



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

(CORAM: MAJANJA J.)

CRIMINAL APPEAL NO. 90 OF 2013

BETWEEN

VINCENT MBAYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J.K.Ngárng'ar, SPM dated 29th April 2013 at the Hamisi Senior Principal Magistrates Court)

JUDGMENT

1. The appellant, **VINCENT MBAYA**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (3)** of the **Sexual Offences Act**. The particulars of the charge were that on 22nd July, 2012, in Vihiga County, he intentionally caused his penis to penetrate the vagina of N.K a child aged 15 years. After conviction, the appellant was sentenced to 20 years' imprisonment.

2. The thrust of the appellant's appeal is that the prosecution did not prove the case against him. As this is the first appellate court, I am required to conduct a fresh review of the evidence and reach an independent conclusion as to whether to uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**).

3. The evidence before the trial court was as follows. N.K (PW 1) narrated how she was returning from the tailor at about 7.30pm on 22nd July 2012 when the appellant appeared and held her by force, dragged her into the maize plantation, tore her panties and proceeded to forcefully insert his penis into her vagina. She told the court that PW 8 found her and she told her what had taken place. On her part, PW 8 recalled that she was heading home when she heard screams coming from the maize plantation. She went there and found PW 1 who told her that she had been defiled by the appellant.

4. PW 2, PW 1's mother recalled that PW 1 was brought home by PW 4, a community health worker who informed her that PW 1 had been defiled. PW 4 recalled that on the material day, PW 8 came home and found her. She told her that she had lost a match box. When they went back to look for it, they found people had gathered at the scene. When she went close, she found PW 1 and the appellant whereupon she decided to take PW 1 to her mother.

5. The incident was then reported to Serem Police Station. PW 7, the investigating officer, recalled that she was on duty on 23rd July 2012 when PW 1 and her mother made the report. She issued the P3 form. PW 1 was examined by PW 5, a clinical Officer at Serem Health Centre, on 23rd July 2012. He noticed PW1's genitalia were normal and no bruises were noted. He observed a whitish discharge from the vagina and the hymen was broken. He concluded that PW 1 was sexually assaulted.

6. While it is clear that PW 1 was subjected to penetration, the key issue in this case is whether the appellant was identified as the person who committed the felonious act. In her testimony, PW 1, in answer to the court's question, stated that she did not know the appellant prior to the case but had just seen him at a neighbour's place. PW 8, who was with PW 1, testified that PW 1 told her that she had been defiled by the appellant. In her testimony, she stated that she did not identify the person she saw running away from the scene.

7. This incident took place at about 7.30pm and it was incumbent on the trial court to caution itself on the circumstances of identification. It is clear from PW 1 that the assailant was a stranger and PW 8 did not identify him. The totality of the evidence does not establish how he came to be arrested for the offence. In addition, PW 4 testified that she went to the scene with PW 8 where she found PW 1 and the appellant together. PW 4's testimony is inconsistent with what PW 1 and PW 8 who did not allude to the fact that PW 1 and the appellant were caught together.

8. The sum of the evidence is that the prosecution did not prove beyond reasonable doubt that the appellant was the person who sexually assaulted PW 1. The appeal is therefore allowed.

9. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at KAKAMEGA this 3rd day of April 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng'etich, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.