



REPUBLIC OF KENYA
IN THE HIGH TRIAL COURT OF KENYA AT MAKUENI

HCCRA NO. 233 OF 2017

DENNIS NDONYE MUTINDI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

JUDGMENT

1. The Appellant was charged with defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006.
2. Particulars being that on 02/08/2016 at [particulars withheld] Village, Malili Sub-location within Makueni County intentionally caused his penis to penetrate the vagina of I M N, a child aged 9 years.
3. The Appellant pleaded not guilty and the matter went into a full trial.
4. The prosecution called four (4) witnesses as follows;
5. PW1 Eric Kasiamani attached as a clinical officer at Kilungu Sub-County Hospital testified that he filled a P3 form in regards to D N dated 09/08/2016. The same showed that he had bruises on the forehead but on examining his genitalia as it was alleged that he had defiled a girl, nothing out of the ordinary was observed.
6. P3 form produced as Exh No. 1. PW1 stated that he had a treatment card from Kilungu Sub-County for Dennis Mutindi and it showed that he had injuries on the forehead and had indicated that his left leg was aching. Treatment card was produced as Exh No. 2.
7. The clinical officer stated that he also had a post rape care form for I M N that shows that she had been defiled. The same noted that the minor's genitalia was extremely red and there was presence of whitish discharge. She was placed on anti-retroviral and other drugs to prevent venereal diseases.
8. PRC form produced as Exh No. 3. He also produced a dental age assessment report from Kilungu District Hospital that showed the complainant was 9 years old produced as Exh No. 4. He identified the treatment card for the complainant I from Kilungu District Hospital dated 03/08/2016.
9. The same stated that the child had been defiled on 02/08/2016 at about 8.00 p.m. It showed that on examination, the genitalia was swollen and red. A urinalysis test done was found to be positive. He also stated that he filled the P3 form.
10. In cross examination, PW1 stated that upon examining the accused person there was no proof that he had committed the offence.

11. PW1 averred that the complainant's hymen was broken and it was red. He however stated that he did not know who defiled her. He indicated that there was no blood when he examined the complainant.
12. PW2 I M N, the complainant upon trial court conducting voire dire, she gave a sworn testimony. PW2 stated that Dennis did something bad to her in 2016. She stated that she could not remember the month but it was at night. She stated that he did it to her at home behind a plot belonging to someone else.
13. It was PW2 testimony that she was sent to get a matchbox from Dennis that he had borrowed. When she got to his house, she stated that he told her to remove her clothes. She refused to remove and he removed them himself. She stated that she had a black trouser and a shirt with pink colour and a red sweater. She stated that he removed her trouser. She indicated that they left his house and went behind the plot and he told her if her mother calls, she should tell her that he had gone to buy her chips.
14. PW2 stated that he unbuckled his belt and did to her "*tabia mbaya*." She testified that when he removed her trouser, he also removed her pant. She stated that he touched her (minor touched her private part area to demonstrate) and she stated that it was the part she uses to urine.
15. She stated that he touched with his hand and he then took his "thing" which she said was the part he uses to urine and put it in hers.
16. The minor testified that she told her mother about what had happened and she was taken to hospital at Mutungu and then taken to Salama Police Station. She told the trial court that she had not lied. She reiterated that Dennis did her wrong.
17. In cross examination, the minor stated that there were other people who live where accused person lives but none saw her with him. She indicated that she screamed but he covered her mouth with his hands. She denied being beaten when she got home however stated that she was beaten for delaying to get home. She stated that she had lied he was in the toilet and then she was beaten and said she was with the accused.
18. The minor informed the trial court that she went to accused person's house and he led her out by his hand. She indicated that she did not bleed. She stated that her mother beat so that she could say where she was because she had overstayed.
19. PW3 C W N testified that on 02/08/2016 at 8.00 p.m., she was in her house when Dennis the accused person came and borrowed a matchbox. She gave him and told him to go with her daughter I and when he lights up, he gave her daughter to return it.
20. She stated that the two left and she thereafter noted that her daughter had overstayed since the accused person's house was not far from her house. She opined that they stayed for about 20 minutes. She informed the trial court that she then got out of the house and called out her daughter's name and she did not respond. She stated that she returned to the house so as to wear shoes and go and look for her.
21. PW3 testified that she went and wore shoes and as she got out, she met with her daughter. She asked her where she had been. PW3 informed the trial court that because of anger she slapped her daughter and she told her that she would tell her where she had been.
22. PW3 indicated that her daughter told her that Dennis had done to her "*tabia mbaya*". She stated that she wondered what to do and decided to go and buy credit to call her husband. She stated that she bought credit and returned to the house to load it and found people gathered outside her house. She found that her husband had come home and had found I in the house shocked.
23. It was PW3 testimony that she had stayed in the plot for 5 years and Dennis had found her there. She stated that I was in class 4 now and in 2016 she was class 3. She was now 10 years old but in 2016 she was 9 years old. She informed the trial court that I does not lie and that she had never been called to school over her lying because she does not.

