

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 74 OF 2017

SEBASTIAN MAKORI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. D.K Matutu – SRM dated 6th October, 2017 at the Principal Magistrate’s Court at Kilgoris in Criminal Case No. 1381 of 2016)

JUDGMENT

1. The appellant, SEBASTIAN MAKORI was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act. The charge against him was that on 27th October 2016 within Kisii County, he unlawfully caused his penis to penetrate the vagina of LK, a girl aged 9 years old.

2. Learned State Counsel for the respondent conceded the appeal on the ground that the complainant’s testimony was inconsistent and could not support a conviction.

3. I have reviewed the evidence and I note that PW 1 gave unsworn testimony after a voire dire. In her evidence in chief, she told the court that the appellant took her to his home and removed her clothes and his clothes and she started to scream. She then explained that the appellant did bad manners to her and it is when police came and arrested the appellant. In re-examination, PW 1 told the court that;

“The accused removed my clothes but did not do anything else. He had also removed his clothes. When I screamed the police came and helped me.”

4. The same evidence is echoed by the complainant’s mother (PW 2) who testified that PW 1 told her that the appellant took her to his house and when he tried to defile her she screamed.

5. The evidence of the clinical officer (PW 3) who examined PW 1 on 28th October 2016, a day after incident, told the court that on clinical examination, PW 1’s condition was fair, the genitalia were normal on the external part and no lacerations or bruises were seen although the hymen was broken.

6. In his defence, the appellant denied that he had defiled PW 1 and stated that the matter had been fabricated.

7. The question before the court is whether there was penetration. The testimony of PW 1, as learned counsel pointed out, is contradictory. If anything, PW 1 was clear that after she was undressed, the police came and arrested the appellant after she screamed. It is the same statement she told her mother, PW 2. The medical evidence though not necessary, did not support the prosecution case for penetration.

8. The trial magistrate failed to consider the contradictory evidence and in the circumstances came to the wrong conclusion that the prosecution proved its case. Having independently appraised the evidence, I am satisfied that the prosecution did not prove its case.

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

Dated and delivered at Kisii this 12th day of July 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Mr. Nyambati for the Appellant.