



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CRIMINAL APPEAL NUMBER 40 OF 2015
CORAM: JUSTICE S.M GITHINJI

*(From original conviction and sentence in criminal case number
667 of 2014 of the Principal Magistrate's Court at Sirisia)*

DAVID KASUTI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

David Kasuti the appellant herein was charged, tried and convicted for an offence of **Defilement, contrary to section 8(1) and (4) of the Sexual Offences Act no. 3 of 2006.**

The particulars of this offence are that on the diverse dates between 1st day of July and 4th day of July, 2014 in Bungoma County, the appellant intentionally caused his penis to penetrate the vagina of S N W (S.N.W) a girl aged 16 years.

The evidence adduced in the lower court in support of the charge is that by the time of the said offence the complainant who gave evidence as PW-1, was aged 16 years, having been born on 2.8.1997. She had just completed her KCPE examination and had not joined high school. On 6.7.2014 at around 10.00 am the complainant was sent by her mother to [particulars withheld] Market to buy paraffin. On her way back home she met with the appellant. He was not known to her. The appellant threatened her and told her to accompany him to his house as he wanted her to be his wife. She did as ordered. They went to his home at [particulars withheld]. This was on 2.6.2014. The appellant told the complainant that she was his wife. She stayed there for 2 days and they had sexual intercourse.

PW-2, the complainant's father started looking for her. On 2.7.2014 he got information that she was within [particulars withheld] market. He went to where she was and he was told that she was living with somebody. He reported the matter to the village elder. On 4.7.2014 she was rescued. The appellant was arrested and taken police station.

On 8.7.2014 the complainant was taken to Sirisia Sub-District Hospital. She was examined. Her external genitalia had no bruises. The hymen was broken. There was no blood or discharge on her genitalia. It was opined this was because she went to hospital late after the incident. Dr. Amos Sakwa concluded that she had been defiled. He thus filled the P-3 form. The treatment card dated 5.7.2014 indicates that she

had urinary track infections. Pregnancy and HIV tests were negative. The two documents were produced in court as exhibits.

The appellant gave unsworn testimony in his defense. He indicated that he left home on 3.7.2014 and headed to Bungoma. On 5.7.2014 while in Bungoma he was called and informed that his wife was at Sirisia Hospital with a sick child. He left Bungoma and went to the hospital. He found his wife and the child. At 10.30pm he took a motorcycle for [particulars withheld] to look for money to pay hospital bills. He was arrested while heading to [particulars withheld] Secondary School. He explained to them about his mission but was not listened to. He was taken to Sirisia Police Post. He was then taken to Malakisi Police Station. On 8.7.2014 he was charged with a strange offence of which he denied.

I have considered the grounds of the appeal and submissions by both parties. I have as well re-evaluated the entire evidence in the file. The only issue which I need determine in this appeal is whether penetration was proved beyond reasonable doubt. The complainant at the time of the alleged offence was aged 16 years and was therefore a child. In her evidence, regarding the issue of penetration, she simply said they had sexual intercourse. Sexual intercourse is a vocabulary defined by Concise Oxford English Dictionary to mean: - **“Sexual contact between individuals involving penetration, especially the insertion of man’s erect penis into woman’s vagina culminating in orgasm and the ejaculation of semen.”** While the definition includes penetration as part of what constitutes sexual intercourse, the question one would raise is whether the complainant, given her age and the fact she did not explain exactly what happened of which she was referring to as sexual intercourse, and that there is no evidence that she was experienced in matters of sex, talked of sexual intercourse within its right meaning.

The doctor’s evidence which would have clarified on the issue is not of much help. There is nothing observed by the doctor which shows that the complainant’s vagina was penetrated by a penis at the time the offence allegedly took place. The noted broken hymen was not described in terms of time when it’s likely to have happened. The doctor’s observation was that there was no blood or discharge on her genitalia as she went to hospital later after the incident, shows he was predetermined that there was defilement probably from the indicated history on the P-3 rather than his own medical finding. The trial magistrate misdirected himself when he observed:-

“I conclude that the absence of hymen is evidence of penetration and find that the prosecution proved as required that there was penetration.”

In *PKW versus Republic [2012]eKLR*, the Court of Appeal rightly observed that:-

“Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen.”

The evidence of broken, ruptured, or torn hymen is not automatic proof of penetration through a sexual intercourse. It is upon the prosecution to establish, beyond reasonable doubt, that it was reputed during the alleged rape or defilement. It is noticeable that in this case the complainant never said her hymen was ruptured during the sexual intercourse she claimed she had with the appellant. She also did not claim that she bled as a result or there was any vaginal discharge soon after. The doctor’s opinion is not therefore supported by any available evidence.

The bottom line is that the prosecution did not prove the element of penetration beyond mere suspicion. On the ground the appeal succeeds. The appellant is set free unless otherwise lawfully held.

Judgment read in the presence of the state counsel, court assistant and the appellant this 17th day of July 2017.

S. M. GITHINJI

JUDGE