



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 84 OF 2018

ZUWA SULEIMAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Kwale

CM CR. Case No. 30 of 2017 (Hon. P. K. Mutai RM)

delivered on 5/1/18)

J U D G M E N T

1. **Zuwa Suleiman (“the Appellant”)** was charged with the offence of defilement contrary to **section 8 (1) and (3) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on diverse dates between 28/3/2017 and 30/3/2017 at [particulars withheld] Village in Kwale County within Coast Region, the appellant intentionally caused his penis to penetrate the vagina of MM a girl child aged 14 years.

2. The appellant denied the charge and after trial he was found guilty and was convicted of the offence and sentenced to twenty years imprisonment. He has now appealed to this court against the conviction and sentence.

3. This being a first appellate court, the court is enjoined to re-appraise and evaluate the evidence afresh and arrive at its own independent findings and conclusions. In so doing however, the court must have in mind the fact that it did not have the advantage of seeing the witnesses. (See **Okeno v. Republic [1972] EA**).

4. The prosecution case was that on 27/3/2016, the complainant was heading to her grandmother's home when she met the appellant on the way. He asked her to accompany him to his home which she did. They stayed in his home up to 7 pm when they started cooking supper. After supper, he asked her for sex and they had sexual intercourse. The appellant repeated the act three times that night.

5. The complainant stayed with appellant in his home for four days during which period the appellant had sexual inter course with her. Since she had not told her parents where she had gone, on 31/3/2016 her grandfather came for her and took her together with the appellant to the chief's office, then the police station. She was then taken to Msambweni hospital where she was examined. She was at the time aged 14 years.

6. **PW1 and PW2** were the complainant's grandfathers. They told the court that the complainant went missing on 27/3/2016 whereby they started looking for her. They traced her in the appellant's house after 4 days. They arrested both of them and took them to the chief's office who directed them to the police. They later took the complainant to Msambweni hospital where she was examined.

7. **PW3** testified that the matter was reported at Msambweni Police Station on 30/3/2016. The complainant was brought by her uncles. It was reported that the appellant had taken the complainant and they had been engaging in sex. He took the complainant to hospital whereby she was examined by **PW5**. On examination, **PW5** found that both the complainant's labia, cervix and vagina were normal but the hymen was absent. For the reason of absence of the hymen, **PW5** opined that there had been sexual penetrative act.

8. In his defence, the appellant stated that he was engaged as a gardener. Her neighbor came and entered his house. He was suddenly attacked and arrested. He was put in custody for 2 days after which he was charged. He stated that the allegations were false.

9. The appellant raised 3 grounds of appeal, viz; **that the charge was not proved to the required standard; that he was charged under a wrong section of the law that led to his sentence of 20 years and that his defence was not considered.**

10. The parties filed their respective submissions which the court has considered. The appellant submitted that the act of penetration was not

proved and that he had been convicted under *section 215 of the Criminal Procedure Code instead of the correct section of the law*. He relied on the case of **Muturi v. Republic HC Cr.A No. 559 of 2003** on the submission that that was fatal.

11. In a defilement case, the age of the complainant must be established. It must also be established that there had been penetration by an accused. In the present case, the complainant told the court that she was 14 years having been born in 2002. A child Health Card for the complainant was produced as PExh.3 which showed that she was born on 26/6/2002.

12. As at the date of the incident on 27/3/2017, the complainant was 14 years and 9 months. Her age was therefore properly proved and was in tandem with the charge sheet. The complainant was below the age of 15 years for the purposes of *section 8(3) of the Sexual Offences Act*.

13. On penetration, the appellant submitted that the complainant stated that he did not finish what he was doing. That he repeated the same thing three times the first night. That this did not prove penetration.

14. This may have been so. However, the evidence of **PW5** was that when she examined the complainant on 1/4/2017, there was absence of the hymen. She formed the opinion that there had been sexual penetration. That evidence was not challenged. Further, the complainant had told the court in cross-examination, which was also not challenged, that the appellant was the first person she had had sex with.

15. Under *section 2 of the Sexual Offences Act*, penetration means the partial or complete insertion of the genital organ of a person into that of the victim. In the present case, the complainant stated that she felt pain when the appellant inserted his penis into her private parts. In my view, the evidence on record clearly proved that there had been penetration a fact that had been proved to the required standard.

16. As to the identity of the perpetrator, the complainant testified that she lived with the appellant in his house for 4 days. **PW1 and PW2** found both the appellant and in the complainant's house. The appellant was well known by the complainant. The appellant was unable to challenge this fact. Indeed, he admitted having been found in his house. He never challenged the fact and allegation that he was at time with the complainant.

17. On the defence, the trial court did not refer or consider the appellant's defence. The appellant's complaint is well merited in the circumstances that as it may, I have noted the appellant's defence. He stated that he was arrested and taken to Msambweni Police Station. That the allegations were false. In my view, this was a mere denial. Even if the trial court had considered the appellant's defence, the same would not have displaced the prosecution's case.

18. In the circumstances, I find that the prosecution case was proved to the required standard.

19. As regards the complaint that the trial court convicted the appellant on the wrong section of the law, this is a well founded complaint. The trial court stated that it had found the appellant guilty and convicted him under *Section 215 of the CPC*. That was against the letter and spirit of *Section 169 of the Criminal Procedure Code*.

20. The correct procedure is to convict under the section of the law that metes out punishment. In this case, it should have been *section 8(3) of the Sexual Offences Act*. However, on the authority of **James Nyanamba v. Republic [1983] eKLR** and **Kevin Nyongesa & 3 Others v. Republic [2017]**, this court's opinion is that the error did not occasion any prejudice to the appellant as the trial court properly set out the offence and the particulars thereof at the beginning of the judgment. The appellant was in no way prejudiced by the error.

21. In the premises, I find that the appeal lacks merit and the same is hereby dismissed.

DATED and DELIVERED at Mombasa this 6th day of September, 2019.

A. MABEYA

JUDGE