



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 48 OF 2013**

**JOSEPH HARE MUMBA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(From the Original Conviction and Sentence in Criminal Case No. 820 of 2012 of the Chief Magistrate's Court at Malindi – L. Gicheha, SPM)**

**JUDGEMENT**

The appellant was charged with the offence of defilement contrary to section 8 (1) (4) of the sexual offences act No. 3 of 2006. The particulars of the offence were that the appellant on the 18<sup>th</sup> September 2012 in Magarini District of Kilifi County, intentionally and unlawfully caused penetration of his male genital organ namely penis into a female genital organ namely virgina of BK a girl aged 17 years

The trial court convicted the appellant and sentenced him to serve 15 years imprisonment. The amended grounds of appeal are that the prosecution did not prove its case of defilement beyond reasonable doubt in that there was no proof of penetration and that there was no valid reason as to why the alledged offence was not reported to the police until the expiry of one month. That the trial court relied on the evidence of a single witness and that the appellant's defence which cast doubt on the prosecution evidence was rejected.

The appellant submitted that the evidence of PW7, clinical officer, does not prove any penetration. The only issue relevant in the evidence is that the complainant's hymen was absent. The complainant had no injuries upon examination. There was no spermatozoa seen. According to the clinical officer the complainant was not a virgin. The trial court in its judgment observed that the medical evidence was conclusive but relied on the evidence of the complainant. The evidence does not fulfil the requirement of section 8 (1) of the Sexual Offences Act as there was no proof of penetration. The trial court overlooked the medical evidence.

It is also submitted that the trial court came up with its own findings which was not part of the evidence. The court held that the complainant was willing and went to the appellant after she was promised a present. The prosecution evidence was to the effect that the complainant was forced. The conviction is therefore not safe. The offence was reported to the police station one month later. There was evidence that the appellant was to marry the complainant's sister and since this never occurred that is when the case came up. There was a grudge that led to the case. The appellant further submits that there were some children who were allegedly sleeping with the complainant but they were not summoned to testify. The complainant alledged that she identified the appellant's voice and someone was going to testify to

that effect but no one testified. The complainant also testified that she was given some money but when the other witnesses testified there was no evidence of the money having been given to her mother or grandmother when she reported. The trial court rejected the appellant's defence yet it raised doubt on the prosecution case. A birth certificate was produced and the appellant informed the court that the birth certificate was unsafe.

The state opposed the appeal. Mr. Alenga, prosecution counsel submitted that the appellant was identified by his voice. The appellant and the complainant had sex for two hours and this was sufficient time to identify the appellant. The complainant was a minor who could not have consented to sex. She was lured by the appellant. The medical evidence corroborated penetration. The defence evidence only touched on the differences in the complainant's names.

The record of the trial court shows that seven witnesses testified for the prosecution. PW1 BK was the complainant. She was 17 years old and a class 6 pupil. On the 19<sup>th</sup> September 2012 at about 10.30 pm she was asleep when the appellant went to their house and knocked the door. The appellant is their neighbor. The appellant told her to come out but she declined. He promised to buy her material and make clothes for her. He also said he would beat her if she did not come out. She came out and went with the appellant to his house. They removed their clothes and lied on the bed. The appellant had sex with her up to midnight. They had sex three times. The appellant then escorted her home and gave her Kenya shillings one hundred. He asked her not to tell anyone. She had not had sex before. She did not bleed. She found her sister in the house. Their mother was not there. In the morning she informed her grandmother S K. They decided to wait for her mother who went home in the evening. She narrated to her mother and they informed the village elder Kahaso Ngare and her teachers. The matter was reported to Malindi police and she was referred to Malindi hospital. Her P3 form was later filled. The appellant was later arrested and charged with offence.

PW2 JOSHUA KARISA MUKARE is the village elder of Mwangani village. On the 9<sup>th</sup> December, 2012 at about 9.00 am he was called by the area chief and informed that there was Joseph Hare, the appellant, in the village. He organized a vigilante group and looked for the appellant. They found him in a shop belonging to another young man. The appellant's village is over 10 kilometers from Mwangani village. They took the appellant to Marereni police station. PW3 KARISA CHARO is a member of community policing. He got information that the appellant was in the village and he informed PW2. They looked for the appellant and managed to arrest him.

