



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HCRA NO. 138 OF 2010

S M K.....APPLICANT

VS

REPUBLIC RESPONDENT

JUDGEMENT

S M K was convicted of the offence of committing a Sexual Assault contrary to Section 5(1) (a) of the Sexual Offences Act No. 3 of 2006, by the Senior Resident Magistrate, Meru and was sentenced to life imprisonment. He had been charged with an offence of incest contrary to Section 20 (1) of the Act and in the alternative, he was charged with the offence of committing an indecent act contrary to Section 11 (1) of the Sexual Offences Act. He denied that he defiled his own daughter.

The appellant filed this petition dated 14/5/2010 challenging both the conviction and sentence. Later, he hired Mr. Ondari Advocate to represent him. Counsel filed an amended petition of appeal dated 6/2/2015 which only contained two grounds of appeal, which are as follows:

- 1. (a) That the Learned Senior Resident Magistrate relied on contradictory evidence to arrive at the conviction;**
- (b) That no sufficient medical test was provided by the prosecution and that the prosecution evidence was insufficient and unreliable and could not sustain a conviction.**

He therefore urged the court to allow the appeal, quash the conviction and set aside the sentence.

Mr. Kiogora, who argued the appeal on behalf of Mr. Ondari reiterated the grounds and added that in the last paragraph of the judgement, the trial court agreed with the Counsel that there was no proof of penetration and he relied on the decision of **FREDERICK WADIA MASANJU V REPUBLIC MSA CRA 204/2012**.

The appeal was opposed. Mr. Mulochi, Learned Counsel for the State argued that the complainant is the appellant's daughter and identification was not an issue; that she clearly narrated what happened to her and the Doctor, PW2 confirmed that there was penetration. Counsel argued that the prosecution evidence was consistent and reliable and the appeal should be dismissed.

This being a first appeal, this court is duty bound to subject the evidence to a fresh examination so that it can be able to arrive at its own independent findings both on fact and the law. See **KIILU & OTHERS V REPUBLIC (2005) 1KLR 174**.

The complainant M. M. (PW1) was a minor. She told the court that she was born in 1998 and was therefore about 9 years at the time the offence was committed. The court recorded that it had examined her and found her to understand the meaning of the oath and she was therefore sworn. On the first day she attended court, while in the middle of her testimony, she was unable to proceed and was stood down. She identified the appellant as the father; that she was living with her grandmother because her mother had gone back to her parents' home; that her father lived on his own but far from the grandmother; that she sometimes visited the father in the company of her brother Antony who was older than her. She recalled that the last time she visited her father's house, her father collected her from her grandmother's house on a Friday, leaving her brother behind. She said that they slept on same bed with the father on Friday and Saturday night and on Sunday night, the father removed her pant and did bad things to her. She said that he **“inserted two “fingers in her thing for urinating and then took his thing for urinating and inserted into my thing for urinating”**. Next day, she was not able to go to school and later, her brother came for her. On the next day when she went to school, she told Mrs. G, her English teacher, what had happened. She was later taken to police station where her statement was recorded and then taken to Kibirichia Hospital. PW1 told the court that after her ordeal at her father's hands she never told her grandmother or her brother because she feared that they would report her to the father.

Dr. Issac Macharia (PW2) was the Medical Officer of Health, Meru District Hospital. He examined PW1 on 1/8/2007 and formed the opinion that there was penetration of PW1 because the hymen was perforated and there were lacerations on the genitalia. The girl had been treated at the [particulars withheld] Health Centre.

PW 3, A M is a teacher at [particulars withheld] Primary School where PW1 was a pupil and is PW1's class teacher. She said that she noticed that PW1 was absent from class on 30/7/07, a Monday, and called the brother A, to enquire where she was and was informed that the father had collected her from her grandmother's house on Friday and she had not returned. PW3 found PW1 in class on 31/7/07 and on questioning her for missing school, she started crying. Later on, she called PW1 to the staff room at break time for a follow up; that PW1 told her that the father had defiled her; PW3 reported to the head teacher and they took the child for examination at [particulars withheld] Health Centre where it was confirmed that she had been defiled. They were referred to Subuiga Police Station where they made a report, recorded statements and on 1/8/2007, she was taken to Meru Hospital for further examination.

PC Peter Maluki (PW4) of Subuiga Police Station told the court that he recorded the report from PW1 and PW3 on 1/8/2007 and that PW1 was referred to Meru Hospital. He went to the suspect's home, did not get him, but he was found at the Market on 2/8/07. PW4 then preferred these charges against the appellant.

