



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL NO. 46 OF 2015

SAID OMAR MWENYE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 144 of 2014

of the Senior Principal Magistrate's Court at Lamu – J.K. Ndeng'ri, RM)

JUDGEMENT

The appellant was charged with the offence of attempted defilement contrary to section 9 (1) (2) of the sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant, on the 15.4.2014 at [Particulars Withheld] within Lamu County, intentionally attempted to cause his penis to penetrate the vagina of T A a child aged 7 years.

The appellant was also charged with the offence of indecent act with a child contrary to section 11 (1) of the sexual Offences Act No. 38 of 2006. The particulars were that the appellant, on the 15.4.2014 at [Particulars Withheld] within Lamu County, intentionally touched the vagina of T A. a child aged 7 years with his fingers.

The trial court convicted the appellant on the charge of indecent act and sentenced him to serve ten years imprisonment. The grounds of appeal as per the amended grounds are that the prosecution case was made up, the medical evidence was not sufficient to warrant the conviction, the case was not proved to the required standard and that the appellant's defence was reliable and raised doubt on the prosecution case.

The appellant submit that the alleged offence occurred in a house yet no scene of crime officers were taken to the scene to photograph the house. The case was fabricated and made up. The witnesses were from the same place. The child was too young for the appellant to have attempted to defile her. The P3 form indicate that the age of injuries as three hours yet it was filled the following day on 16.4.2014. The appellant's defence was reliable and raised doubt. The appellant ought to have benefited from the doubt.

The State opposed the appeal. It submitted that the evidence did rove that the appellant touched the complainant's vagina. The appellant was arrested while inside the house where the complainant was. The appellant threatened those who arrested him with a knife. The appellant was accorded ample time to cross-examine the prosecution witnesses.

This is a first appeal. This court needs to evaluate the prosecution evidence and make its own

conclusion. Before the trial PW1 was the complainant. She gave unsworn evidence. Her evidence was that she was six years old. On the material day, someone took her to his house and touched her private parts. It was on a storey house. He held a knife on his right hand and touched her vagina with the left hand. PW2 A B A is the mother of PW1. On 15.4.2014 she was at home when she got information about the incident. She went to the scene and found PW1 crying. She took PW1 to the police and later for medical examination. The medical examination revealed that PW1 had not been defiled but had cells around her vagina from finger nails and elbows. It was her further evidence that PW1 was seven years old. She found PW1 at a shop on the ground floor.

PW3 SULTWANA ALI MZAMIL is a teacher. On 15.4.2014 at about 3.30 pm he was heading to work. He got information that a child had been kept in a room. Together with PW4 decided to find out. They found the house locked. They waited until when the house was opened. The appellant picked a knife and PW3 shielded himself with a piece of firewood. They reported to the police who went to the scene. The child was found inside the house. The appellant broke the window and jumped out. PW4, SHAIB ABDALLA was heading to the mosque on 15.4.2014 at about 3.30 pm. He saw PW3 outside a shop. PW3 informed him that a child was locked inside the shop. He checked and saw the child's legs. They confronted the appellant who picked a knife. The child was inside the house. They took the appellant to the police who had also gone to the scene.

PW5 NICHOLAS LEWA is a clinical officer who was based at the Lamu District hospital. He filled the P3 form. PW1 had cuts on the inner and outside areas of her vagina. The cuts could have been caused by human finger nails. PW1 also had bruises on her elbows. PW6 P.C. PURITY WAINGU was based at Lamu police station. The case was reported on the same day 15.4.2014. At around 4.10 pm she got information about the case. She went to the scene with a colleague. They recovered a knife. PW1 was taken to Lamu District hospital and injuries were found in her private parts. The appellant was charged in court the following day. PW6 produced PW1's birth certificate which showed that she was born on 13.11.2007.

In his sworn defence, the appellant testified that on 2.4.2014 at around 3.00 pm he was carrying out his daily business. He called his wife to attend to his shop. Three people went there and started beating him. He was then taken to the police station. DW1 FADULA ABDALLA is the appellant's wife. She testified that the appellant was heading to the shop when three people arrested him.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The evidence of PW1 is that someone led her to a house where he touched her vagina using his left hand as the right hand held a knife. PW3 and PW4 got information that a child was being held in a house. They pursued the information and saw PW1 who was with the appellant. According to PW4, the appellant sells cassava. This is the same evidence as per PW2. PW6 testified that they went to the scene and recovered a knife. The knife was produced in court. The medical evidence show that PW1 had injuries on her private parts which injuries could have been caused by finger nails. PW1 was taken to hospital the same day. The P3 form was filled the following day.

The appellant denied committing the offence. His wife simply narrated how the appellant was arrested by three people.

The evidence of PW3 and PW4 show that indeed the child was found at the appellant's premises. The evidence also establish that PW1 was in the company of the appellant only and there is no evidence that there were other people who were at the scene.

The appellant was convicted of the charge of indecent act. The essence is that no defilement or attempted defilement was established. The appellant's submissions on defilement cannot assist him. Section 2 of the Sexual Offences Act defines indecent act as an unlawful intentional act which causes contact between any part of the body of a person with the genital organs, breasts, or buttocks of another. It also includes exposure or display of any phonographic material to any person against his/her will.

It is the evidence of PW1 that her vagina was touched. That allegation was corroborated by the medical

evidence which show that there were injuries on PW1's vagina. The appellant was arrested in the company of the complainant. The appellant's contention that this was a made up case cannot arise. The defence evidence does not raise any doubt on the prosecution case.

The prosecution evidence does prove that PW1 was a child. Her birth certificate indicate that she was born on 14.11.2007. On 15.4.2014 she was below seven (7) years old. PW1 narrated what happened to her. The contention by the appellant that the witnesses are from the same area does not raise any issue. PW3 and PW4 rescued PW1. They were going by their own business when they got information that a child was locked in a house. There is no malice on the part of the witnesses.

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

Dated and delivered at Malindi this 8th day of February, 2017.

J.S. CHITEMBWE

JUDGE