



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL NO. 99 OF 2016

RAMADHAN SHUSHE SAID.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant was charged with the offence of indecent act Contrary to Section 11(1) of the Sexual Offences act No.3 of 2006. The particulars of the offence are that the appellant on the 6th day of March 2016 at [particulars withheld] in Tana River County intentionally touched the breasts of M W a child aged 13 years. The trial Court convicted the appellant and sentenced him to serve ten(10) years imprisonment.

The grounds of appeal are that:-

- i) PW1 was not a reliable witness and the conviction is not safe.***
- ii) There was an outstanding grudge between the appellant's family and that of the complainant***
- iii) The prosecution evidence is based on witness from one family***
- iv) The appellant's defence was water tight and could lead to an acquittal.***

The appellant submit that the evidence of PW1 was not reliable. She testified that her father, PW2, saw the appellant and greeted him. PW1 did not scream or tell the court that she was threatened. PW2 told the police that he saw the appellant and even greeted him but in his evidence denied giving that information to the police. The appellant contends that there was a grudge between the two families as he hosted PW2's son who had been arrested for assault. It is also submitted that the complainant's father demanded money from the appellant's father but denied that fact in his evidence.

The state opposed the appeal. It is submitted that the complainant testified that she was defiled by the appellant. PW2 and PW3 corroborated the complainant's evidence. The sentence imposed by the trial court is proper.

This is a first appeal and this court is expected to evaluate the evidence on record and make its own conclusion. The prosecution evidence is that of three witnesses. PW1 M.W. was the complainant. She testified under oath. She told the Court that she was twelve years old. On 6.3.2016 she picked keys from her father's place of work and went home. She took water to the bathroom. The appellant entered and began to touch her on the breasts and waist. He then removed her skirt. Her father went home and the appellant skipped through the back. Her father saw the appellant as he was going to the toilet. The appellant then left for his cyber cafe place of work after greetings. Her father told her to follow the appellant to his place of work. The appellant was arrested. She was starting to scream when her father went in. It was around 11.00am.

PW2 R N M is PW1's father. He runs a hotel at [particulars withheld] town. On 6.3.2016 he was at his hotel when he felt stomach upset. He went home and PW1 opened the gate. He went to the toilet and saw a man hiding at a corner of his house. He asked PW1 who told him that the appellant had fondled her. He knew the appellant. He called the Police who arrested the appellant. It is his evidence that PW1 was born in 2003. PW2 denied that he asked for money from the appellant's parents.

PW3 PC ESTHER MUTEMU was stationed at the Hola Police station. The case was reported on 6.3.2016. She was informed by PW1 that PW1 was preparing to leave for the bathroom when the appellant entered and told her that he loved her. He started touching her breasts. Shortly her father went home and the appellant left. The matter was reported to the Police and the appellant was arrested.

In his sworn defence the appellant testified that he works at a cyber café. He started working from 7.00am. At 8.30am his assistant also reported at work. At around 11.00am PW1 passed by and greeted them while on the road. At around 11.30am Police went to his place of work and arrested him. He told his parents to follow PW2 and ask him what was the problem. PW2 asked for money from his father. His neighbour Salim Mohamed and Ali Mohamed were at their place of work. Salim Mohamed was selling meat close to where PW2 works. He never left his place of work from the time he reported.

DW2 Ali Mohamed is the owner of the cyber café and the appellant's grandfather. He testified that he usually works at the café during weekends. On 6.3.2016 it was a Sunday and he was at the cyber café. He went to the cyber café at 8.00am. He worked together with the appellant who was doing photocopying while he was doing typing for their customers. He works at the Tana River County Service Board. It is his evidence that from 8.00am to 11.00am the appellant never left the cyber café. Police went to the cafe and arrested the appellant. DW2 never left the cyber café all that time even for a call of nature.

