



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CRIMINAL APPEAL NO.4 OF 2015

JAMES MONG'ARE NYAUNDIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in criminal case No. Sexual Offences 66 of 2013 Senior Principal Magistrate's Court Kericho, Hon. Ayuka (Resident Magistrate).)

JUDGMENT

The appellant was sentenced to life imprisonment for the offence of defilement **Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006.**

The particulars are that on the 2nd day of December 2013 at about 6.30p.m at [particulars withheld] village in Kericho County, intentionally and unlawfully caused his penis to penetrate the vagina of C C a child aged 5 years.

This is the first appellate court. It has a duty to re-evaluate and reconsider the evidence on record so as to arrive at its own conclusions bearing in mind that it did not have the opportunity to assess the demeanor of the witnesses. **Okeno -v- R. 1993EALR.**

The prosecution in this case called eight witnesses in support of their case. The appellant tendered an unsworn statement.

Brief facts

After a voir dire examination of the complainant the court was satisfied that she was intelligent enough to testify and proceeded to receive her unsworn statement. The complainant testified to have been playing with the appellant's child when he approached her and took her to a maize plantation and after promising her maandazi "buns" and "mapera" had "tabia mbaya" with her. She further told the court that she felt lots of pain in her private parts. She knew the accused as a neighbour and by the name of Mongare.

Complainant's mother (PW2) testified to the effect that her daughter was born on 19th June 2009 and that on the 2nd day of December 2014 at about 6.00p.m she went for milking leaving the complainant playing with others near the house of the appellant. When she returned she found the complainant crying and complaining of pain at her private parts. She took the child for treatment at Kabianga Hospital. Upon

interrogation the child said that it was the appellant who had defiled her. The matter was reported to police who went and arrested the appellant. The child was admitted in hospital for one week. PW3 Geoffrey Langat is the father of the complainant. After receiving the news that the complainant had been defiled by the accused, in the company of members of public they went and arrested the appellant and took him to police station.

The ingredients of defilement are

1. Age
2. Penetration
3. Identification
4. Corroboration

Age:

The complainant's mother gave the age of the complainant as five years and the year of birth as 19/6/2009. A child health card was produced as exhibit and shows the date of birth of the complainant as 19/6/2009. The particulars of the charge show the date of defilement as 2/12/2013. This places the age of the complainant at around 5 years old.

Penetration:

The complainant did complain of pain from her private parts. The mother (PW2) did observe that she was bleeding from her private parts. The child did state that she had been defiled by the appellant. The complainant was examined by a clinical officer who found that she had a torn hymen which was fresh. There was a perenial tear on the walls of the vagina and lacerations. She was taken to the theatre for repairing.

There were a few pus cells and numerous red cells due to the bleeding. He formed the opinion that the victim had been defiled and seriously injured.

Identification:

The complainant testified that the incident took place during the day. She had been playing outside the house of the appellant whom she knew as "Mkisii Mongare".

It is quite evident that the complainant knew the appellant before and had been playing with his children before he lured her into a maize plantation with the promise of maandazi which promise he never fulfilled.

Corroboration:

The evidence of the complainant was corroborated by that of her mother(PW2) and that of the clinical officer(PW7).

The appellant in his unsworn statement alleged that there was a misunderstanding between him and the complainant's father and uncle over a portion of land allocated to him by their father. That they caused him to be locked up and beaten. In his judgment, the trial magistrate noted that throughout the trial and more so during cross-examination of the prosecution witnesses the appellant did not raise the issue of a grudge between himself and the father of the complainant. He found the allegation as an afterthought.

Upon a careful analysis of the evidence on record, I am satisfied that there was overwhelming evidence against the appellant in this case.

The prosecution had proved their case beyond reasonable doubt. The conviction was safe and the sentence was lawful. Both are upheld.

Judgment delivered, dated and signed this 20th day of July, 2017 in the presence of learned Counsel for the prosecution, Appellant in person present, Court Assistant Hillary.

HON. M. MUYA

JUDGE

20/7/2017