REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 176 OF 2013

ANTHONY MUSEE MATINGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*From the judgment in Kyuso Principal Magistrate's Criminal Case No. 7 of 2013*

***delivered on 28/09/2013 – B. M. Mararo PM*)**

JUDGMENT

The appellant was charged in the subordinate court with defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 7th March 2006 at [particulars withheld] Village in Mwingi District of Kitui County intentionally caused his penis to penetrate the vagina of MM a child aged 7 years. In the alternative he was charged with indecent act with a child contrary to section 11 (1) of the same Act. The particulars of offence were that on the same day and place intentionally touched the vagina of MM a child aged 7 years with his penis. He pleaded not guilty to both counts.

After a full trial he was convicted on the main count of defilement. He was sentenced to serve life imprisonment. He has now come to this court on appeal. He filed his initial petition of appeal on 19th December 2013. However on 6th November 2014 he filed an amended petition of appeal as well as written submissions. He relied on the later petition of appeal and the written submissions. He abandoned previously filed hand written submissions.

Learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that the charge sheet was drawn by citing Section 8 (1) (2) instead of section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. In counsel's view that was a defect which was curable under section 382 of the Criminal Procedure Code. Counsel submitted further that the appellant also participated fully in the trial by cross examining witnesses. Therefore it cannot be said that he did not understand the complaints against him. On ground 2 of appeal, counsel submitted that the appellant had not indicated the law that was violated against him.

Counsel submitted that penetration was confirmed by the evidence of the doctor. In effect therefore defilement was committed. Counsel further submitted that the prosecution witnesses corroborated each other, and that there were no contradictions alleged by the appellant.

Lastly, counsel submitted that the sentence was not excessive. Counsel asked this court to uphold both the conviction and sentence.

At the trial, the prosecution called 6 witnesses. PW1 was the complainant. She stated that she was 13 years of age and a standard six pupil. She was sworn. It was her evidence that on 7nd March 2006 at midday she was at home with her sister PW2. The appellant then came and told them to accompany him to go and cut tree branches. At the gate, however the appellant told the sister to go back. The appellant then proceeded on with PW1 into the bush where he sat on a stone, removed his trousers and her pants, and had sexual intercourse with her. When she started crying he stopped. He then he wore his trousers and told her to go home. On arrival at home she narrated the story to her sister PW2 called M. The sister (PW2) gave the story to her grandmother and the grand mother went to the appellant's fathers house with her brother. Later the mother of the complainant was informed and the issue was reported at Kyuso Police Station. She was cross examined. She stated in cross examination that she was not couched to say what she was saying. She denied the existence of a grudge.

PW2 was the sister by the name M M. She also started that she was in Standard 6 and aged 13 years. She testified on oath. She stated that on 7th March 2006 while at home with PW1, the appellant came carrying a panga and told them to assist him cut fencing branches. They left together but at the gate the appellant instructed her to go back home and proceeded on with PW1. When PW1 later returned home, she told her that the appellant had defiled her. This witness then told the grand mother PW3 who examined the complainant. They went to the appellants father with her brother. The grandmother then washed PW1. Later PW1 was taken to hospital. She was cross examined and confirmed that the grandmother washed the complainant. She denied the existence of a grudge.

PW3 M M was the grandmother of PW1 and PW2. It was her evidence that on the day in question she had gone to grind maize. On return home, M M (PW2) informed her about the incident. She went to the appellant's home with a brother of the complainant called J. When asked about the incident, the appellant denied committing the e offence. He did so in front of his father. According to this witness the mother of the complainant came the next day and reported the incident to the police.

PW4 E K M was the mother of the complainant. It was her evidence that she came back from Mombasa on 8th March 2006 at 5pm. She was informed that the complainant had been defiled by the appellant. She slept at home after examining the child. On the 9th March 2006 she searched for the assistant chief but did not get him. On 10th March 2006 she reported the incident to the chief who referred them to the police. On 11th March 2006 they reported the incident to Kyuso Police Station and were referred to hospital. The accused was arrested. They got a P3 form for the complainant. She denied the existence of a grudge.

PW5 Reuben Murithi was a Clinical Officer who produced a P3 form on behalf of Eunice Kiema a colleague who was on study leave. The findings were bruises on the labia majora and labia minora and swelling on the vaginal walls. There was no blood discharge but there were pus cells in the urine. The injury detected was classified as harm. In cross-examination he stated that there was no penetration and that the appellant could not penetrate a child of that age.

