



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL NO. 9 OF 2012

CHARO MWENI..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 37 of 2010 of the Chief Magistrate's Court at Malindi – D.W. Nyambu, SPM)

JUDGEMENT

The appellant was charged with the offence of defilement of a girl contrary to section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on 17.8.2010 at [particulars withheld] Village in Malindi District of the Coast Province, intentionally and unlawfully caused the penetration of his genital organ, namely, penis into the genital organ namely vagina of P.M. a girl aged 14 years.

The trial court convicted the appellant and sentenced him to serve fifteen years imprisonment. His grounds of appeal are that: -

- (i) The charge sheet was defective
- (ii) The doctor's evidence contradicted the P3 form
- (iii) The trial court did not consider that there was a long standing land dispute between the appellant and the complainant's family.
- (iv) The evidence was entirely from members of the same family and crucial independent witnesses were not called to testify.
- (v) There was no evidence relating to the complainant's age.
- (vi) The appellant was not supplied with witness statements.
- (vii) The appellant's sworn and truthful defence was dismissed.
- (viii) The prosecution did not prove its case beyond reasonable doubt.

The appellant submitted that the charge was defective. The charge sheet only cited section 8 (3) yet the

correct section was 8 (1). The charge was therefore defective. The complainant told the court she did not know why the appellant was arrested. The case was fabricated since the appellant's parents sold land to the complainant's family and there was a grudge. The appellant was summoned to the DO's office and he went there voluntarily. If he had committed any offence he could have run away. The conviction is based on an alleged penetration. It is not always defilement that causes penetration. The evidence of the clinical officer does not support the allegations of defilement. The clinical officer told the court that the complainant alleged to have been assaulted with a knife by a known person. Examination showed no injuries. There was no evidence of fresh defilement and it is possible that the complainant's hymen was perforated on another occasion. This was a made up case and the appellant's case was reasonable.

The State opposed the appeal and submit that the charge sheet disclosed the offence. The medical officer testified that the injuries were grievous harm and the complainant's hymen was perforated due to penetration. The evidence on record does not show that the appellant was framed. All the relevant witnesses testified.

This is a first appeal and this court is required to evaluate the evidence afresh and make its own conclusion. PW1 was the complainant. She was fourteen years old and a class five pupil. She testified under oath. On 17.8.2010 she was at their farm with her younger brother PW2. They had been sent to go and cultivate at the farm. At about midday, the appellant went there with some fish. He asked them to help him clean the fish at the Galana river. They did that and the appellant gave them seven pieces of fish. They cooked their fish and ate at the farm. The appellant went back to the farm and enquired about her father. PW1 went to the bush to relieve herself and left the appellant with PW2. The appellant followed her later and told her that he wanted to make love to her. She refused but the appellant removed a knife and threatened to kill her if she screamed. He dragged her into the bush, removed her skirt and underwear and pushed her on the ground. He removed his clothes, put on a condom and defiled her for a long time. He then released her and told her not to tell anyone otherwise he would kill her. PW1 went back to the farm but found PW2 had already gone home. She went home and informed her father what had happened. They went to report at Lango Baya AP Camp. They were advised to report at the Malindi police station. They went home. The following morning they went to Malindi police station. She was taken to hospital and examined. She was issued with a PW3 form and her age was assessed.

PW2 LM was eleven years old and a class three pupil. He is a younger brother to PW1. On 17.8.2010 they were at the farm when the appellant went there holding fish. He asked them to assist in cleaning the fish. He also gave them some fish. The appellant returned at about 3.00 pm. PW1 had gone to relieve herself and then get firewood. By 6.00 pm PW1 had not returned and he went home. He informed his father that PW1 was lost. His father went to look for PW1 but did not find her. Later PW1 went home and told them that the appellant had defiled her. He knows the appellant very well as his aunt is married at their home.

PW3 MM is the father of PW1 and PW2. On the material day, he told his children to go to the farm. He returned home at 6.00 pm but PW1 was not there. PW2 told him that PW1 had gone to fetch firewood. He went to check on her but she was not there. He went back home and shortly PW1 arrived. She told him that she had gone to relieve herself while the appellant followed her and defiled her. He went with her to the scene and recovered a condom wrapper. They went to report at an AP Camp but were advised to go the police. The following morning, they reported at the Malindi police station. A female police officer took them to Malindi hospital. On 31.8.2010 they went back to the police station. The appellant took himself to the police station and was arrested.

PW4 IBRAHIM ABDULAHI is a clinical officer who was based at Malindi Hospital. On 20.8.2010 he examined PW1 and filled a P3 form. PW1's age was assessed to be fourteen years. PW1's hymen was perforated. He noted penetration on PW1. There were no injuries noted on her genital.

