



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

H.C.CR.A135 OF 2013

BONIFACE MUTETI MUTUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and Sentence of the Principal Magistrate’s

Court at Kangundo by Hon. I.M Kahuya (PM) in Criminal Case No. 24 of 2014

dated 5th April 2013)

(Before E. Ogola J)

JUDGMENT OF THE COURT

1. **Boniface Muteti Mutuku**, the Appellant herein was charged with the offence of **defilement** contrary to **Section 8(1) (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 15th day of July 2012 in **Machakos County**, the Appellant caused his penis to penetrate the vagina of **K M**, a child of 12 years. The alternative charge was one of committing an **indecent act** with the said **K M** contrary to **Section 11 (1)** of the said **Act**.

2. To prove these charges the prosecution called a total of 4 witnesses, the combined effect of whose evidence was that on the 15th day of July 2012, the Complainant (PW1) had been sent to a river by the mother (PW2) when the Appellant called her into his house ostensibly to send to bring him a bar soap. While in the house, the Appellant pulled her to the bed side, removed her underpants and asked her to lie on the bed and then the Appellant inserted his finger into her vagina. Her mother PW2 confirmed the testimony of the Complainant. PW3, a Medical Officer from **Kangundo District Hospital** testified that he examined both the Appellant and the Complainant but found nothing substantial to note except that the complainant had a laceration of the upper edge of the vulva, a wound on one side of the urethra and broken hymen of long standing. The Clinical Officer in cross-examination raised the possibility that the Complainant was sexually active at an early age. He stated that the laceration had been healed and that there was no evidence to suggest that the Appellant had been involved in this offence.

3. The trial court after considering the evidence formed the view that the principal charge had not been proved, and acquitted the Appellant under **Section 210** of the **Penal Code**. The court then proceeded

with the alternative charge of committing an **indecent act** with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**, under which the trial court convicted the Appellant and sentenced him to ten years imprisonment, the minimum length provided under **Section 11 (1)** aforesaid, where the offence is that of indecent act with a child.

4. The Appellant not being satisfied with the said conviction and sentence, has preferred this appeal on the following grounds, that is:

- i. **That the charge was defective.**
- ii. **That the elements of the alternative charge were not proved by independent witness.**
- iii. **That the trial court relied on hearsay evidence.**
- iv. **That the trial court misdirected itself on the ingredients constituting an offence under Section 11 (1) of the said Act.**
- v. **That the age of the Complainant was not ascertained.**
- vi. **That the court disregarded the defence.**
- vii. **That the trial court disregarded the fact that the Appellant was arraigned in court after the period constitutionally allowed.**
- viii. **That the alternative charge was defective.**
- ix. **That the sentence met was manifestly harsh and excessive.**

5. The defence submitted that the evidence adduced was for the main charge, and was not suitable for the alternative charge. The evidence adduced did not establish that the Appellant intentionally touched the vagina of the Complainant with his penis. It was submitted that the trial court convicted the Appellant based on different facts which were that the Appellant inserted his finger into the vagina of the Complainant, and that these facts were contrary to the facts contained in the charge sheet.

6. The defence further submitted that the prosecution failed to determine the age of the Complainant for the purposes of sentencing and that such failure amounts to a miscarriage of justice.

7. In response, the prosecution submitted that the trial court correctly convicted and sentenced the Appellant, and that particulars of the charge sheet different from evidence adduced at trial is no big issue and did not cause any injustice. The prosecution submitted that the **Evidence Act** states that in sexual offences matters, the court can convict on the evidence of the Complainant alone without corroboration. In this case the prosecution submitted that the Complainant was very consistent and her evidence was clear enough to sustain a conviction.

8. I have carefully considered this appeal and the submissions of the parties. I have also reviewed both the evidence and the judgment. I have also considered the grounds of appeal put forth by the Appellant. In my view, the following issues are relevant for a determination:-

- i. **Whether the failure to determine the age of the complainant was a fatal error.**
- ii. **Whether the prosecution had established their case at trial beyond a reasonable doubt.**

9. On the first issue, it is important for sentencing under **Section 11 (1)** of the **Sexual Offences Act** to first determine the age of the Complainant. This is necessary because the minimum sentence provided for an offence under that **Section** is ten years. In the instant case, the defence states that the court did not determine the age of the Complainant, and that such failure is fatal to the prosecution's case. In my view

however, there are several ways of determining age. A court is composed of reasonable people and provided a trial magistrate records the court's impression of age, that would suffice. In the instant case, the Complainant was recorded in the charge sheet to be a child of 12 years. In my view, she continued and remained a child even if she was two or three years above that. If the issue of age was that material at trial, the defence would have raised the same, but it did not. I agree with **Justice Ouko** in **Manguyu-vs-Republic Criminal Appeal No. 28 of 2010(Nakuru)** in which the learned Judge stated as follows:-

“It is instructive to note that a conviction and sentence under Section 8 aforesaid depends on the age of the victim. It is therefore essential that the age be proved beyond reasonable doubt. However, personally I do not subscribe to any requirement that insists that age can only be proved by means of a birth certificate or any other such documentary evidence. If that were to be so, then a good majority of children victims of sexual offense will never get justice as it is common knowledge that such documents are not generally available to the rural or even urban families. In my view, it is enough that the court be satisfied that there is some other evidence proving the age of the victim”.

10. In that regard, it is clear that in the proceedings before the trial court, the age of the Complainant was accepted to fall within the limits of **Section 11 (1)**. It is only where there is a doubt that the issue needs to be proved beyond a reasonable doubt. A court, upon recording its view, in the absence of any documentary evidence, is entitled, for the ends of justice, to take judicial notice of a minor's age and especially so, where there are no reasons to doubt that the Complainant is a minor. However, where there is a doubt, a proof beyond reasonable doubt cannot be avoided.

11. The second issue is whether the conviction of the Appellant was based on evidence proved beyond a reasonable doubt. I have reviewed the evidence at the trial. There are notable discrepancies which raise doubt. The first one is the evidence of **John Mutua** (PW3), who was the Clinical Officer from **Kangundo District Hospital**. He ended his testimony by raising the possibility that the complainant was sexually active at an early age. The lacerations she suffered had healed and there was no evidence to suggest that the Appellant had been involved in the offence. The evidence of PW3 was very important to this case. Firstly, in light of the fact that in her testimony, PW2, the Complainant's mother stated that initially she and the Complainant had decided not to let the father of the Complainant know about what had happened to her, and the parents of the Complainant also tried to seek redress from the mother of the Appellant. When this failed, they then reported the matter to the police and this explains the delay in examining the Complainant by the doctor. The second issue was the defence by the Appellant that there was family feud between the two families. Although the trial court dismissed this defence as an afterthought, the defence was relevant in light of the Clinical Officer's testimony that the Appellant had nothing to do with the offence. The result of this testimony, and the alleged family feud and the late decision to file a complaint with the police all raise a fundamental issue in criminal jurisprudence; the benefit of the doubt. In my view, the testimony of PW3 created a doubt about the Appellant's involvement in the offence, and considering other factors which I have stated above, it is the finding of this court that the conviction and sentencing of the Appellant was contrary to the law as the evidence relied on was not proved beyond any reasonable doubt.

12. Arising from the foregoing the inescapable verdict of this court is that the conviction herein was not safe. I find this appeal has merit. I allow the appeal, the conviction is quashed and the sentence of 10 years is set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

That is the judgment of the court.

Dated and delivered at Machakos this 8th day of September 2016.

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E. OGOLA

JUDGE