



IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 33 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

F K M.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. H. Ndungu, CM

dated 20th February 2018 at the Chief Magistrate's Court

at Meru in Sexual Offence Case No. 23 of 2017)

JUDGMENT

1. The appellant, **F K M**, was charged and convicted of the offence of defilement contrary to **section 8(1)** as read with **section (2)** of the **Sexual Offences Act** ("the **Act**"). The particulars of the charges were that on the 24th day of December 2012 in Imenti North District within Meru County he intentionally caused his penis to penetrate the vagina of MM, a child aged 11 years.

2. The appellant was sentenced to life imprisonment and now appeals against conviction and sentence on grounds that the medical evidence was inconclusive and contradictory in nature and that in fact the prosecution failed to prove the elements of the offence. The respondent supported the conviction on the grounds that the prosecution proved all the elements of the offence.

3. It is the duty of this court, being a first appellate 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**).

4. The facts of the case before the trial court were as follows. The complainant, PW 2, gave evidence on oath after a *voire dire*. She told the court that she knew the appellant who lived in the neighbourhood and was indeed her uncle. She described what took place on the material day as follows:

I saw F ahead of me. I knew him. He appeared very drunk. I did not fear him because he is my uncle and used to frequent our home. We passed each other then suddenly he held me further near. He held the neck and took me to their shamba. He took me to the maize shamba and ordered me not to scream else he strangle me dead. I kept quiet. I was wearing a black dress striped white MM(1). Also I wore a red T shirt MM (2). He then removed my panty. He also removed his trouser. He then inserted his penis into my vagina. I was wearing a black panty MM(3). I screamed and one A K came. I told her what had happened.

5. The child's grandmother, PW 3, testified that on the evening 24th December 2012 at about 5.30pm, she sent PW 2 to the shop but she did not return immediately. The child's mother called and told her that PW 2 had been defiled. She went home and found PW 2 who narrated her ordeal. She took her to report at the Kienderu police post from where she was referred to Meru Level 5 Hospital where she was treated.

6. On the same evening, P.W 4, who was a casual labourer in the locality, testified that he met PW 2 crying and when he asked her what happened, PW 2 narrated her ordeal to him. He called his mother who located PW 2's mother who then took PW 1 to hospital.

7. PW 1, a doctor at the Meru Level 5 Hospital, confirmed that he filled the P.3 form on 28th December 2012. He noted that there were no injuries on the vagina but that the hymen was absent. He also produced the Post Rape Care (PRC) form.

8. In his sworn defence, the appellant stated he was drunk and could not recall what had taken place on the material night.

9. Counsel for the appellant relied on the supplementary petition of appeal dated 13th September 2018. She submitted that the medical evidence relied upon was inconclusive and contradictory and that the conviction was against the weight of evidence. She also submitted that the elements of the offence were not proved. She added that the prosecution failed to call crucial witnesses.

10. I am satisfied that the testimony of PW 2 was clear and credible and indeed established that the appellant, whom she knew caused an act of penetration. The proviso of **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** dispenses with corroboration if the trial Magistrate, for reasons to be recorded believes the child to be telling the truth. In this case the trial magistrate expressed her view as follows:

I believed her evidence she struck me as an honest and credible witness. Moreover, she immediately reported what had happened to her mother, PW 4, and grandmother, BN.

11. Thus, the testimony of PW 2 was sufficient to support a conviction without further corroboration. On this issue the Court of Appeal in **J W.A. v Republic [2014] eKLR** observed:

*We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a *voire dire* examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.*

12. It follows therefore, the medical evidence was merely corroborative of the fact of penetration. I have read the PRC form and P.3 form. In as much as the PRC form does not impact on the evidence or the P3 form does not disclose the presence of spermatozoa, this must be seen in light of testimony of PW 2 and PW 3 in support of PW 1's case.

13. I also note that the prosecution did not call the child's mother to testify. The law on this issue was summarized by the Court of Appeal in **Benjamin Mbugua Gitau v Republic [2011] eKLR** thus:

This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 of the Evidence Act Cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys.

14. I find and hold that it was not necessary to call the child's mother to testify as she only received the report from another party and communicated to the grandmother. Her testimony would neither add nor subtract from the testimony of PW 2 and those she met immediately after the incident, PW 3 and PW 4.

15. The question of age of a child is a question of fact proved by available evidence. For purposes of the offence, there is no dispute that the child was below the age of 18 years. As regards the apparent age of the child, which is relevant for determination of the sentence, the immunization form produced in evidence showed the child was 11 years old at the time the offence was committed. Under **section 8(2)** of the **Act**, the life sentence is mandatory.

16. I affirm the conviction and sentence and dismiss the appeal.

DATED and DELIVERED at MERU this 15th day of October 2018.

D.S. MAJANJA

JUDGE

Ms J. Nelima, Advocate for the appellant.

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