The appellant gave sworn testimony. He stated that on 24.8.2010 he was playing football and went home at about 7.00 pm. His wife gave him a letter and he opened it. He was being called at the DO's office. He went to Malindi police station the following day. He was given a letter and asked to report again on 30.8.2010. On that date, he went back and was locked in the cells. He was later charged with offence.

At one time, he worked for the complainant's father and that is where the enmity began. He is a neighbor to the complainant. They sold land to the complainant's family and there is grudge between the families.

The appellant contends that the charge sheet was defective as it did not cite section 8 (1) of the Sexual Offences Act. It is true that the charge sheet only refers to section 8 (3) of the sexual Offences Act. The section provides for punishment for defiling a child aged between twelve and fifteen years old. It should be noted that the charge sheet clearly indicates that the appellant was charged with defilement. All along the appellant was aware that he was accused of having defiled a 14 year old girl. The fact that section 8 (1) was not stated in the charge sheet did not prejudice the appellant or cause injustice. Indeed, the appellant was aware that if he was to be convicted, then the punishment was to be not less than fifteen years imprisonment. I do find that the charge sheet is proper. When the plea is taken, the sentence is not mentioned. The charges were read over to the appellant as per the particulars of the offence. The appellant was told that he had defiled a 14 year old girl when the plea was taken. That is sufficient information. There is no prejudice to the appellant. This ground of appeal fails.

There is the issue relating to the evidence of PW4, the clinical officer. The record shows that PW4 stated that PW1 was assaulted by known person who threatened her with a knife. The sequence of events is that a report on the offence was made to the police station on 18.8.2010. PW1 was referred to the Malindi District hospital. A P3 form was issued. The P3 form indicate that PW1 alledged to have been defiled by person known to her. The medical history part of the P3 also gives that background. There is no issue of assault. The problem could have either been confusion by PW4 or improper recording by the trial court. PW4 was to examine PW1 who alledged to have been defiled. There is no assault complaint. The appellant was charged with defilement and not assault. The P3 form support the charge as its entire contents refer to defilement. This ground of appeal also fails.

The other grounds of appeal involve the prosecution evidence. It is alledged that the evidence is from the same family members and that there is no evidence on the complainant's age. The prosecution's case is that PW1 was defiled. PW4 was with PW1. There was no other adult person or witness who saw the appellant when he went the farm. PW3 is the father to PW1. He was involved in looking for PW1 at around 7.00 pm. He went to the scene with PW1 and recovered condom wrapper. He was a crucial witness. The only witness who did not testify is the investigating officer. However, the P3 form indicate that the case was reported at the Malindi police station and recorded under Occurrence Book (OB) No. OB/[particulars withheld]. PW3 testified that they were given a police woman who went with them to the hospital. The P3 form and age assessment report by Doctor Ariba were produced by PW4.

I do find that the witnesses who testified were sufficient. The fact that the investigating officer did not testify does not show that his/her evidence would have prejudiced the prosecution case. In any case the appellant complied with a request to go to the police station and was arrested.

The next issue involves witness statements. Throughout the hearing the appellant informed the court that he was not supplied with witness statements. At one time a counsel appeared for the appellant and the court ordered that he be provided with witness statements. After PW1, PW2 and PW3 were recalled, the court placed the file aside to enable the appellant be provided with witness statements. Thereafter PW4 testified.

The record shows that the appellant fully participated in the hearing. He cross-examined all the witnesses. Further, PW1, PW2 and PW3 were recalled. It took some time before the witnesses testified again. The appellant was aware of what they had stated during their first testimony. He cross-examined the witnesses for the second time. I do find that lack of being provided with witness statements cannot be a ground to allow the appeal. Lack of witness statements has to be evaluated together with the entire record of the trial court. The record shows that there was no prejudice on the appellant. He fully participated in the hearing and cross-examined the witnesses. His wish to have the witnesses recalled was granted. The trial was fair.

The evidence of PW1 is that she went to relieve herself when the appellant followed her. The incident

occurred during the day. PW1 knew the appellant. PW2 also saw the appellant that day. The appellant had gone to the farm initially and asked PW1 and PW2 to clean his fish. PW1 and PW2 knew the appellant. They talked to him. The appellant contends that there was a dispute on land. There is no evidence of such dispute such as a court case or a report to the village elder or area chief. The defence evidence does not raise doubt on the prosecution case. I do find that the prosecution proved its case beyond reasonable doubt.

In the end, I do find that the appeal lacks merit and is hereby disallowed.

Dated and delivered in Malindi this 6th day of February, 2017.

S.J. CHITEMBWE

JUDGE