PW6 was PC Julius Sunguti the investigating officer. It was his evidence that on 11th March 2006 a report was made at Kyuso police station. It was booked. The accused was later arrested and charged with the offence.

When put on his defence the appellant gave unsworn testimony. He stated that he worked as a herdsman for a man called Philip Matinge. That on 7th March 2006, as he was going home at 5.30pm, he saw the complainant's grandmother go to talk to his father. His father summoned him and he explained where he had been that day. The girl or complainant did not say anything. The next Sunday the Assistance Chief came and arrested him at 2pm.

The appellant called one defence witness DW2 who was his father M M. It was his evidence that the maternal grandmother of the complainant went to his house and made a report on the incident. He told them that they meet the next day because it was at night. When he checked the alleged scene he did not see any footprints. The next day, he told the grandmother to take the child to the scene to check if there footprints and there was none. The child was not talking. According to him, there was a grudge. He also

stated in cross examination that there was no stone at the alleged scene.

Faced with the above evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The court thus convicted and sentenced him.

This is a first appeal. As a first appellate court I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. This is a case of defilement. The burden is on the prosecution to prove three elements beyond reasonable doubt. Firstly they have to prove the age of the complainant. Secondly they have to prove penetration. Thirdly the prosecution has to prove that the accused is the culprit.

I have perused the record. Though it is stated in the list of exhibits that a birth certificate was produced for the child the record does not show that PW4 E K M (the mother) produced a birth certificate of the complainant. She merely identified the P3 form which was marked for identification. In addition, there is no single witness who testified regarding the age of the child. It was only PW1 the complainant who was recorded as having stated that she was in Standard 6 and was 13 years old. She was sworn before she testified in evidence. Somewhere during her testimony, she stated that she had a birth certificate which was filled by E K on 20th March 2006. The said birth certificate was however merely marked for identification and not produced.

In my view, there is a serious contradiction the evidence on age of the complainant, that leads me to the conclusion that the prosecution did not deal with age of the complainant with sufficient seriousness. A person who is in primary Standard 6 cannot be 7 years of old as alleged in the birth certificate. It will also not be expected that a magistrate would allow such a person to tender evidence on oath and be cross examined as happened in the present case. In my view, in light of these major doubts on the evidence on the age of the complainant, the prosecution should have taken a further step by medically examining the complainant for her actual age. They did not do so. In effect this court cannot say that the age of the complainant was established. The court cannot also say that the complainant was below the age of 18 years. She could as well be over 18 years. On that account the appeal will succeed.

With regard to the element of penetration, there is no evidence at all that there was penetration. The medical evidence tendered by the Clinical Officer PW5 Reuben Muriithi as well as the contents of the P3 form do not indicate any penetration. The Clinical Officer specifically stated that there was no penetration. The contents of the P3 form also say that the hymen was intact. Though there were bruises or swellings on parts of the vagina of the complainant, one has to be mindful of the fact that such bruises could be caused by factors other than sexual activity. Besides, the complainant was taken to hospital four days after the incident. It would thus be difficult to connect the injuries with the actions of the appellant. I find that penetration was also not proved.

With regard to the appellant being the culprit, in my view, the evidence was not sufficient to establish that he was the culprit. The evidence against the appellant was that of children PW1 and PW2. The allegation is that the appellant took the complainant to a place where there was a stone, sat down on the stone, and committed the offence. There is no evidence however, that the police visited the scene of crime to see where the stone was.

The appellant and his father alleged the existence of a family grudge. The incident was not reported to the authorities immediately. Neither the chief or sub chief or the police visited the scene. No description of how it was possible for the appellant to do what he was alleged to have done at that site was given. In addition to this the brother of the complainant who accompanied the grandmother of the complainant (PW3) to the homestead of the appellant's father was not called to testify. In my view he was a very crucial witness. No explanation was given by the prosecution on why they failed to call him to testify. In my view all these gaps lead to only one conclusion, that the appellant could not be said without doubt to be the culprit who defiled or attempted to defile the complainant, even assuming that such incident occurred.

In these circumstances therefore, I hold that the prosecution failed to prove their case against the appellant

beyond any reasonable doubt. I thus allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 5th day of March, 2015

GEORGE DULU

JUDGE

In the presence of:-