DW3 Salim Mohamed Ali runs a butchery at [particulars withheld] town. On 6.3.2016 he was at the butchery. At around 6.30pm PW2 sent him to call the appellant's son to talk about an issue. PW2 asked for Ksh.70,000 so that the matter could be settled. The appellant's father said he had no money. There were four people when PW2 asked for Ksh.70,000.

DW4 Said S W is the appellant's father. He told the court that his son was alledged to have touched the neighbour's girl. PW2 demanded Ksh.70,000 from him. He told him he had no money.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. The evidence against the appellant is that of the complainant. She testified that the appellant entered their home and started touching her breast and waist. PW1 was 12 years old. She was preparing to go and take a bath. Its not clear whether she had removed her clothes or not. From the evidence on record, it can be presumed that PW1 had her clothes on. Her father went to the house and she opened the gate.

It is the evidence of PW1 that the appellant told her that he loved her. He then started touching her. There was no other eye witness. The court will have to evaluate the evidence of PW1 and make a conclusion. The complainant's father went home and his daughter opened the gate. It appears that PW2 did not suspect anything wrong in his house and went to the toilet. According to PW2 he saw the appellant hiding at the back of his house through the toilet door which had holes.

In his evidence, the appellant testified that he never left his place of work and denied committing the offence. PW2 also told the court that the appellant never left his place of work. The evidence shows that the cyber café where the appellant was working is not far from the complainant's home. According to the appellant, PW1 passed by at 11.00am and greeted them.

Section 124 of the Evidence act allows the court to convict someone charged with a Sexual Offence if the Court finds the evidence of the complainant believable and if the only evidence is that of the complainant. According to the complainant, the appellant followed her when she passed the cyber café. The complainant wanted to scream when her father went in. It's the complainant's evidence that the appellant touched her breasts and waist. He then removed her skirt. It is not clear to me why the complainant did not scream at the very moment the appellant touched her breast. How was the skirt removed. Was it forcefully removed without the complainant resisting or screaming? I do find the complainant's evidence quite unbelievable. If there was no friendship between the two, PW1 could have either screamed or pushed the appellant aside. There is no evidence that PW1 was threatened by the appellant or that the appellant was armed.

Going by the complainant's evidence, it appears that the incident took less than a few minutes. The appellant just touched her, removed her skirt and her father was at the gate. Its not clear whether she put on her skirt and then ran to the gate. PW2 simply ran to the toilet as he had stomach upset. PW1 testified that there were greetings before the appellant left. It appears that PW2 met the appellant in the house and greeted him. It is possible that PW2 asked his daughter about the appellant's presence. The complainant decided to defend herself by saying that the appellant had touched her breast.

Given the evidence on record, I do find that the evidence of PW1 is not believable. It is possible that the appellant sneaked from his place of work and entered the complainant's home. We have to take into account that PW1 was 12 years old. She knew the appellant. The two started talking. However, the evidence that the appellant touched PW1's breasts and removed her skirt is doubtful. The submissions by the state refer to defilement. PW1 did not testify that she was defiled. There was no P3 form or medical evidence produced in court. There was no defilement.

It is not believable that PW1 could be in the house alone and the appellant removed her skirt without screaming. His father could have heard her screams at the gate had she raised alarm. It is also clear that PW1 did not tell her father immediately that the appellant was in the house and had touched her breast. This alledged information came much later. The appellant, according to PW1, left for the cyber café.

This being a criminal case, the prosecution had to prove its case beyond reasonable doubt. There is the evidence that PW2 asked for money from DW4. That evidence is proved as DW3 who was an independent witness was present when the demand for Ksh.70,000 was made. DW3 was sent to call DW4 by the complainant's father. I do find that the prosecution's case was not proved beyond reasonable doubt. If the touching and removal of the skirt was forceful, at least PW1 could have sustained some injuries or her clothes could have been torn. That is not the case.

The upshot is that I do find the appeal merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and Signed at Marsabit this.....day of2017

SAID CHITEMBWE

JUDGE

Dated and Delivered at Malindi this 11TH Day of JULY, 2017

WELDON KORIR

JUDGE