



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO.85 OF 2011

(From original conviction and sentence in Kilifi SRM criminal case no.105 of 2010 by Hon. A. M. Obura)

D K APPELLANT

VRS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with the offence of attempted defilement contrary to section 9 (1) as read section 9(2) of the Sexual offences Act no.3 of 2006. The particulars of the offence were that the appellant on 1st December 2010 at [Particulars withheld] area in Kilifi District of the Coast Province attempted to cause penetration of his genital organs namely penis into the genital organs of S N J a child aged 14 years.

The appellant was convicted and sentenced to serve 10 years imprisonment. The grounds of appeal are that no P3 form was produced, that section 36(1) of the Sexual offence Act was not complied with, that there was no age assessment report and that no exhibit was produced. The appellant further contends that his alibi defence was not considered. The appellant filed written submissions and pleads with the court to consider the period he has served in prison. He is a first offender and should be given a fresh start in life.

The record of the trial court shows that six witnesses testified for the prosecution. **PW1 S N J** was the complainant. She testified that the appellant is her cousin. On 1/12/2010, she was asleep at her grandmother's home together with other children when the appellant sneaked through the roof and started undressing her. He caressed her and held her by the mouth asking her not to shout. The appellant had a torch. He pushed aside K who was sleeping with her on the same bed. PW1 screamed and the other children in the room came out. The appellant ran away. The matter was reported to the police. The appellant was arrested after some time. It is her evidence that the appellant had never seduced her. The appellant had no shirt but had a short.

PW2, J S is PW1's niece. She was called while at Vipingo and informed of the incident which occurred at [Particulars withheld]. She went there and made a report to the police. **PW3, Josephine Changawa** is a neighbour. She heard noise on 1st December 2010 at about 3.00 a.m. she went out and found a crowd. She was told that the appellant wanted to rape PW1. The appellant was not there. The appellant then went to the scene but denied the allegations. PW3 decided to make phone calls to the concerned parents.

PW4, P. C. Henry Kiplagat was based at Jaribuni A. P. Post. On 4th December, 2010 he was sent to arrest the appellant. They did not find him at home. Later on 6th December 2010 he was called and informed that the appellant had been arrested by members of the public. **PW5, C S** was aged 13 years. He was sleeping in the same room with PW1 but on a different bed. His evidence is that he saw the appellant climbing through the roof while having a torch. It was dark. The appellant went to PW1's bed and pushed K aside. He then started undressing PW1. PW1 screamed and they all went out of the room. People gathered outside. The appellant later went there claiming that he had gone to the shops to buy cigarettes. No shop was opened at that time. PW5 knew the appellant.

PW6, Corporal Cosmas Kanyi was based at the Kilifi Police Station. He investigated the case that had been reported at the station on 4/12/2010. He caused the appellant to be charged with the offence.

In his sworn defence, the appellant testified that he is a farmer. He knows nothing about the allegations. His evidence is that on 28/11/2010 a woman by the J wanted to borrow money from him. He had no money. She accused him of being stingy. He was arrested on 6/12/2010 by strangers and taken to Jaribuni A. P. Camp. He was later charged with the offence. He knows PW1 and had no grudge with her.

The main issue for determination is whether the prosecution proved its case to the required standard. The main evidence is that of PW1 and PW5. It is clear that the alleged incident occurred at night. It was dark and the two witnesses were asleep. According to PW1, she knew the appellant who is a cousin. It is her evidence that she recognised his voice and asked her to speak in low tones. She saw the appellant had no shirt on but had a short. It is the evidence of PW1 that the appellant had a torch. She was able to identify the appellant. PW5 testified that he saw the appellant as he climbed over the ceiling. The torch was on. He knew the appellant.

The defence evidence is that the appellant did not commit the offence. It is the evidence of PW3 and PW5 that when a crowd gathered after the screams, the appellant went there alleging that he had gone to buy cigarettes from the shops. PW5 estimated the time as midnight while PW3 who is an adult stated that it was about 3.00 a.m.

Given the evidence on record, I do find that an attempt was made to defile PW1 who was 14 years old. PW1 and PW5 knew the appellant. Although the incident occurred at night, both witnesses were able to identify the appellant. The appellant talked to PW1 and she was able to identify him by his voice as well. The defence evidence did not raise doubt on the prosecution case.

Since there was no defilement, there was no P3 form filled. The grounds of appeal that no P3 form or exhibit were produced are misplaced. PW1 was not taken to hospital. The same applies to the contention that section 36 of the Sexual Offences Act relating to examination of samples or specimen was not complied with. There were no specimen to be examined.

From the evidence on record, I do find that the prosecution proved its case beyond reasonable doubt. The appellant was positively identified. It was the appellant who attempted to defile PW1. The sentence imposed is the minimum sentence. The appeal lacks merit and is hereby disallowed.

Dated, signed and delivered at Malindi this 8th day of October, 2015.

SAID J. CHITEMBWE

JUDGE