24. PW3 indicated that the matter was reported at Salama Police Station and they later went to Mutungu Hospital.

25. In cross examination, PW3 stated that her house to accused person's house is like from trial court 2 to the trial court's office but the accused person's house is at the back hence she cannot see his door. She stated that her daughter told her that the accused person took her out of the gate.

26. PW3 denied having any issues with the accused person's mother. PW3 stated that her daughter came running and on asking her where she had been, at first she said she was in the toilet and she told her that she had not sent her to the toilet. She then said she would say the truth of where she had been and did say.

27. PW3 stated that she beat up the minor because of pain wondering where she had been. She denied beating up the child so that she could falsely accuse the accused person. She indicated that on examining the minor's private parts, she noted that they were 'red'. She averred that she did not hear screams on that day.

28. PW3 stated that she did not hear her husband threaten the accused person's mother. She denied having a meeting in the plot to deliberate on how to chase accused person since her husband is the caretaker.

29. PW4 F N M testified that on 02/08/2016 at about 8.00 p.m. to 9.00 p.m., he returned from work and found his daughter I in the house alone crying. He indicated that she told her not to beat her and that she would tell him what happened. She told him that Dennis took her behind the plot and removed her pant and did to her '*tabia mbaya*'.

30. PW4 stated that when the minor told her that, he got out of the house to look for his wife and they met at the gate. They then proceeded to Salama Police Station and reported. It was PW4 testimony that I his daughter could not have lied to him and he thus believed her. He indicated that on the next day, they went to hospital at Kilungu.

31. PW4 informed the trial court that before going to Salama Police station, he went and took Dennis and they all went to Salama police station and he was locked in on that day. PW4 stated that he talked to Dennis but he denied the offence. PW4 denied having a grudge with the accused person and/or his mother.

32. In cross examination, PW4 stated that he was the caretaker in the plot. PW4 averred that he believed her daughter and the doctor's examination. He stated that he did not beat the accused person on that day. PW4 informed the trial court that also the accused person was taken to hospital at Kilungu.

33. PW4 denied threatening to kill the accused person's mother. He further denied that the plot occupants had a meeting to resolve the said threats. He also denied threatening to chase the accused person out of the plot.

34. After close of prosecution case, the Appellant was found to have case to answer. He opted to give unsworn statement. The accused person stated that on 02/08/2016 he woke up at 6.00 a.m. and went to make ballast. He worked until 5.00 p.m. and returned home to the plot in Malili. He indicated that he arrived at 6.00 p.m. and put water to bath and had a bath. He was hungry and realised that he did not have a matchbox.

35. He thus went to his neighbour and borrowed a matchbox and heat food as he washed dishes. Shortly he heard a knock on the door and he told whoever it was to enter. On checking he saw it was the complainant and she said that she had been sent to collect the matchbox. He indicated that he gave it to her and continued with his chores. He later began eating.

36. As he ate he heard another knock on the door and two people entered and it was PW3 and PW4. He stated that PW4 held him at the throat and began to beat him. He wondered what the problem was. He thus began to cry and blood was dripping from his face. He asked PW4 why he was beating him and he

took him to his house and beat him again.

37. The accused person testified that PW4 asked him to tell him what he was after in his house and the accused person indicated that he told him that he had borrowed a matchbox and his daughter had come to collect it and he gave it to her. He stated that PW4 slapped him and told him to tell the truth that he had defiled his daughter.

38. The accused person stated that he denied having done such a thing. He indicated that they took him to the police and at Malili town they saw a police vehicle and PW4 stopped it and they all boarded the said motor vehicle and were taken to Salama police station.

39. PW4 reported in the OB and the accused person was locked in. On the next day at 8.00 a.m., he was taken out of the cells and told that they were going to hospital. He found PW2, PW3 and PW4 outside the station and they all went to Mutungu Hospital. The doctor made his findings. He was later brought to trial court and charged for defilement which offence he stated that he did not know.

40. The accused person informed the trial court that his mother and PW4 have differences because his mother is the spy for the owner of the plot and she learnt that PW4 who is the caretaker had rented out houses without informing the owner. Therefore his mother told the owner and the caretaker learnt of his mother's actions though the owner did not tell him how he had come to know.

41. The accused person stated that PW3 had heard his mother talking to the landlord and had told her husband. Hence PW4 came to their house with a panga and threatened to harm them or they move out of the plot. The accused person stated that he tried to intervene for his mother's sake but PW4 shoved him aside and his mother screamed and neighbours came out.