When called upon to defend himself, the appellant testified on oath that indeed the complainant is his daughter but he denied having committed the offence; that on 29/7/07, he spent the whole day in the garden, and in the evening he went to relax at the shops; that PW1 was at the house of D K, his neighbor; that PW1 went there at 4.00 p.m. and never returned till Monday and that his son A picked PW1 from D's home and went back to her grandmother's home; that he was arrested on 1/8/2010. He denied that his children ever spent nights in his house but just visited. He said that the teacher had a grudge against him because she failed to issue him with a receipt for the money he had paid.

I have carefully considered all the evidence on record. There is no dispute that the complainant is the daughter of the appellant. He admitted that fact.

The testimony of the complainant was very clear. She told the court as follows:

“my father and I were sharing the one bed there was. We slept, my father did bad things to me. He inserted two fingers into my place of urinating. I do not know what it is called.. He then took his thing for urinating and inserted it into my thing for urinating. I did not look to see how it looked like”.

In her judgement, the trial magistrate observed that:

”...she did not seem hesitant in her narrative at all, after she opened up on her second day of testifying. No evidence was given for her to try and frame up her father”.

The appellant also told the court that PW1 is a truthful girl and that she was only misled to tell the court untruths about this incident. The trial court was impressed by PW1’s demeanor, that she was truthful. The trial court had an opportunity to see her and I have no reason to find otherwise.

The complainant, who was a child aged about 9 years gave evidence on oath and was cross-examined at length and her testimony in my view was not shallow. She told the court that the father picked her up from her grandmother’s house and took her to his on a Friday. Even though the grandmother and her brother were not called as witnesses, I find her testimony to be truthful. To some extent, it was corroborated by the evidence of PW3 who noticed that PW1 was not in class and enquired from the brother who informed her that PW1 had gone to the father’s house for that weekend. By then, PW3 had not known what had happened to PW1. Although the appellant denied that the children ever went to sleep at his house yet he admitted that PW1 had gone to his neighbour’s house, one D K. It means she had gone to visit him. The appellant had Counsel and yet not once was any question put to PW1 about the said D.

Dorcas was mentioned for the first time during the defence. The court allowed the defence time to call this D as a witness but she never came. By then, the appellant was on bond and there was no reason why he could not get Dorcas to come to testify. Even if D exists, I do not believe the defence that PW1 was at D’ house from 29th till 30th. Why would the appellant leave PW1 at D’ house on a Monday, and not question why she had not gone to school? The defence is an afterthought and unbelievable. I find that the complainant was at the appellant’s house for the days 26th-30th July, 2007 and the appellant had the opportunity to commit the offence.

The appellant told the court that the complainant is a truthful girl and that she had been advised to lie against him. In his defence he then claimed that PW3 had a grudge against him and when pressed in cross-examination, he stated that it is because he had paid some money to PW3 and she declined to issue a receipt. Like the other allegation of PW1 having been at D’ home, this allegation of a grudge was raised for the first time during the defence. The appellant had an opportunity to put these questions of the alleged grudge to PW2 when she testified but he never did. In his defence PW3 would not have a chance to respond to the allegation. That allegation of a grudge with PW2 is an afterthought and unbelievable.

Counsel argued that there was no penetration because in cross-examination, PW1 in answer to a question by Counsel, said that she never parted her legs even when the appellant lay on her. In her evidence-in-chief, she had told the court that the appellant had on the first two days put his fingers in her genitalia but on Sunday, he inserted his thing for urinating into hers though she did not look at it. PW2’s evidence confirmed that there was penetration of PW1 because her hymen was perforated and there were lacerations on her genitalia. If indeed the court were to believe that PW1 never parted her legs during the ordeal, then it would mean that even penetration with fingers would not have been possible. The court appreciates that PW1 was examined about 2 days on 1/8/2007 after the incident, so that even if there had been a sexual act between PW1 and the appellant, the presence of evidence of spermatozoa would have disappeared.

The onus still rested on the prosecution to prove beyond any doubt that the appellant took part in a sexual act with his daughter, PW1. There was indeed evidence of penetration of PW1 but in light of her evidence that she did not part her legs, the court cannot say how the appellant penetrated PW1, was it with his genitalia or the fingers? For that reason, I will agree with the judgement of the trial magistrate that the appellant committed an offence of sexual assault on PW1. Section 5 (1) reads:

“Any person who unlawfully –

(a) penetrates the genital organs of another person with -

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault."

I confirm the conviction under Section 5(1) (a) (1) of the Sexual Offences Act, 2006 as read with Section 186 of the Criminal Procedure Code. PW1 was a child aged 9 years and in my view the court was right in sentencing the appellant to life imprisonment. The sentence is legal and lawful. In the end, I dismiss the appeal both on conviction and sentence.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JUNE, 2015.

R.P.V. WENDOHO

JUDGE

PRESENT:

Mr. Mulochi for State

Faith, Court Assistant

Mr. Omari for Appellant

Appellant, Present