistrate erred in matters of law and fact by failing to find that the medical evidence did not conclusively prove that there was penetration of Pw3 genital organ.

4. That the Hon. Magistrate erred in matters of law and fact in failing to find that there were material contradictions and inconsistencies in the prosecution's case.

5. That the Hon. Trial Magistrate erred in matters of law and fact in failing to find that the prosecution did not prove its case beyond reasonable doubt since he was not properly identified as the perpetrator of the alleged offence.

5. The prosecution lined up five (5) witnesses to prove its case. The complainant testified as **Pw3 D.K.** she was born on 14/09/2002. She told the court that on 13/4/2014 she was at [particulars withheld] hill grazing animals with one Bernard Kyalo the Appellant. He lifted her dress made her lie down and removed her pant. He removed his trouser and lay on her and she felt a lot of pain but she did not scream. She went home and informed her elder sister who testified as Pw1 (**PNM**). When Pw1 received the complaint she immediately informed their mother Pw2.

6. **Pw2 Susan Koki Maweu** upon receipt of the report took Pw3 to Sultan Hamud Hospital and she was examined by the doctor. She had made a report to the police from where she was issued with a P3 form, which was later filled by the doctor. She also brought with her Pw3's child health card (EXB1), treatment card from Sultan Hamud Hospital (EXB2), lab request form (EXB3 and PRC form (EXB4).

7. **Pw4 Jackson Nzivo** is the clinical officer who presented the P3 form on behalf of Mr. Kamwere who had resigned. This was with the consent of the Appellant. Pw3 was examined on 15/04/2014 and the findings were as follows

- **No injuries to the labia minora or majora**
- **Hymen not intact**
- **No discharge noted**
- **HVS revealed epithelia cells**
- **Pregnancy and HIV tests were negative.**

He produced the P3 as EXB1.

8. **Pw5 No.33830 P.C Benjamin Makau** investigated the case and charged the Appellant after confirming the claims.

9. When placed on his defence the Appellant denied the claim through his unsworn defence. He said he was building a toilet of Bernard Kyalo from **8/4/2014 – 14/4/2014**. At 3:00 pm as he waited for food he was called by another boy who asked him to go and see his father. He went and was arrested and taken to Sultan Hamud police station. It was while there that he heard about the defilement claims.

10. He claimed that his parents and Pw3's parents had a dispute over land where Pw3's father decided to have him put in prison. His witness **Dw2 – Bernard Mulinge Munyao** denied any knowledge of the charge against the Appellant. He denied that the Appellant was at his home on **13/4/2014**.

11. When the appeal came for hearing the Appellant relied on his written submissions. First of all, he argues that the *voire dire* conducted of Pw3 was not properly done. That proper questions were not put to the witness. He next argues that the evidence was not conclusive proof of penetration. He therefore faults the trial magistrate for finding as he did at page 24 lines 9 that penetration had been proved.

12. He disputed that Pw3 was a witness worth of belief. He explained that it was not true that Pw3 told her sister (Pw1) who in turn told her mother about it. He referred to some portions of the proceedings. Further he states that the investigating officer (Pw6) appears to have begun investigations even before the complaint arose. He reckons that Pw6 began investigations on **4/4/2014**.

13. He finally submitted that the case was not proved beyond reasonable doubt, while referring to the case of **Woolmington vs- DPP (1935) AC**.

14. The appeal was opposed on submission that the trial was free from error and that the trial court addressed all relevant issues of age, penetration and identification of the Appellant.

15. This is a first appeal court which has a duty to review the evidence and arrive at its own conclusion. It should also bear in mind that DKM was a child.

i. Whether the complainant was a child

ii. Whether the penetration was by the Appellant.

iii. Whether there was penetration of the complainant's genitalia?

Issue (i) Whether the complainant was a child

16. Pw1, Pw2 and Pw3 testified on 16/7/2018. It was Pw3's evidence that as at 16/7/2018 she was 15 years of age. Her mother Pw3 stated the same. Going by those that unlike the trial court it did not see nor hear the witnesses testify; and so give an allowance for it. **See Okeno – vs- R 1972 32; Njoroge –vs R 1987 KLR19**.

