



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 118 OF 2012

(An appeal against both conviction and sentence of the Chief Magistrate's court at Kakamega in Criminal Case No. 1409 of 2011 [M. I. G. MORANGA, MRS. PM] dated 23rd May, 2012)

JOSEPH SHITAVAI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with defilement of a girl contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of charge were that on the 1st of July, 2011 at [particulars withheld] in Kakamega District within Western Province unlawfully and intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of E V a girl aged 12 years. In the alternative, he was charged with indecent act with a child contrary to **Section 11 (1)** of the same Act. The particulars were that on the same day and place, unlawfully and intentionally contacted his genital organ namely penis into the genital organ namely vagina of E V a girl aged 12 years.

He denied both charges. After a full trial, he was convicted on both counts and sentenced to serve 20 years imprisonment on each count. The sentences to run concurrently.

Being dissatisfied with the decision of the trial court, he has appealed to this court on several grounds. At the hearing of the appeal, he was represented by Mr. Onsando advocate. Counsel made submissions in support of the appeal. The learned Prosecuting Counsel, Mr. Oroni, conceded to the appeal. In his view, the age of the complainant was not proved. There were also contradictions in the evidence of the prosecution witnesses.

I have re-evaluated the evidence as I am required to do in a first appeal. See the case of **Okeno vs Republic [1972] EA 32**. I take note of the fact that the State concedes to the appeal.

The Prosecution called three witnesses. One was the complainant who testified as PW1. The second was the mother of the complainant who was PW2 L A. The third witness was a Clinical Officer, PW3 Joseph Maloba. The complainant stated that she was defiled by the appellant on two different days. She did not report the two incidents to anybody. It is the evidence of the prosecution that another old woman told the mother of the complainant, about the incident. That woman was not called by the prosecution to testify in court. Besides, she was said to have been informed about the incident by another young man, who was also not called to testify. No explanation was given for the failure by the prosecution to call these two crucial witnesses.

The Clinical Officer, PW3 merely stated that the hymen of the complainant had been broken. There was no evidence that the breaking of the hymen was recent or that it was connected with any action by the appellant.

The appellant gave sworn testimony in his defence, and stated that the case was a frame-up. Before tendering his sworn defence, he had cross-examined prosecution witnesses seriously. He claimed that there was an existing grudge between the complainant's mother PW2 and his employer, due to a misunderstanding over milk. The appellant was employed as a herdsman for a neighbouring woman of PW2.

Besides the above, in the judgment, the learned trial magistrate noted doubts on the credibility of the complainant, PW1. She stated as follows -

“I note the only witness is PW1 and I caution myself on her evidence. Although a young girl of 12 years of age as evidenced on the Clinic card produced, she gave a vivid and clear testimony of the twin events of 1st July, 2011 and 8th July 2011 in which the accused defiled her. I must confess I found rather too intelligent and eloquent for her age a quality one hardly notes in girls her age especially when faced with such a situation.”

The magistrate nonetheless went ahead to find that the complainant was telling the truth because she answered questions without hesitation while maintaining eye contact with the appellant.

In my view, the observation on the credibility of the complainant by the magistrate was a doubt whose benefit should have been given to the appellant. The demeanour of the complainant showed that she was either older than the age stated, or she was coached or both. It is noteworthy that there was no medical evidence tendered to establish her actual age. Therefore if the magistrate found her testimony to be of extra ordinary mature, that would show that she was much older than alleged in the charge sheet. The benefit of that doubt should have been given to the appellant.

Secondly, the appellant had maintained that the charges were a frame-up. He gave sworn testimony, after seriously cross-examining the prosecution witnesses. From the evidence, I find that it was highly probable that the complainant was coached. That is why she was overconfident and gave unusually intelligent and eloquent evidence for a girl alleged to be 12 years of age. The benefit of that doubt should also have been given to the appellant.

It is trite since the decision in English case of **Woolmington -vs- DPP [1932] AC 462** that the burden is always on the prosecution to prove an accused person guilty beyond any reasonable doubt. Once a reasonable doubt is created, either by the prosecution or by the defence, the benefit of the same should be given to an accused. The consequence is always that the said accused has to be acquitted on the basis of the existence of such reasonable doubt.

I wish to state lastly, that the learned trial magistrate erred in convicting both on the main count and alternative count. An alternative count is an alternative. A court can convict either on the main or the alternative count, not both at the same time.

The learned prosecution Counsel has conceded to the appeal. In my view, he was right to do so. I find that the appeal has merits. I allow the appeal, quash the convictions and set aside the concurrent sentences. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered this 6th day of March, 2014

George Dulu

J U D G E