



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 4 OF 2017

BETWEEN

DOUGLAS ATANGA NYAMARI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. N. Kahara – RM

dated 13th June 2016 at the Principal Magistrate’s Court at Keroka

in Criminal Case No. 6 of 2014)

JUDGMENT

1. The appellant, **DOUGLAS ATANGA NYAMARI**, was charged and convicted of the offence of defilement contrary to **section 8(1)** and **(4)** of the **Sexual Offences Act** (“the Act”). The charge facing him was as follows:

On the 27th day of December 2013 at [particulars withheld] Sub-location in Masaba South District within Kisii County, he intentionally and unlawfully had an act of penetration with his genital organs namely penis into the genital organ of DN a girl aged 16 years old.

2. The appellant was convicted and sentenced to 15 years imprisonment. He now appeals against sentence. In his petition of appeal, he complains that the sentence imposed is excessive as he did not commit the offence. He is the sole breadwinner of his family and has suffered greatly in prison.

3. The case against the appellant was proved by three witnesses. The complainant, PW 1, testified that she was 16 years and on 27th December 2013, she was leaving Ghesu headed to Sansora when someone got hold of her neck from behind. She noticed that they were two men who dragged her to a house near the road. She was unable to scream as she was being choked. When they got to the house, one man lifted her leg and the other stripped off her clothes. She tried to fight them off but they overpowered her. They proceeded to sexually assault her the whole night in the locked house. They released her in the morning. She told her mother what transpired and the matter was reported to the Chief and Ramasha Police Station. She went to Masimba District Hospital where she was examined and treated.

4. PW 1 further testified that on 1st January 2014 while she was going to Church, she heard some men asking her why she was not greeting them, and asking her why she could not remember when they had taken her. She immediately called her mother who went to report the matter thus leading to arrest of the appellant.

5. The complainant’s aunt (PW 2), testified that PW 1 came to visit her on 27th December 2013 and then left in the evening. PW 1’s sister called her to find out whether she had left her place but she told her she had. On the next morning, PW 1 came home crying. She had scratch marks on her neck and narrated her ordeal. PW 1 told her she would identify the assailants if she saw them. They reported the matter to the Chief and were referred to Ramasha Police Station. PW 2 recalled that PW 1 called her on 1st January 2014 and told her she had seen one of the person who assaulted her. She reported the matter at Masimba AP Post and arrangements were made to arrest the appellant.

6. The investigating officer, PW 3, testified that the incident of defilement was reported at Ramasha Police Station on 29th December 2013. He escorted PW 1 to Masimba District Hospital. He also led them to the house where she had been defiled but they did not trace him.

7. In his sworn defence, the appellant stated that he was leaving church on 15th December 2013, when he was arrested and later charged.

8. In order to prove its case under **section 8(1)** of the **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.”

9. PW 1 gave clear evidence on how she saw two men she did not know committed acts of penetration against her. Her testimony on this aspect of the evidence was unshaken on cross examination and did not in fact require any corroboration. It was however corroborated by PW 2 who saw her in a state of distress after her ordeal and the medical evidence produced by PW 3 which confirmed that she had been subjected to penetration.

10. The appellant complained that the doctor who prepared the medical report was not called to testify and the P3 form, treatment notes and birth certificate were produced by PW 3. Although the trial magistrate allowed him to produce it under **section 33** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which allows the production of documentary evidence without calling the maker, the applicable provision in this case was **section 77** of thereof. In **Stephen Mutuku Makau and Another v Republic [2017]eKLR**, the Court quoting and explaining this provision observed as follows:

Although generally expert documents should be produced by their makers, Section 77 of the Evidence Act allows any other person to adduce an expert document such as medical, analyst, document examiner’s and geologist reports so long as the authenticity of the documents is not disputed. The Section provides as follows;

77 (1) In criminal proceedings any document purporting to be report under the hand of a government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

11. I therefore do not find any prejudice that was caused by the fact that the P3 form and treatment notes were produced by the investigating officer. Further, medical evidence was merely corroborative evidence of the fact of penetration which was proved by the testimony of PW 1 and corroborated by that of PW 2.

12. The main issue in this case is whether the appellant was the assailant. It is not in dispute that the assailants were strangers to PW 1 but they dragged her to a house and defiled her the whole night until morning. Given the time she spent together in the house, I find that those circumstances were favourable for positive identification hence she could be able to recognise the assailants if she saw them. This is what she told PW 2 immediately after her ordeal. It is only when the appellant exposed himself to her by taunting her while she was going to church that she recognised the appellant thus triggering his arrest. It is noteworthy that this fact was elicited in cross examination when she recalled that the appellant told, “*Mnjua kule tulikuwa tumekuchukua*” which was in reference to what had happened to her. Her testimony was unshaken and it tied him to the offence. The appellant’s defence was, on the other hand, a mere denial.

13. I am satisfied that it is the appellant who committed the act of penetration.

14. The age of a child is a question of fact and in this case the statement of PW 1 that she was 16 years old was supported by production of the birth certificate which showed that she was born on 26th January 1997. Since she was 16 years old, the applicable minimum mandatory sentence under **section 8(4)** of the **Act** is 15 years’ imprisonment. There was thus no error in the sentence imposed.

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

DATED and DELIVERED at KISII this 4th day of DECEMBER 2018.

D.S MAJANJA

JUDGE

Appellant in person.

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