



IN THE HIGH COURT OF KENYA AT MOMBASA

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 157 OF 2016

BETWEEN

MKALA NYANJE MDZELE..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J. Kamau, RM dated 23rd July 2015 at the Chief Magistrate's Court at Mombasa in Criminal Case No. 637 of 2014)

JUDGMENT

1. The appellant, **MKALLA NYANJE MDZELE**, was charged and convicted of the offence of defilement contrary to **section 8(1)** and **(2)** of the *Sexual Offences Act* ("the Act"). The particulars were that on 27th March 2014 in Likoni District within Mombasa County, he unlawfully and intentionally caused his penis to penetrate the vagina of MJ, a girl aged 4 years old. He was sentenced to life imprisonment and now appeals against the 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. The facts emerging before the subordinate court were as follows. On 27th March 2014 at about 5.00pm, PW 1 had left her 4 year old daughter, PW 3, at home as she went to buy vegetables. When she returned, she found PW 3 crying. She told her that the appellant had sexually assaulted her. She examined the child's private parts and noted that they were swollen. She reported the matter to the village elder.
4. PW 3 gave unsworn testimony. She recalled that her mother had left her home when the appellant whom she identified as "Hassan" called her to his house and did, "bad manners" to her. She stated that he inserted his finger in her vagina and put his penis in her vagina. She told her mother what had taken place when she returned.
5. The appellant was arrested by members of the public and taken to the police station. At the police station, PW 4, the investigating officer, re-arrested him and issued the P3 form to PW 1 and sent her to the hospital. PW 2, the doctor who examined her on 28th March 2014, observed her private parts and noted that the hymen was not broken and the labia were swollen and tender. He concluded that there was penetration. PW 5, a clinical officer, also confirmed that she received PW 3 at the hospital on 28th March 2014. At the time she could not walk and when he examined her, the labia were swollen and tender.
6. In his unsworn statement, the appellant denied the offence. He told the court that on the material day, he worked as usual and when he returned home, PW 1 came to see whether she could help him wash his clothes but he refused as she was married. He left for a bath and when he returned, PW 1 demanded to have sex with him but he refused and she chased her away. PW 1 told him that he would regret his action. Thereafter he was arrested.
7. The appellant challenges his conviction and sentence on the grounds set out in his petition of appeal, amended grounds of appeal and written submissions. The substance of his appeal is that the prosecution did not prove its case beyond reasonable doubt. He submitted that the trial magistrate failed to consider his defence of a grudge and that he was not connected to the alleged offence. The appellant also emphasized that the prosecution did not prove penetration as the medical evidence established that the child's hymen was not broken.
8. The respondent opposed the appeal and submitted that the prosecution proved all the elements of the offence of defilement.
9. The main issue for determination in this appeal is whether the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant. In order to prove its case under **section 8(1)** of the *Sexual Offences Act*, the prosecution must show that the appellant did an act

that amounted to penetration of a child. “Penetration” under **section 2** of the **Act** means, “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

10. PW 3 gave clear testimony on how the appellant, whom she knew as “Hassan” called her to his house and proceeded to sexually assault her by inserting his finger and his penis in her private parts when her mother PW 1 had gone to buy sukuma wiki. PW 3’s testimony was corroborated by PW 1 who examined PW 3’s private part and noticed she had been injured and blood was oozing consistent with penetration.

11. Further, the fact of penetration was confirmed by PW 2 and PW 5, who examined the child on the day after the incident. According to the Post Rape Care form, the child had swollen labia. Although the hymen was not broken, this fact alone does not absolve the appellant. What the prosecution is required to prove is the fact of penetration as defined by **section 2** of the **Act** which I have set out above. The testimony of PW 2 as taken together with what PW 2 observed in her private parts and the fact of the swollen labia leave no doubt that there was penetration. PW 2 identified the appellant as Hassan whom she knew as a neighbour while PW 1 also testified that she was his neighbour.

12. In his unsworn defence, the appellant’s case was that there was a grudge between him and PW 1. When this issue was expressly put to PW 1, she denied it. Further when his unsworn statement is put alongside the credible evidence of the witnesses, it does not amount to anything and was properly dismissed by the trial magistrate.

13. The age of a child is a question of fact. First, there is no dispute that the child was below the age of 18 years establishing that she was defiled. PW 3’s apparent or actual age, which is necessary for sentencing was established by the testimony of the mother who told the court that PW 3 was born on 14th November 2011 and produced the child’s clinic card. Thus the child was aged 4 years and the sentence of life imprisonment fell within **section 8(2)** of the **Act** and was lawful.

14. I affirm the conviction and sentence. The appeal is dismissed.

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

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Masila, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.