



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL APPEAL NO. 137 OF 2017

ORIGINAL CR. CASE NO. 1585 OF 2013 AT PM'S COURT AT MAKINDU

MUINDE KITHYAKA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant Muinde Kityaka was charged with defilement contrary to Section 8(1) as read with Section 8(2) of Sexual Offence Act No. 3 of 2006.
2. Particulars being that on 24/11/2013 at [Particulars withheld] market, in Kibwezi District, Makueni County, intentionally and unlawfully caused his penis to penetrate the vagina of C J, a child aged 10 years. Alternatively, he was charged with indecent act of a child contrary to Section 11(1) Sexual Offence Act No. 3 of 2006 particulars being that on 24/11/2013 at [Particulars withheld] market, in Kibwezi District, Makueni County, intentionally and unlawfully touched the vagina of C J, a child aged 10 years.
3. The Appellant pleaded not guilty and the matter proceeded to trial.
4. The Appellant was convicted and sentenced to imprisonment for life.
5. Being aggrieved by the above decision, the appellant lodged the instant appeal setting out 4 grounds of Appeal namely:-
 - *The sentence was harsh against the weight of adduced evidence in support of the charge.*
 - *The prosecution failed to prove case to the standard required by the Law.*
 - *There was no DNA test made to confirm the prosecution evidence thus doubtful.*
 - *The mode of delivery of the Judgement contravened Section 169(1) CPC and was incurable under Section 382 CPC.*
6. When the matter came for hearing, the Appellant lodged Amended Supplementary grounds of Appeal which apparently were a replication of the grounds filed earlier.
7. The supplementary grounds are:-

- Prosecution case was not proved to the required standard.

- Section 169(1) CPC was not adequately complied with in relation to Appellant defence statement.

8. The parties agreed to canvass the appeal via written submissions. The Appellant filed and served his submissions. The respondent replied via oral submissions.

9. This being the first Appellate court, it is enjoined to look at the evidence before the trial court afresh, re-evaluate and examine the same and reach its own conclusion whether or not to uphold the conviction of the Appellant.

10. In reaching its decision, this court has to bear in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore is not expected to make any findings as to the demeanor of the said witnesses.

11. Finally, this court is expected and mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment. See **KINYANJUI –VS- R (2004) 2KLR P.364.**

12. The prosecution called 6 witnesses to prove its case. PW1 testified that his parents found victim inside the Appellant house and then they removed her and Appellant from the house and took them to police post (AP) at Mosongaleni.

13. The girl was later taken to hospital. PW1 identified Appellant as their neighbour. On cross examination, PW2 said that the girl was his niece.

14. PW2 is the mother of the girl. She said that on the material date the girl went out and never came back. They looked for her at the mosque and toilet. She heard Appellant call the girl to come out of his house. She went to the Appellant and asked him where the girl was.

15. The Appellant showed her the girl in a sack inside Appellant house. She collected her and together with her grandfather took the girl to the police station. The girl said that the Appellant had defiled her. She said this while at the police post.

16. They were referred to Kibwezi police station and then later to hospital. Later P3 form was filled. PW2 knew Appellant by then. On cross examination, PW2 said that they were looking for the small child. PW2 reported Appellant for defilement.

17. PW3 works as an elder in the mosque. He went to house and found the child missing. PW3 waited and saw Appellant come out and light a jiko. PW3 heard him call the girl to get out of the house and leave. They went inside and found the child put in a sack.

18. They arrested Appellant and took him to AP post. On cross examination, PW3 stated that the child was found in Appellant house. He stated that they were friends with Appellant and thus could not fix the Appellant. He saved him from being lynched by the members of public.

19. After *voire dire* was conducted, the victim testified as PW4. She testified that she was in standard 3 [particulars withheld] Primary School. On 24/11/2012 at 5.00 p.m., she was at Appellant house.

20. She had headed to the toilet when Appellant called her. He took her to his house and removed her panties and had sex with her. The Appellant then stuffed her in the sack and put her under the bed. Appellant then told her to get out and leave. PW4 brother heard Appellant telling her grandmother.

21. The grandmother came and removed her from the sack in Appellant house and took PW4 to the police post. The Appellant had been having sex with her. PW4 was later taken to Makindu hospital. PW4 knew the Appellant as a neighbour.

