



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
HIGH COURT CRIMINAL APPEAL NO. 12 OF 2014

S M S.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence in Kisii CMCR NO. 231 of 2013) (Hon. A.C.A. Ong'injo C.M.)

JUDGMENT

1. The appellant, **S M S**, appeared before the Chief Magistrate at Kisii facing a charge of defilement, contrary to **Section 8(1)** read with **Section 8(3) of the Sexual Offence Act** in that of the night of 2011 and **21st February 2013**, at [particulars withheld] **Sub-location Kisii South District** defiled **S V N**, a child aged twelve (12) years.

There was an alternative count of committing an indecent act with the same child contrary to **Section 11(1) of the Sexual Offences Act**.

2. After a full trial, the appellant was convicted on the main count and sentenced to twenty (20) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds of appeal contained his petition filed herein on the **19th February 2004**.

At the hearing of the appeal, the appellant presented written submission which he fully relied on. He urged this court to allow the appeal and set him free.

3. The learned prosecution counsel, **Ms. Boyon**, opposed the appeal on behalf of the state/respondent and submitted that the prosecution case was proved beyond reasonable doubt as the evidence presented by the five (5) prosecution witnesses was credible. That, the complainant (pw1) presented credible evidence showing that she was indeed defiled by the appellant and her evidence was duly corroborated by that of her mother (pw2) and the clinical officer (pw3).

4. The learned prosecution counsel further submitted that in totality the evidence by the prosecution pointed a finger at the appellant as the culprit who took advantage of the complainant being her foster father. That, his conviction by the trial court was proper and the sentence meted upon him was lawful. The learned prosecution counsel urged this court to uphold the conviction and sentence and dismiss the appeal for want of merit.

5. In response to the foregoing submissions by the state/respondent, the appellant submitted that he was convicted on evidence which was contradictory in that the name of the complainant as appears in the charge sheet and the court's proceedings is different and that whereas the clinical officer (pw3) indicated that he examined the child two (2) days after the incident, her mother (pw2) indicated that she took the child to the doctor one day after the incident.

The appellant contended that he was convicted on evidence which was not availed in court and that the medical examination form (p3) did not show how the complainant was injured.

6. Having considered the grounds in support of the appeal in the light of the rival submissions by both the appellant and the respondent, the duty of this court was to re-consider the evidence and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witness (**see, Okeno vs. Republic (1972) EA 32 and Achira .vs. Republic (2003) KLR 707**).

7. In that regard, the case for the prosecution was briefly that at the material time, the complainant **S V N** (pw1), was aged **twelve (12) years** and **standard three (3)** pupil at **[particulars withheld] Primary School** in **[particulars withheld]** village. She lived with her mother, **T K** (pw2) and her father (the appellant) at a place called **[particulars withheld]** and on the material night at about 9.00p.m., the appellant arrived home while intoxicated. He chased away the complainant's mother while armed with a panga. He then proceeded to defile the complainant on the floor of their house after having tored her dress and forcefully removed her underpants. He warned her not to tell her mother.

8. Her mother returned home on the following day and was informed that she (complainant) and her father had left to go and buy milk. Upon her return, she (complainant) reported the incident to her mother who then took her to **Suneka Ap camp** where a formal report was made.

APC Moses Mogou (Pw4), received the necessary report and in the company of his colleagues proceeded to **Suneka Township** where they found and arrested the appellant whom they took to Gesonso Police Station.

9. The complainant was referred to Kisii South District hospital where a medical examination was conducted on her by a clinical officer, **Edmond Oyunge Ratemo (pw3)**, who complied and signed the necessary p3 form (p.ex1) confirming that the complainant was indeed defiled.

Cpl. Rachel Ayabei (pw5), investigated the case and in the process recorded necessary statements and obtained a clinical card (Pex2) showing that the complainant was born on the **28th November 2001**. He later charged the appellant with the present offence.

10. The defence case was a denial and contention that the appellant was arrested on the **21st February 2013** while at his place of work in a hotel without being told the reasons for the arrest. He had left his place of work on the previous day at 7.30 p.m. to proceed to a funeral ceremony where he kept vigil upto 5.45a.m. after which he left for work.

11. He contended that the complainant's mother had side issues and had all along wanted to leave. He did not know that she had been married elsewhere when he took her for his wife. He was surprised that she discriminated the children between those belonging to her and those belonging to him. His family members did not testify in court and the complainant's clothes alleged to have been torn were not produced in court. Besides, there was no evidence from the clinical officer of a broken hymen.

12. From all the foregoing facts, it was clear that there was no substantial dispute that the complainant was defiled. Indeed, the complainant's own evidence coupled with that of the clinical officer (pw3) proved beyond reasonable doubt that the complainant was sexually offended by being penetrated through her sexual organ by a male sexual organ.

13. Signs of a broken hymen and injuries to the complainant's genitalia as stipulated in the medical examination report (p3 form) provided adequate evidence in establishing defilement which is essentially

an act which causes penetration with a child. Penetration being simply the partial or complete insertion of the genital organs of a person into the genital organs of another person.

The clinical card (P.Ex2) showed that the complainant was born on **28th November 2001**, meaning that she was 12 years old at the material time hence a child.

14. The issue that clearly presented itself for determination by the trial court was the identification of the person who sexually offended the complainant.

The appellant denied responsibility but the evidence by the complainant in that regard implicated him. He implied in his defence that he was not at the scene of the offence when it occurred as he was keeping vigil at a funeral ceremony. However, the complainant's evidence placed him at the scene at the material time. He was not a stranger to her. They lived together as he was the husband to her mother. There was nothing in her evidence to suggest that she maliciously implicated him on her own or in conspiracy with her mother.

15. The learned trial magistrate found the complainant's evidence to be credible and although it stood on its own with regard to the identification of the appellant as the offender, it could be relied upon for a proper conviction of the appellant without the necessity of corroborative evidence regard being given to the provision to **Section 124** of the **Evidence Act**.

16. This court is satisfied that the evidence against the appellant was adequate and credible it establishing not only the material ingredients of the offence of defilement but also the criminal responsibility of the appellant in relation thereto. His conviction by the learned trial magistrate was therefore sound and proper.

17. With regard to the sentence of twenty (20) years imprisonment imposed upon the appellant, **Section 8 (3)** of the **Sexual Offences Act** provides that:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

The minimum number of years that the appellant could receive upon conviction was twenty (20). The sentence imposed by the learned trial magistrate was thus lawful.

18. In his oral submissions, the appellant alluded to evidence which was contradictory and contended that the trial court relied on such evidence to convict him. However, the contradictions alluded to were immaterial for purposes of watering down the strong prosecution case against him.

In sum, this appeal is devoid of merit and is hereby dismissed in its entirety.

J.R. KARANJA

JUDGE

[Delivered and signed this 3rd day of December 2015].