REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 11 OF 2014

BETWEEN

PETER MORARA....…..... APPELLANT

AND

REPUBLIC …..... RESPONDENT

(Being appeal from the conviction and sentence of Hon. L. Komongoi PM

dated 23rd April, 2010 in the original Kisii Criminal Case No. 451 of 2009.)

JUDGMENT

1. The appellant 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 which were that on the 7th day of July 2009 at [particulars withheld] Sub-location in Nyamira District of Nyanza province intentionally and unlawfully by use of his genital organ namely penis caused penetration to genital organ namely vagina of Z K P a girl aged 15 years old.

2. He faced on alternative charge of indecent Act with a child contrary to Section 11(i) of the Sexual Offences Act No.3 of 2006 the particulars of which were the particulars of which were that on 7th day for July 2009 at [particulars withheld] sub-location in Nyamira District of Nyanza province unlawfully and indecently assaulted Z K P by touching her private parts namely vagina.

3. He pleaded not guilty to the said charges, was tried convicted and sentenced to 20 years imprisonment. Being aggrieved by the said conviction and sentence he filed this appeal and raised the following grounds:-

> 1. The learned trial magistrate erred in law and infact in convicting the appellant on the basis of the violence that was full of contractions and devoid of analysis.
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> 2. The learned trial magistrate erred in law and in fact in failing to consider the evidence adduced by the appellant in his defence.

3. The learned trial magistrate erred in law and in fact in failing to appreciate the fact that the state failed to call the complainant's parents particularly the father whom she said had sent her for sugar from the shop shortly before the time of the commission of the alleged offence.

4. The learned trial magistrate erred in law and infact in basing her conviction on a p3 form that was contradictory on material facts.

5. The learned trial magistrate erred in law and infact in relying on the p3 form produced by the clinical officer who in the light of section 48 of the evidence Act is not an expert in law.

6. The learned trial magistrate erred in law and in fact in convicting the appellant on the evidence that was in realm of hearsay.

7. The learned trial magistrate erred in law and in fact in failing to give the appellant the benefit of doubt in the circumstances where the benefit of a doubt to have been given to the appellant.

4. When this appeal came up for hearing, Mr. Nyamwanga advocate appeared for the appellant while Miss. Boyon appeared for the state and opposed the same.

SUBMISSIONS

5. It was submitted by Mr. Nyamwanga that the appellant was convicted on the basis of contradictory evidence of the prosecution witnesses as regards to the place where the complainant was defiled . It was his submission that whereas the complainant Pw1 testified that she was defiled at the bridge, the investigating officer's evidence was that it was in the bushes.

6. It was further submitted that an material witnesses including the complainant's father and two people who escorted the complainant home were never called to testify and the court was urged to make an inference that their evidence would have been adverse to the prosecution case.

7. It was submitted by Miss. Boyon for the state that the evidence of Pw1 was corroborated by that of pw2 and Pw3 who found her at the bridge after the appellant had defiled her. It was submitted that Pw4 confirmed that the complainant had been defiled. It was further submitted that the sentence of 20 years was sufficient taking into account the age of the complainant.

8. This being a first appeal, the court is required to reassess the evidence tendered before the trial court though taking into account the fact that it did not have the advantage of seeing and hearing witnesses.

9. Pw1's evidence was that on 7/7/2009 she was sent to the shop by her father at 6.00p.m. On the way back she met the appellant whoms he knew at the bridge who held her neck removed her clothes and defiled her. When he heard people talking he left her and stood up.

10. This evidence was confirmed by Pw2 Gilbert Gichana Mariko who found the complainant with the appellant. When they asked Pw1 why she was crying she told them that the appellant had defiled her and when the appellant heard her telling them what he had done the appellant ran away. This evidence was corroborated by Pw3.

11. Pw4 Maina James Bogonko a clinical officer attached to Nyamira subdistrict hospital examined the complainant and confirmed that she had a grab marks on the posterior aspect of the neck her age was assessed as 15 years old. Her vaginal walls were bruised, hymen not intact with whitish discharge sticky from the vulva . He formed an opinion that penetration had taken place. Pw5 PC David Uka received the report from the complainant and her father, issued her with P3 form and took statements from the witnesses while pw6 Kennedy Naphtal arrested the appellant.

12. When put on his defence the appellant stated that in July 2009 at about 5.00a.m. He was woken up by police officers and he thought it was due to land dispute he had at home. It was his evidence that the charge was a fabrication due to the land dispute between him and the complainants father.

13. From the proceedings herein the following issues have been identified for determination:

(a) whether the complainant was defiled by the appellant.

(b) whether the prosecution case against the appellant was proved beyond reasonable doubt.

14. The fact that the complainant was defiled is not in dispute. This was confirmed by the evidence of Pw4 the doctor who examined the same. The complainant was able to identify the appellant by name and her evidence was corroborated in material particularly by Pw2 and Pw3 both who found her with the appellant at the bridge. They both knew the appellant and the complainant and therefore there is no possibility of mistaken identity.

15. I am therefore not persuaded by the submission by Mr. Nyamwage that the two witnesses who escorted the complainant home were never called to testify and as submitted by Miss. Boyon there was no need to call the complainant's father as a witness as his evidence would have been hearsay.

16. As regard the appellants defence I have noted that the appellant did not put the same to the pw1 in cross examination and further it is pw2 and pw3 who reported the matter to the complainants father. If the appellant had a dispute with the complainant's father then his evidence that he did not know the complainant cannot stand.

17. I therefore find and hold that the prosecution case against the appellant was proved beyond reasonable doubt and his conviction was safe I would therefore dismiss the appeal on conviction.

18. On sentence under section 8(1) (3) a person convicted for defilement of a child between the age of twelve and fifteen is liable to imprisonment for a term of not less than twenty years. I have noted that the appellant was given the minimum sentence available under the said section while the court had taken not of the fact that the offence was prevalent in the area and therefore called for a deterrent sentence.

19. I would therefore not interfere with the said sentence which cannot be termed as excessive or unlawful.

20. In the final analysis I find no merit on the appeal herein which I hereby dismiss.

Delivered, signed and dated at Kisii this 2nd day of July 2015.

J. WAKIAGA

JUDGE

In the presence of:

Mr. Mojale for the state.

Mr. Kaburi for Nyamwange advocate for the appellant.