



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

HCRA No. 4 OF 2015

ISMAEL BAJILA SOMO.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence of life imprisonment

by Hon. MD Kiprono (SRM) on 12/08/2015 at Hola Law Courts

in CR. Case No.321 of 2014)

JUDGMENT

1. The appellant was sentenced to life imprisonment for defilement contrary to section 8 (1) as read with section 8 (2) of the sexual offences Act No. 3 of 2006.

2. The particulars of the charge were that on 12/11/2014 within Tana River County, the Appellant intentionally caused his penis to penetrate the vagina of XX a child aged 10 years.

3. The prosecution evidence in summary was that the Appellant called the complainant to his house *[particulars withheld]*. He gave her Ksh. 200 and had sex with her. After that occasion, again the appellant gave the complainant Ksh. 10 and he again had sex with her.

The complainant said on the 3rd occasion, the Appellant did not give the complainant any money. He had removed her skirt when the mother of the complainant caught them. The mother of the complainant screamed and neighbors attacked the Appellant and he was arrested and taken to the police station. The complainant was taken to hospital.

4. PW2, the complainant's mother said on 12/11/2014 in the morning she was at her house giving medicine to her child when a neighbor called MALKIA BUNYA told her that she had seen the complainant entering a house at *[particulars withheld]*. PW2 went to the house and found the Appellant with the complainant. The complainant had no skirt. There was a mat on the floor. The Appellant had opened his zip. PW2, screamed and neighbors attacked the Appellant. She went to call her husband but when she returned she found the appellant had been arrested. The complainant was taken to Hospital where she was treated and an age assessment was done which showed the complainant was 10 years old.

5. PW4, JOHN VICTOR MADUBI a clinical officer at Hola District Hospital who examined the complainant on 12/11/2014 said her hymen was broken and she had an old scar and a whitish discharge which had a foul smell. The Doctor said the complainant had a history of defilement for over 6 months and the use of condoms at some time.

6. The Appellant said in his defence that he works as a watchmen at night and during the day he does whole sale business. He stays at Kibuyu village. He said he does not know the girl he is alleged to have defiled. He said on the day he was arrested, he went to the house at Gam to take a nap having stayed at work overnight. He said he did not close the door due to heat. He was about to fall asleep when he heard someone stepping on his wrist and woke him up. He said he saw four men and three women with a young girl. They asked him what the girl was doing in his house the previous day. The Appellant said the men beat up the girl until she said the appellant had defiled her. The people then turned on the appellant and assaulted him. He was later picked by police and taken to the police station

7. The trial magistrate found the Appellant guilty as charged and sentenced him to life imprisonment. The appellant has appealed against both conviction and sentence on the following grounds:-

AMENDED GROUNDS OF APPEAL

- (i) That the learned trial magistrate erred in law and fact by not considering that the minor's evidence was obtained under torture thus the same was un-reliable.
- (ii) That the learned trial magistrate did not consider that there was need for the application of sec Lion 36 (1) (2) of the S.O.A to ascertain whether the Appellant had the alleged infection.
- (iii) That the learned trial magistrate erred in law and fact by not considering the evidence of s prosecution witnesses was suspicious hence the same was un-reliable.
- (iv) That the learned trial magistrate Le did not consider that prosecution side was poorly investigated thus remained un-proved.
- (v) That the learned trial magistrate did not consider that the defence evidence was reliable to award him the benefit of doubt.

8. The appellant submitted in writing as follows:-

- i) That according to the evidence of the complaint, the Appellant ought to have been charged with attempted defilement and not defilement.
- ii) That the Appellant ought to have been examined under section 36 (1) (2) of the SOA to confirm: is the one who infected the complainant with the sexual transmitted disease.
- iii) That the prosecution did not prove penetration to the required standard and that there is 11,, that the Appellant penetrated the complainant or he infected her.
- iv) Finally the defence by the was not considered at all and yet it had truth in it.

9. The respondent opposed the appeal and submitted as follows:-

- (i) That the complainant was assessed and her age assessment showed she was 10 years old at the time of the defilement.
- (ii) That the prosecution discharged the burden of prove imposed by law. The prosecution called 8 witnesses and PW1 and PW2 were the key witnesses.
- (iii) That there is evidence that appellant enticed the complainant a small girl of 10 years with money and defiled her.
- (iv) That the defence evidence did not shake the prosecution evidence

10. I have re-evaluated the evidence before the trial court. My duty was stated in the case of Isaac Nganga Kihiga alias Peter Nganga Kahiga vs. Republic Criminal Appeal No. 272of 2005 as follows:-

“In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno vs. Republic [1972] EA 32will suffice. In this case, the predecessor of this court stated:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (shantila M. Ruwala vs. R. [1975] EA 57).it is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings ad conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”.

11. I have analyzed and re-evaluated the evidence which was before the trial court bearing in mind that the trial court had the advantage of seeing the witnesses. My findings are as follows:-

- (i) There are three elements the prosecution has to prove in a case of defilement in order to secure the conviction of the Appellant on the charge of defilement. The first element is penetration is defined under section 2(1) (d) of the sexual Offences Act as

“the partial or complete insertion of the genital organs of one person into the genital organs of another person”.

The Complainant gave evidence that the Appellant had sexual intercourse with her on two occasions before the mother of the complainant found them. The doctor confirmed that the hymen of the complainant was missing and she had a foul discharge.

- (ii) The second element that the prosecution was required to establish is the identity of the perpetrator. The complainant testified that she

knew the Appellant and she had had sexual intercourse with him on two occasions after the Appellant lured her with money. The complainant said the first time the Appellant gave her Ksh.200 and the second time he gave her Ksh. 10 /=-.

(iii) The third element that the prosecution is required to prove is the age of the complainant. Under section 2 (1) of the Sexual Offences Act, the definition of a child is the one assigned thereto in the children Act. This means any human being of less than eighteen (18) years. In the present appeal, the age of the complainants was proved by the production of the age assessment report which stated that the age of the Complainant was 11 years old at the time of the offence.

(iv) I also find that the trial court considered the defence evidence and said that the defence evidence did not rebut the prosecution case. The trial court found the credibility of the Complainant beyond doubt.

(v) From the foregoing, the prosecution proved its case against the Appellant on the count of defilement contrary to Section 8 (1) as read with section 8 (2) of the Sexual Offences Act to the required standard (beyond any reasonable doubt). The Appellant's appeal against the conviction and sentence lacks merit and is hereby dismissed.

The conviction is safe and I accordingly uphold it and confirm the sentence.

Dated, Delivered and Signed at Garsen this 7th June, 2017 in the presence of the parties.

ASENATH ONGERI

JUDGE.