



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 23 OF 2014

E A O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original Conviction and Sentence in Criminal Case No.3 of 2012, CMS Court Kericho – Hon. Lilian Kiniale - RM)

JUDGMENT

The Appellant was convicted and sentenced to twenty (20) years 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.

This sentence was later, on revision enhanced to life imprisonment by the High Court.

The particulars are that on the 5th day of January, 2012 between 6.30am and 5.00pm at [Particulars withheld] Estate in Kericho County intentionally and unlawfully caused his penis to penetrate the vagina of V K a child aged five (5) years.

The grounds of appeal can be condensed into one main one. That the conviction was against the weight of the evidence adduced. It is the Appellant's contention that if there was penetration, it was not proved that he is the one who caused it.

Further, that if the alleged victim was his daughter he should have been charged with the offence of incest but not that of defilement.

That the learned trial Magistrate did not appreciate and consider his defence and the fact that his wife bore a grudge against him.

This appeal is opposed. On the issue of a grudge. It is the prosecution's contention that PW1 had testified to the effect that at the time of commission of this offence the parties were in good terms as their disputes had been resolved earlier on.

Examination

The Appellant contends that he was not taken for medical examination so as to ascertain that he was the one who had penetrated the victim.

The Prosecution case is that the Appellant had sexual intercourse with his wife that night and examination would not have yielded positive evidence.

Exhibits

The Appellant contends that the underpants of the victim should have been produced as exhibits but the prosecution's case is that the pants were washed and therefore they could not present evidence supportive of their case.

Statements

The Appellant had submitted that he had not been supplied with witness statements but the prosecution's contention is that though he had requested for them earlier on the proceedings he later participated in the hearing and conducted exhaustive cross-examination of the witnesses an indication that he had been supplied with same.

This is the first appellate court, it has the duty of analysing and evaluating the evidence on record so as to arrive at its own conclusion bearing in mind that it did not have the opportunity of observing the demeanor of the witnesses. *Okeno V. R* 1972 EALR.

The prosecution in the lower court called a total of five witnesses in support of their case. The defence by way of the Accused tendered an unsworn statement.

The learned trial Magistrate in her judgment at page 3 did frame for issues for her determination.

1. Age of the Complainant.
2. Penetration.
3. Whether it is the Accused who defiled the child.
4. Whether case has been proved beyond reasonable doubt.

Age Assessment

The mother of the Complainant did testify to the effect that the child was aged five (5) years. A perusal of the record of proceedings page 14, line 19 gave the date of birth as 20th June, 2007. A clinic immunization card was produced (P. Exh. No.1) which also showed the date of birth as 20th June, 2007. The defilement is said to have taken place on 5th January, 2012 placing the age of the Complainant at five (5) years.

It is also noted that the Appellant has not made age of the Complainant as one of the grounds of appeal.

Penetration

The Complainant's mother had on the 5th day of January, 2012 early in the morning proceeded to pick tea leaving the Complainant and B (a younger child) behind with their father (Appellant). Upon returning at lunch time she noticed that the Complainant was walking with marked difficulties and decided to check her genitals. It was her evidence that upon examination with her neighbour called Judy (PW2), they saw semen and blood and bruises. The child upon interrogation mentioned the father who is the Appellant.

The Clinical Officer who examined the Complainant (PW3) found that both the labia minora and labia majora were bruised and the hymen was broken. She had a whitish-yellowish discharge, spermatazoa seen in her urine, puss cells and a few red cells. He formed the opinion that the broken hymen, bruises on the genitalia (labias) and spermatazoa were suggestive of sexual penetration and intercourse.

Identification

The Appellant maintains that the Complainant was forced to testify against him by the mother. It is

instructive to note that the Complainant was a child of tender years barely five. She was treated as a vulnerable witness but the accused was allowed to ask her questions.

The learned trial Magistrate did observe that the mother of the child had to call her neighbours to witness what had befallen his child and hear from the child as to who had done the act.

PW2 (Judy) did corroborate PW1's evidence. PW1's evidence is that she had left her children under the custody and care of the Appellant who was her husband but upon return at lunch time she did not find him. The Appellant had the opportunity and ample time to commit the offence.

I do not find any good ground or reason to fault the magistrate's finding. The learned Magistrate did also observe that the Appellant was the biological father of the Complainant but he was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act which provides;

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

Section 20(1) of the Act has a proviso to the effect that if the female is under the age of 18 years the accused shall be liable to imprisonment for life.

Either way, therefore, no prejudice was caused to the Appellant as both offences carry the same punishment. On the issue of an existence of a grudge. The Complainant did concede that issues of infidelity had cropped up but these were resolved and at the time of this incident they were staying together and infact she was the one who was housing the Accused as his employment services had been terminated after he was convicted and sentenced to imprisonment for five months. This the Accused did not challenge.

I am satisfied that the main ingredients of defilement age, penetration identification were proved in this case. The conviction was safe and the sentence lawful.

This Appeal has no merit and its dismissed. The conviction and sentence are upheld.

DELIVERED, SIGNED AND DATED THIS 9TH DAY OF NOVEMBER, 2016.

M. MUYA

JUDGE

In the presence of:

1. M/s Mwangi for the State
2. Learned Counsel for the Defence- N/A
3. Emmanuel - court assistant