



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

HCCRA NO.59 OF 2013

MWS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Applicant herein MWS had been charged with the offence of defilement contrary to section 8(1)(2) of the Sexual Offences Act- No.3 of 2006. On the main count. The particulars of this count were, that on the 13th of August, 2012 at [particulars withheld] Village in Mukuyuni Location in Kimilili within Bungoma County he unlawfully and intentionally caused his penis to penetrate the vagina of SNS a child of 9 years.

2. The alternative count was of Indecent Act with a child contrary to section 11(1) of the said Act. The particulars thereof were that on the 13th of August, 2012 at the place mentioned above he intentionally touched the vagina of the said child with his penis.

3. The appellant denied both counts and the matter went for trial. The trial court found him guilty of the main count, convicted him and sentenced him to life imprisonment.

4. The appellant was dissatisfied with the conviction and sentence and appealed to this court on the grounds that:-

- The age of the complainant had not been established by way of a birth certificate or age assessment.
- The trial court failed to consider the medical report that indicated the hymen was not broken.
- The trial court in view of the medical report erred by convicting him of the offence of defilement.
- The trial court failed to take proper account of the credibility of the prosecution witnesses.
- Crucial independent witnesses were not called and
- The case was not proved to the required standard.

5. This is the first appellate court and it has a duty to consider the evidence afresh and arrive at an independent opinion. Okeno vs R (1973) E.A

6. The prosecution's case in brief is that on the 13th of August 2012 the complainant (PW1) was sent by the appellant's wife to collect vegetable from him. The complainant a child of 9 years went to where the appellant sold maize, he kept her waiting and later at about 7pm he left with her for home. The appellant

is an uncle to the complainant; on their way home the appellant defiled the complainant.

PW1 SNS gave an account of how as they walked home near a fig tree the appellant trapped her, she fell down when the appellant removed her pant, drew his penis and put it in her vagina. He warned her against telling anyone or he would stab her with a knife. She felt pain and bled. Later she secretly washed her panty. Her mother discovered her walking with difficulties and asked her what was wrong and she disclosed to her mother the incident. She was taken to hospital and the matter reported to the police.

PW2 JNS confirmed that on 13th August 2012 the appellant's wife requested to send the complainant to the accused which she allowed. The complainant was at the time 9 years old. The child returned at 9pm having eaten at the appellant's who was her brother in law. On 17/8/2012 4 days later she noticed her child walking with difficulties and on asking the complainant, the child informed her that the appellant had defiled her. On 18/8/2012 she took PW1 to hospital in Kimilili and thereafter reported the matter to the police. She accompanied the police to arrest the accused who escaped. The same day the police returned and were able to arrest the appellant. At the hospital a P3 form was filled.

PW3 Oscar Makata a clinical officer at Kimilili District Hospital. He filled the P3 form on 20/8/2012 related to PW1 who reported an assault. The complainant's private part had minor injuries associated with sexual assault meaning she may have been sexually assaulted although not penetrated as her hymen was intact. She had a foul smell. Lab test showed her urine had a problem. He also examined the appellant and found pus cells similar to what he found on PW1. The pus cells tallied. One may have infected the other.

PW4 P.C. Esther Chebet of Kimilili Police Station the investigating officer in the matter. She recalled that on 19/8/2012 she received the complainant and her parent at the station. Later she took both the complainant and the suspect to Kimilili District Hospital for medical examination. Both were checked. A P3 form was issued and she later charged the appellant.

7. In his unsworn statement upon being found to have a case to answer the appellant stated that he is 25 years. On 19/8/2012 the village elder told him that he was being required by the assistant chief but before getting to the Assistant chief they got into the A.P post where he was arrested and taken to Kimilili police station, his finger prints taken and he was brought to court on unknown charges.

8. Having considered the evidence on record the issues for consideration are as follows:

1. Age of the complainant;
2. Whether she was defiled; and if the answer is to the affirmative
3. If there is evidence to the required standard linking the appellant to the offence.

9. PW1 and PW2 gave the age of PW1 as 9 years at the time of the incident. PW3 on his part indicated that he also assessed the age of minor as 9. I will therefore find as a matter of fact that the complainant was 9 years at the time of the alleged offence.

10. The evidence of PW1 is that on their way home from the market where she had been sent to the appellant, she walked ahead and the appellant followed behind, they reached near a fig tree when the appellant trapped her, she fell, he removed her pant and put his penis into her vagina, he held her mouth so that she did not scream and told her not to tell anyone. She felt pain in the privates and bled.

PW3 Oscar Makate a clinical officer examined PW1 on the 20/8/2012 and found that her private parts had injuries though the hymen was intact. She released water which had a bad odour. He formed the opinion that she may have been sexually assaulted but not penetrated. He also examined the appellant and found pus cells similar to what he found on PW1.

11. I will take judicial notice of PW1 a nine year old girl who never engaged in sex and may not know

what this entails. PW3 found injuries on her private part and formed the opinion that she was sexually assaulted. He found pus cells on both the appellant and the child which pus cells tallied meaning the appellant had made contact with PW1. Forming the opinion that one had infected the other.

12. Although the appellant denies having defiled the appellant and the entire prosecution evidence by stating that he is not aware of the allegations. There is adequate evidence from PW1 who gave the impression of being an intelligent girl to the trial magistrate. From reading the evidence she adduced, I have equally formed the opinion that she was intelligent for a girl of her age. Her evidence was vivid of what transpired. The bleeding may not have been from the hymen as the same did not rupture but form the injuries she sustained. There is indeed evidence of contact as the lab test done on her and the appellant proves contact between them.

13. The next question is whether the sexual assault can be classified as defilement. Section 8(1) of the Sexual Offences Act no 3 of 2006 defines defilement as

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.

Under Section 2(1) of the Act. Penetration is defined as follows:

“Penetration “means the partial or complete insertion of the genitalia of a person into the genitalia organs of another person”.

14. Was there penetration. PW3 ruled out penetration although PW1 in her evidence said that the appellant inserted his penis into her vagina. As noted earlier at her age she may not be know what sex is all about.

15. As there is doubt as to whether penetration occurred or not I will resolve the doubt in favour of the accused and turn to the next possible and lesser offence of attempted defilement. Section 9(1) of the Act provides

“A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

“9(2) A person who commits an offence of attempted

Defilement with a child is liable upon conviction to

Imprisonment for a term of not less than 10 years”.

16. The appellant’s defence does not dislodge the prosecution case. I believe the evidence of PW1 and would admit the evidence as per the provisions of section 124 of the evidence Act. I find that the evidence was corroborated by that of PW3 there was an attempt to penetrate the complainant and hence the injuries and the infection transmitted as evidenced by the pus cells.

17. It is my considered view therefore that although the evidence before court did not prove the offence of defilement the evidence proves beyond all reasonable doubt that the appellant attempted to defile PW1.

18. Consequently, I set aside the conviction of defilement and quash the life sentenced imposed.

19. In its place I convict the appellant of a lesser offence of attempted defilement under Section 9(1) of the Sexual Offences Act and accordingly sentence him to 10 years imprisonment run from the 18th of April 2013 the day of the 1st conviction.

Dated at Bungoma 16th day of March, 2017.

ALI-ARONI

JUDGE