PW4 K M is the mother to the complainant. She testified that PW1 was born on 13<sup>th</sup> February, 1995. On 19<sup>th</sup> September, 2012 at about 11.00 am she went home and found PW1 who appeared unwell. A neighbor, Sidi (PW5) went to her home and informed her that PW1 was not in the house at night and the other young children had gone to her place. She gave the children a place to sleep. She asked PW1 where she was that night and she told her that the appellant had forced her to go to his home and he had defiled her. The appellant then gave her one hundred shillings and promised to buy her material. PW4 went to inform the village elder and also reported to the headmaster. The matter was then reported to the police. The appellant was arrested on 9<sup>th</sup> December 2012. She used to see the appellant after the incident but did not talk to him. The appellant was a friend to her fourth born child by the name N. They wanted to marry. PW1 is her sixth born child.

PW5 S K is a neighbor to PW4. On the 18<sup>th</sup> September 2012 at about 10.00 pm three children namely D, B and F went to her home. The children had been left with PW1 who was about 18 years old. The children told her that PW1 had left the house. She showed the children a place to sleep. In the morning she went to PW4's house and found PW1. She asked her where she was that night and PW1 told her that she was at home. PW5 decided to wait for PW4. PW4 went home and they talked to PW1. PW1 informed them that the appellant had taken her out of the house at about 10.00 Pm and defiled her. The matter was reported to the village elder.

PW6 Corporal ROTUS ARAP SANG was attached to Marereni police station. On 20<sup>th</sup> October, 2012 he was assigned the case to investigate. He recorded witness statements and noted that PW1 was born on

13<sup>th</sup> February 1995. The appellant had disappeared after the incident but was arrested in December. The appellant was charged with the offence.

PW7 IBRAHIM ABDULAH I was a clinical officer. Was stationed at the Malindi hospital. On 30<sup>th</sup> October, 2013 he examined PW1 and filled the P3 form. PW1 had no injuries and no spermatozoa was seen on examination. PW1 was not a virgin and he signed the P3 form.

In his unsworn defence the appellant testified that he is a carpenter. The case against him was not true and that the complainant took a false birth certificate.

The issue for consideration is whether the prosecution proved its case beyond reasonable doubt. The appellant contends that the prosecution did not prove its case beyond reasonable doubt. The facts of the case show that the appellant is a neighbor to the complainant. They definitely knew each other. It is the complainant's evidence that she was in their home at about 10.30 pm when the appellant knocked and asked her to come out. She was reluctant but the appellant promised to buy her material and also threatened to beat her. She went out, met the appellant and went to his house. They had sex three times.

The evidence of PW5, S K is to the effect that the complainant had been left with three other children. On 18<sup>th</sup> September, 2012 the other children went to her place at night as the complainant was not at home. PW5 gave them a place to sleep that night. There is then the evidence of PW7, the clinical officer who confirmed that PW1 was defiled.

The appellant did not say much in his defence. He is a carpenter and it is his evidence that the complainant took a false birth certificate.

The evidence does prove that PW1 went out of their house on the material night. PW5 had to stay with the other children at her place that night. It is PW1's evidence that she was at the appellant's place up to midnight. The appellant did not explain where he was that night. The defence evidence does not raise doubt on the evidence of PW1 and PW5. It is PW1's evidence that she went with the appellant to his house. She was given Kshs.100/=. The fact that the money was not given to PW4 or PW5 does not disprove PW1's allegations.

The evidence proves that PW1 knew the appellant. Even if it was at night she knew the appellant's house. She also recognized his voice. They had sex three times and this proves that she had contact with the appellant. It cannot be said that she had sex with a stranger. I am satisfied that she had sex with the appellant.

PW1's age was proved. The clinical card was produced. It shows that PW1 was born on 13<sup>th</sup> February, 1995. She was 17 years in September, 2012. She was below the age of consent. The evidence shows that the appellant lured her into his house. She did not behave like an adult who was ready for sex. Her naivety led her into the appellant's hands.

The appellant contends that the offence was reported after a period of one month. That does not disprove the evidence on record. There is no provision under the law that defilement cases must be reported within a certain given period or that if there is no spermatozoa then there is no defilement. Sometimes defilers use condom and no spermatozoa is found. It also depends on the time taken to have the victim taken for medical examination. The evidence has to be taken in totality and not in isolation.

Given the evidence on record, I do find that the appellant lured PW1 into his house and had sex with her. PW1 was under the age of 18 years. There was no grudge between the appellant and PW4's family. The case took place and is not made up. PW1 was defiled. She was promised clothing material and money. The appellant knew PW1 was still a minor. He was a friend to PW1's sister as per the evidence. The appellant's lust made him lure PW1 to his bed. I do find that the prosecution did prove its case beyond reasonable doubt.

In the end, the appeal lacks merit and is hereby disallowed.

**Dated and delivered in Malindi this 15<sup>th</sup> day of November, 2016**

**S. J. CHITEMBWE**

**JUDGE**