



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL NO. 88 OF 2012

M D D.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 490 of 2010 of the Senior Principal Magistrate's Court at Lamu –

A.R. Kithinji, SRM)

JUDGEMENT

The appellant was charged with two counts of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 38 of 2006. The complainant for both counts was the same. One count involved penetration of the anus while the second count involved penetration of the vagina. The period of the offence is the same. The particulars of the offence for the first count are that the appellant on diverse dates between 20.9.2010 and 28.10.2010 in Lamu District within Lamu County committed an act which caused penetration to M.M.D., a child aged 13 years by inserting his penis into the anus of the said child. The particulars of the offence for the second count are similar only that the penetration is into the complainant's vagina.

The trial court convicted the appellant of both counts and sentenced him to serve twenty (20) years imprisonment. The grounds of appeal filed on 3.10.2012 are that: -

1. The prosecution did not prove its case beyond reasonable doubt.
2. No proper investigations were done as to whether the broken hymen was fresh or old as there was no discharge found in the complainant's private parts.
3. The charge sheet was defective as the particulars were not clear.

The appellant did not file any submissions and left the appeal for the court to determine. The State opposed the appeal. It is submitted that the key ingredients of the offence of defilement were proved. The complainant's age was established. The appellant used force on the complainant. A P3 form was produced and the child lacked capacity to consent.

It is unfortunate that the original handwritten record of the trial court was damaged. By a letter dated 13.5.2014, the Senior Principal Magistrate in Lamu wrote to the High Court in Malindi indicating that the

original file was retrieved from their store already damaged. The judgement was typed but the proceedings could not be typed as most of it is damaged beyond reconstitution.

This is a first appeal and the court has to evaluate the evidence adduced before the trial court afresh and make its own conclusion. The trial court did summarise the evidence in its judgement and I will rely on that summary as well as on the available portions of the record which are legible. PW1 was the complainant. She stated that she is the appellant's niece. She was also an orphan. She came from Garsen and went to live with the appellant in Lamu. On 20.10.2010 she was asleep when the appellant went to the room. She was asleep with two other children who are younger than the complainant. The appellant pushed the children and slept in the middle. He told the complainant to remove her panty. The appellant then removed his clothes and placed his penis in her anus. He threatened to stab her. The appellant then put his penis in her vagina. On another occasion, the appellant took her to the forest, sodomised her and then defiled her through the vagina. The appellant threatened to kill her. The defilement continued for several days and the complainant was threatened with death should she inform anyone.

It was the complainant's evidence that in one occasion during the month of Ramadhan, the appellant's wife caught the appellant defiling the complainant. The complainant reported the matter to her teacher who testified as PW3. The incident was reported at the Lamu police station on 25.10.2010 as per the P3 form. The complainant was referred to the Lamu District hospital where her P3 form was filled.

The torn record indicate that the complainant informed the court that her mother was called H while her father was called A. The mother is indicated to be deceased. The complainant testified as PW2. The handwritten evidence of PW2 also indicate that the appellant threatened to kill PW2 with a knife if she told anybody. The appellant's wife caught the appellant defiling PW2 and she shouted. The appellant woke up. The village headman was informed as well as the school teacher. PW2 further testified that the appellant used to defile her when his wife had travelled. The house had only two rooms. One room was the kitchen. PW2's original name was M A H but she changed it to M M D when she started living with the appellant.

PW1 was a medical officer who produced the two P3 forms. One for the complainant and the other one for the appellant. They are both dated 27.10.2010. PW3, A H S is the complainant's teacher. She reported the matter to the police. PW5, DAUDI WARE was the headman of Shella Village. He testified that the complainant reported to him that she was defiled on several occasions by the appellant. He advised the complainant to report to her head teacher and to the police.

PW7, Corporal TIMOTHY WEKESA was stationed at the Lamu police station. He received the complainant and referred her to Lamu District hospital. He investigated the case and charged the appellant with the offence.