42. It was the accused person's testimony that he dashed to the sub-chief and reported and his mother followed him crying. Nyumba kumi officials arrested PW4 and brought him to the sub-chief. The accused person stated that the matter was thereafter resolved and his mother forgave PW4 and PW4 begged her for forgiveness.

43. However PW4 still told the accused person and his mother to move out of the plot or they will die. The accused person indicated that PW3 told the trial court that the child told her she was in the toilet and she beat her.

44. He thus believed that she beat her so that they could falsely accuse him because of their disagreements. He urged the trial court to look into both sides. He indicated that he believed that they wanted to separate him from his mother yet his mother is normally unwell. He opined that they seemed to have succeeded.

45. He urged the trial court to acquit him because even the doctor confirmed that the incident had occurred long ago and the complainant had framed him in fear of being beaten further.

ISSUES, ANALYSIS AND DETERMINATION

46. After going through the evidence on record and the parties submissions, I find issues arising are;

- Whether prosecution case was proved beyond reasonable doubt?

47. The complainant PW2 informed the trial court that Dennis the accused person herein had done her wrong in 2016. She referred to what Dennis had done to her as "tabia mbaya". She explained to the trial court that Dennis had removed her trouser and pant and he touched her genitalia. She demonstrated her genitalia in trial court by touching her private parts area.

48. She further indicated that she used that place to urinate. It was her testimony that the accused person then put his "thing" on her genitalia. She explained to the trial court that by "thing" she meant the part

that the accused person uses to urinate.

49. The doctor PW1 produced a PRC form and treatment notes form Kilungu Sub-county hospital. The treatment notes showed that there was redness on the inner aspect of the vaginal walls and no hymen was noted.

50. No bleeding was noted but there was presence of a whitish discharge. A urinalysis test that was done was positive. PW1 formed the opinion that the minor had been defiled.

51. In light of the foregoing the trial court found that there was evidence adduced to demonstrate that there was penetration of the complainant's genitalia.

52. The minor informed the trial court on the day that she gave her testimony which was in 2017 that she was 10 years old. The doctor further produced an age assessment report form Kilungu sub-county hospital that illustrated that the minor was 9 years old.

53. Hence in light of the foregoing, the trial court found that the age of the complainant was adequately ascertained and it is not in dispute that the complainant was a child.

54. The complainant stated that she went to collect their matchbox from the accused person upon being asked by her mother to do so. Her mother indicated that she got concerned when her daughter took long to return, yet the accused person's was not far from their house.

55. The minor later returned and due to anger PW3 stated that she slapped the minor as she had wondered where she had been.

56. It was PW3 testimony that the minor first told her that she was in the toilet but thereafter the child told her that she would tell her the truth.

57. PW3 indicated that the child told her that she had been with Dennis and he had defiled her. The minor in her testimony admitted having been beaten by her mother but denied accusing the accused person falsely upon being beaten. She indicated that her mother beat her because she had overstayed.

58. The accused person contended that the minor accused him out of fear after being beaten which allegation the minor denied. The minor informed the trial court that she had not lied but told the truth.

59. The accused person indicated in his defence that he had indeed borrowed a matchbox from the PW3 and PW2 was sent to collect it and he gave it to her. The accused person contended that the PW3 and PW4 had a grudge with his mother and consequently had used their daughter to frame him.

60. Nevertheless the accused person stated that his mother had forgiven PW4 but still PW4 who was the caretaker of their plot had asked the accused person and his mother to move out or they will die.

61. The trial court observed that though the accused person alleged to have had a strained relationship with PW3 and PW4, he still had willingly gone to their house to borrow a matchbox.

62. The accused person did state that they lived in a plot and there were other neighbours in the plot, hence it is surprising that he portrays PW3 and PW4 in bad light but stills borrows a matchbox from the said house yet there were other neighbours he could have borrowed from.

63. Consequently the trial court found that the accused person's defence of an alleged grudge between him and PW3 and PW4 not to be believed.

64. The minor identified the accused person by name and indicated that she was sent to collect the matchbox from him. The accused person admitted that the minor did come to collect the matchbox from him on the material date. Hence it is not in dispute that the accused person then led her out of the plot and

took her behind a plot belonging to someone else.

65. PW3 stated that the minor took long to return and she got worried and even on calling her out she did not respond yet the accused person's where she had sent her was not far from their house.

66. In sum this court finds that the case was proved beyond reasonable doubt and thus appeal has no merit.

67. The court thus makes the following orders;

- The appeal is dismissed, conviction and sentence affirmed.

SIGNED, DATED AND DELIVERED THIS 2ND DAY OF JULY 2018, IN OPEN TRIAL COURT.

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C KARIUKI

JUDGE