22. The Appellant did not cross examine PW4. On cross examination by the court, PW4 stated that she did not report the first day and there was no reason for that. PW4 had never slept with another man before. She never cried out. She never got any tears.
23. PW5 PC Julius Cheruiyot stated that on 24/11/2013 at 6.20 a.m., he was woken up by the members of public noise and went where they were. PW5 found them holding one man and a child. PW5 re-arrested the Appellant and locked him to protect him from members of the public. He was then escorted to Kibwezi police station by PC Rashid.
24. Both the Appellant and the girl were taken to hospital at Makindu. The police had already issued a P3 form which was duly filled.
25. PW6 is Dr. Makau Donglas, medical officer Makindu sub-county hospital. He examined the PW4 and found that the hymen was perforated. He also found spermatozoa in her vagina. He formed an opinion that the girl was defiled. The child was 10 years old. He produced P3 form as an exhibit. On cross examination, he confirmed that he found the victim was defiled.
26. At the close of prosecution case, the court found the Appellant had a case to answer and put him on his defence.
27. The Appellant gave unsworn statement and called no witnesses. He said that he was arrested at his business premises. It was a neighbour who arrested him on 24/11/2013. He woke up at 6.00 a.m. and went to answer a call of nature.
28. He tried to light his jiko and then saw neighbour with 5 children. One child went and called his mother. C (victim) (PW4) was ahead. She then came to his compound and child's mother beat the girl and also she assaulted him. (Appellant).
29. They then arrested him and took him to AP post. The police beat the girl and asked her to say what he did to her.
30. The girl said the Appellant defiled her 5 times. He denied defiling the girl. He says the doctor never examined him.
31. The trial court found that penetration was proved as defined by Section 2 of Sexual Offence Act No. 3 of 2006. PW4 and P3 form evidence proved that the girl was penetrated as perforation of hymen and presence of spermatozoa proved there was penetration.
32. There was no evidence PW4 was assaulted by police and PW2 to implicate the Appellant. The age of the girl was stated to be 10 years in the P3 form. Thus the trial court convicted the Appellant.
33. The Appellant submitted that there was no prove of the case beyond reasonable doubt. This is because the P3 form talked of hymen being perforated and spermatozoa being found in the girl's vagina yet same was not tested as to its sources. Thus the failure weakens prosecution case.
34. He relied on **WOOLMINGTON -VS- DPP (1935)**. Secondly there was no age assessment report of the girl to prove she was 10 years, thus no prove of the age of the child. He relied on the case of **HILARY NYONGESA -VS- REPUBLIC ELD CRA NO. 123 OF 2009** which held that ***“age is such a critical aspect in sexual offences that it has to be conclusively proved and thus becomes more important because punishment (sentence) under Sexual Offences Act is determined by the age of the victim. A birth certificate is conclusive proof of the age of the complainant or an individual.”***
35. Mr. Orinda in opposing the appeal submitted that the examination proved there was penetration. The child was found in Appellant house. She was 10 years old. PW1, PW2 and PW3 testified of a child being found in Appellant's house. The Appellant is a neighbour.

36. The finding based on evidence was sound. The defence was considered and found to be incredible. The sentence was lawful.

37. After going through the evidence on record and the submissions tendered, I find the issues arising are:-

a. Whether the penetration was proved?

b. Whether the age of the victim was proved?

c. Was defence considered?

d. Was sentence excessive?

38. Section 8(1) of Sexual Offences Act stipulated that a person who commits an act which causes penetration with a child is guilty of an offence termed as defilement. Section 2 Sexual Offences Act defines penetration as partial or complete insertion of the genital organ of a person into the genital organ of another person.

39. PW4 the victim testified that the accused removed her underpants and had sex with her. The Prosecution exhibit P3 form shows that PW4 vagina had spermatozoa inside. This is sufficient corroboration that penetration occurred.

40. PW1, PW2 and PW3 testified that the PW4 was retrieved from Appellant house stuffed in a sack. He was heard asking her to come out of his house and leave early in the morning. There is no other evidence pointing into any other person having opportunity to defile the child.

41. The P3 form shows the child was 10 years. She also testified that she was in standard 3. The Appellant did not challenge the evidence on the age of the child.

42. The court therefore finds no merit in the appeal and reaches a conclusion that the case was proved beyond reasonable doubt.

43. The Appellant submits that the child was beaten to say that he defiled her 5 times. There was no evidence of assault of the PW4 tendered in court or even reflected in her P3 form.

44. The court considered the defence and found same incredible. The child was found in his house at 5.00 a.m. and he does not explain why she was in his house.

45. A sentence when the defiled child is 11 years old and below, is mandatory life imprisonment. The same was lawful.

46. The court therefore makes the following orders:-

1) The Appeal is dismissed.

2) The conviction is affirmed

3) Sentence is confirmed.

SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 6TH DAY OF JUNE, 2017.

C. KARIUKI

JUDGE

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