17. I have considered the evidence on record, the rival submissions and cited authorities. This court has to establish whether the ingredients proving a case of defilement were established in this case. These ingredients are: -

i. Whether the complaint dates it follows that at the time of the alleged offence Pw3 was aged 11 years.

The child health card (EXB5) showed that Pw3 was born on 14th September, 2002. At the time of the alleged incident on 13/4/2014 she was

12 years 5 months (rounded to 12 years). I therefore find that age was proved.

18. The Appellant challenged the manner in which the *voire dire* examination was conducted. The record has clearly shown the questions the court asked Pw3. She was not asked about the knowledge of an oath. However, after examining her the court formed the opinion that she did not understand the meaning and nature of an oath. There is no format or set questions that need to be asked during a *voire dire* examination. It is not a test examination.

19. What is important is for the court to get a feel of the kind of witness it is dealing with. Again this court did not hear or see the witness. The learned trial magistrate did his assessment and directed that she gives unsworn evidence which she did and the Appellant was given an opportunity to cross examine her. I find no merit in this ground.

Issue no. (ii) Whether there was penetration of the complainant's genitalia.

20. In her evidence, Pw3 explained that the Appellant removed her pant and equally removed his trouser, caused her to lie down and he lay on her. She felt pain. She did not fully explain what he did. Pw2 acted very fast the moment she received the report from Pw1. She took Pw3 to hospital and also reported the matter.

21. The medical examination revealed that there were no bruises on her genitalia and there was no discharge. Silence on the presence of blood means there was no bleeding. A high vaginal swab was done and only revealed the presence of epithelial cells. Again silence on presence of spermatozoa means there were no spermatozoa present.

22. The child having been taken to hospital and having been examined in less than 24 hours, if indeed there was defilement there would have been bleeding and presence of spermatozoa. The mere fact that the hymen was missing in itself was not sufficient proof of defilement on that date of 13th April, 2014. I therefore find that the learned trial magistrate erred in making that finding. My finding is that penetration of Pw3's vagina by the Appellant's penis was not proved.

Issue no. (iii) Whether it was proved that the Appellant had been with the complainant

23. It was a known fact by Pw1, Pw2 and Pw3 that the Appellant was herding animals on the hill with Pw3. The Appellant was known to be working for Pw2's neighbour. Pw1 knew the neighbour's name as AK. This incident took place during broad day light. When Pw3 came home she told her elder sister who it was that had defiled her. I am therefore satisfied that the Appellant was identified as the person who had been herding animals with Pw3.

24. I now move to determine whether the Appellant committed an indecent act with Pw3. The Appellant has discounted the evidence of Pw1 and Pw3 for being contradictory and inconsistent. I have found no inconsistency in the evidence of Pw1 who reported to their mother what Pw2 had told her, and then left for the market. On her way back she met their mother (Pw2) taking Pw3 to hospital. I find no inconsistency in that.

25. The Sexual Offences Act defines "indecent act" as follows:

"any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration."

Pw3 explained what the Appellant did to her with his exposed genital organ. He had removed her pant. I am satisfied that he touched her vagina with his penis. I therefore find the offence of indecent act with a child proved.

26. I therefore find some merit in the appeal and set aside the conviction for defilement and the sentence of twenty years' imprisonment.

27. Section 11(1) of the Sexual Offences Act provides that: -

"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

The key word here is **liable** to and not **shall**. In other words, the ten (10) years is not a mandatory minimum sentence.

28. I wish to mention that I have noted with concern that the offence was committed on 13th April 2014, and the Appellant was arrested immediately. The charge sheet shows he was arrested on 18/02/2016 and was arraigned in court on 22/2/2016. However, the record before me shows he was actually arraigned in court on 9/7/2018 when plea was taken. This is something that is not clear from the record.

29. It is nowhere indicated where the Appellant was since his arrest in 2014, and/or his purported arrest in 2016, before his actual arraignment in court on 9/7/2018.

30. I have considered all these circumstances and the fact that the Appellant was found to be a first offender.

31. As a result of the above findings, the Appellant is found guilty and convicted of the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

32. He will serve three (3) years imprisonment from the date of his first actual arraignment in court which is 9th July, 2018.

Orders accordingly.

DELIVERED, SIGNED & DATED THIS 16TH DAY OF JULY 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE