



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 183 OF 2015

BETWEEN

KHAMISI MTWANA CHOMBO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. N. S. Lutta, SPM dated 22nd September 2015 at the Senior Principal Magistrate's Court at Mariakani in Criminal Case No. 504 of 2014)

JUDGMENT

1. The appellant, **KHAMISI MTWANA CHOMBO**, was charged and convicted of the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the *Sexual Offences Act*. It was alleged that on diverse dates between the month of December 2013 and February 2014 at [particulars withheld] village, Rabai Sub-county of Kilifi County, he unlawfully and intentionally committed an act which caused penetration into with his penis of the vagina of T.K.M.M. a child aged 12 years. He was sentenced to 20 years' imprisonment and now appeals against conviction and sentence.

2. As this is a first appeal, I am aware that it is the duty of this court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic* [1972] EA 32).

3. In July 2014, the complainant went to her grandfather's place. Her grandfather (PW 1) testified that his wife told him that the complainant was pregnant. PW 2, the complainant's grandmother, told the court that he met her while she was on the way to see PW 1 and noticed she was pregnant. She told PW 1 and they decided to report the matter to the chief. PW 2 testified that the complainant told her that it was the appellant who defiled her.

4. The complainant, PW 3, recalled that the appellant had sexual intercourse with her twice but that she was so scared to inform anyone. She however told PW 1 after he asked her about it. At the time PW 3 was testifying before the trial court she had given birth and the child was 10 months old.

5. After the matter was reported to the police on 29th July 2014, PW 3 was referred for a medical examination at the hospital. PW 5, the clinical officer, who examined her on 30th July 2014 confirmed that she was 6 months pregnant and confirmed that she had been defiled as her hymen was torn. He also confirmed her age from the clinic card which stated that she was born on 9th April 2002.

6. The Investigating Officer, PW 6, testified that the appellant came to the police station and reported that his life was in danger. After PW 3's case had been reported, he organized for samples of saliva to be taken from the appellant and PW 3's child. He prepared an exhibit memo and sent the samples to the Government Chemist to confirm whether the appellant was the father of PW 3's child.

7. An analyst from the Government Chemist, PW 4, testified that he conducted a DNA analysis of the saliva samples sent to him. He produced a report of his findings and confirmed that there was 99.9% chance that appellant was the father of PW 3's daughter.

8. In his defence, the appellant gave an unsworn statement in which he denied the offence and claimed that he was being framed for allegedly not supporting his wife and for non-payment of dowry.

9. The key issue in this case is whether an act of penetration was caused by the appellant. The testimony of PW 3 that the appellant had sexually assaulted her twice was credible and was in fact corroborated by the fact that she gave birth to a child whose father was the

appellant. Under **section 60** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the court is entitled to take judicial notice of the ordinary course of nature. In this case, the fact that PW 3 had given birth to a child whose father was the appellant could only be the result of sexual intercourse unless there was evidence of use of artificial means. In light of this evidence, the appellant's defence was a mere denial and could not dislodge the strong prosecution evidence of his felonious action.

10. PW 3's age was proved by production of the clinic card which showed that she was 12 years old at the time the offence was committed. The sentence of 20 years' imprisonment was therefore within the law and is accordingly affirmed.

11. The appeal is dismissed.

DATED and DELIVERED at MOMBASA this 5th day of September 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Ogega, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.