In his sworn defence, the appellant testified that he was a watchman in Lamu. He went home in the morning and met three people in his home. Among them was the village elder "**mzee wa mtaa**". He had differed with the village elder over the appellant's wife. He had reported to the OCS two times about it. The appellant greeted the three people and they asked him to follow them to the police station.

During cross-examination, the appellant testified that he did not know the complainant. He also did not know the teacher who testified. He stated that the child was cheating the court. The child did not live in his house.

The trial court analysed the evidence and convicted the appellant. According to the trial magistrate, the complainant appeared to be telling the truth as she could recollect all what happened to her. The issue for determination by this court is whether the prosecution proved its case beyond reasonable doubt. The evidence of the complainant was that she used to live with the appellant who is her uncle. According to the complainant, the defilement took place on several occasions. They were sleeping in the same house. In one occasion, she was sodomised and defiled in the forest.

The appellant denied knowing the complainant. He testified that he was not living with the complainant.

The evidence of PW5 Daudi Were is that the complainant was an orphan and the appellant was taking care of her as an uncle. PW4, B D testified that she is a teacher. On 25.10.2010 she was heading home from school when she found the complainant seated while crying under a tree. The complainant told her that she was defiled on several occasions. PW4 took the complainant to hospital. She informed the head teacher and the matter was reported to the police. During cross-examination, PW4 testified that she knew the appellant as the complainant's uncle.

PW6 J N is also a teacher. Her evidence is not captured in the typed judgement of the trial court. She was informed by the complainant that she was defiled by the appellant.

Although the record of the trial court is damaged, the evidence that was adduced can be discerned from both the judgement as well as from the damaged proceedings. The totality of the prosecution evidence is that the complainant was living with the appellant as her uncle. The complainant was defiled on several occasions. She was both sodomised and defiled. The appellant was also examined by the medical officer, Ahmed Hassan, but no significant findings were detected.

Given the evidence on record, I do find that indeed the complainant was defiled. The incident took place on several occasions. PW2 was able to know who was defiling her. At one time, she was taken to the forest and sodomised. She knew her defiler to be her uncle, the appellant. She even changed her name to take up the appellant's name. She considered the appellant to be her father. The appellant's evidence that he did not know the complainant is untrue. The complainant's age is given as thirteen years. The trial court observed that the hardships had hardened the child and she looked to be mature. The teachers and the village elder knew the appellant as the complainant's uncle. They took up the matter and reported it to the police.

The defence evidence relates to the manner in which the appellant was arrested as well as denial that the complainant was living with the appellant. That evidence does not disprove the evidence of the complainant, that of the two teachers as well as that of the village elder. They all knew that the complainant was living with the appellant. The appellant's contention that he had a disagreement with the village elder is unsupported. It is a general statement. The fact is that the complainant was defiled. It is not established that the village elder used the girl to settle his own scores with the appellant.

Although the original record is damaged, I do find that there is no miscarriage of justice. The handwritten judgement of the trial court is still legible. There are portions of the original handwritten record which are still legible. It is possible to follow what transpired before the trial court. There was a case of defilement that was reported. Investigations were done and the appellant was convicted of the offence. Independent witnesses testified before the trial court. This court is able to know the evidence of each witness before the trial court including that of the appellant. There is no miscarriage of justice. PW1 was defiled and the case was reported to the teachers as well as the headman.

The evidence shows that the complainant took the appellant as her father. Since there is no other witness who could confirm the blood relationship between the appellant and the complainant, I do find that the charge of defilement was proper. There was no need to charge the appellant with the offence of incest contrary to section 20 (1) of the Sexual Offences Act.

In the end, I do find that the prosecution did prove its case beyond reasonable doubt. The appeal lacks merit and is hereby dismissed.

Dated and delivered in Malindi this 13th day of February, 2017.

S.J. CHITEMBWE

JUDGE