



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA
HCCRA NO. 32 OF 2015
(FORMERLY MERU HCCRA 87 OF 2012)

DENNIS MUREITHI MAKONYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment and conviction of P.M. KIAMA – P.M made on 7/11/2012

in Marimanti Principal Magistrate’s Court Criminal Case No. 1 of 2012).

J U D G M E N T

1. Dennis Mureithi Makonyi, the Appellant herein was on 3rd January, 2012 arraigned before the Principal Magistrate’s Court, Marimanti with the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. It was alleged that on 22nd December, 2011 at Tunyai location in Tharaka South District of Eastern Province, the Appellant intentionally caused his penis to penetrate the vagina of “S N” a child aged 11 years. The Appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. It was alleged that on 22nd December, 2011 at Tunyai Location in Tharaka South District of Eastern Province, the Appellant intentionally touched with his penis the buttocks/breasts/vagina of “S N” a child aged 11 years.

2. The Appellant denied the charges but after trial, he was found guilty of the alternative charge, convicted and sentenced to 10 years imprisonment. Aggrieved by the said decision, the Appellant appealed to this court through the firm of Gatari Ringera & Company Advocates. In the Petition of Appeal filed on 21st November, 2012, it was alleged that the trial court erred in finding that the prosecution had proved its case; that the trial court erred in relying on contradictory evidence, and that the sentence was manifestly excessive.

3. At the hearing of the Appeal, the Appellant’s Advocates did not appear and the Appellant applied and was allowed to conduct his appeal in person in that he was unable to continue retaining Gatari Ringera & Co as his Advocates or to appoint any other Advocate to represent him. In arguing his appeal, the Appellant only prayed that his sentence be reduced. On his part, Mr. Ongige for the state submitted that 10 years is the minimum sentence provided for by law; that the Appellant is entitled to a remission of three (3) years on his sentence. Counsel left it to court to decide whether or not to reduce the sentence. This being a first appeal, this court is enjoined to re-evaluate the facts afresh and draw its own

independent conclusions. **Okeno –v- Republic [1972] EA 352.**

4. The prosecution case was that on 22nd December, 2011, PW2 the mother of the complainant sent her to the poshomill to grind maize for flour at about 4 pm. That when the complainant was returning home with the flour, she met the Appellant on the way who held her by the neck, dragged her to a maize plantation, pushed down his trouser and defiled her. The matter was reported to Marimanti Police Station after which the complainant was examined at Marimanti District Hospital and was issued with a P3 form (PEXh1). Dr. Karanja Mwangi (PW3) produced the P3 form which showed that there was no lacerations or wound on the vagina, but the area was abit swollen. However, there were lacerations on the anus. PW4 and PW5 narrated how the Appellant was arrested on the report of the complainant.

5. In his defence, the Appellant told the court that on the material day, he did not leave the posho mill where he worked the whole day. That he closed the posho mill at 8 pm and stayed at home. He was then arrested on 29th December, 2011 and later charged with the offence he faced before the trial court. He denied knowing the complainant. He alleged that there was a grudge between his family and the area Chief who is related to the complainant's family. DW2 and DW3 were the mother of the Appellant and neighbour, respectively. They told the court that on the material day, there was circumcision celebrations in the home of the Appellant and there were very many people who attended the same. That the Appellant was at the posho mill throughout the day.

6. The trial court found that the main count of defilement was not proved as there was no evidence of penetration. PEXh 1 showed that there were no lacerations or any wound in the vagina and the hymen was still intact. The court found that since there were lacerations in the anus of the complainant, the alternative charge had been proved.

7. Although at the hearing of the appeal the Appellant did not challenge the conviction but only the sentence, this court has nevertheless deemed it necessary to consider all the grounds of appeal. The first ground was that the trial court erred in convicting the Appellant of the offence he was charged with. The record shows that PW1 was consistent in her testimony that it is the Appellant whom she met on her way home from the posho mill. That he was not at the posho mill but his father was. That he grabbed her neck and dragged her to the maize plantation wherein he defiled her. Even on intense cross-examination, she remained firm in her said evidence. On examination, her anus was found to have lacerations, meaning it had been interfered with. According to her, the Appellant had defiled her. In this court's view, the Appellant's defence was not able to dislodge the firm and consistent evidence of the prosecution. Further, this court finds that there was no contradiction whatsoever in the prosecution evidence. In the opinion of this court, the conviction of the Appellant on the alternative charge was proper.

8. As regards sentence, the Appellant complained that the sentence was excessive. He therefore urged the court to reduce the same. The trial court convicted the Appellant to 10 years imprisonment. The sentence was based on Section 11 (1) under which the Appellant was convicted. That section provides:-

“11 (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

It is clear from the foregoing, that a sentence of ten (10) years imprisonment is the minimum sentence imposed by law. Neither the trial court nor this court is given any discretion on the sentence. In this regard, the Appellant having been sentenced to the minimum sentence imposed by law, it cannot be argued that the same is excessive.

9. Accordingly, the Appeal is without merit, the same is hereby dismissed. As regards the Appellant's application that this court reduces the sentence imposed, there is no jurisdiction to do so and the same is declined.

DATED and DELIVERED at Chuka this 12th day of May, 2016.

A.MABEYA

JUDGE

Judgment read and delivered in open court in presence of all the parties.

A.MABEYA

JUDGE

12/5/2016