



IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO 109 OF 2012

REUBEN MUOKI MULEIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 42 of 2011 by Hon J.K. Karanja, PM on 17/11/2011)

JUDGMENT

1. The Appellant was charged with the offence of defilement of a girl between the age of **12** that **15** years contrary to **Section 8(3)** of the **Sexual offences Act No. 3 of 2006**.

Particulars thereof being that on the **23rd** day of January, 2011 at *[particulars withheld]* village, **Mutambuku Sub-location** in **Mbooni East District** of the **Eastern Province** unlawfully caused penetration with his male genital organs to **M M** a girl aged **13** years.

2. In the alternative, the appellant was charged with indecent assault contrary to **Section 11(1)** of **Sexual Offence Act No. 3 of 2006**.

Particulars thereof being that on the **23rd** day of **January, 2011** at *[particulars withheld]* Village, **Mutambuku Sub-location** in **Mbooni East District** of the **Eastern Province** unlawfully indecently assaulted **M M** a girl aged **13** years by touching her private parts.

3. He was tried, convicted on the alternative count and sentenced to serve ten **(10)** years imprisonment.
4. Being dissatisfied with the conviction and sentence he appeals on grounds that;-

- i. The learned trial magistrate erred both in law and fact in failing to appreciate that the matter was premised on a defective charge.
- ii. **Section 214** of the **Criminal Procedure Code** was not complied with which was prejudicial.
- iii. **Sections 85 (2)** and **88 (1)** of the **Criminal Procedure Code** were not complied with.
- iv. The evidence adduced was contradictory, inconsistent and uncorroborated.
- v. The case was of mistaken identity.

5. According to the evidence adduced by the prosecution, on the **23rd January, 2011**, PW1, **M M** was with three (3) others girls. They were from the river. They encountered a young man sitting

- under a tree. He asked them if they had seen a girl called **N**. They answered in the negative. On reaching home she went to the farm. The same person held her hand and pulled her towards the river. He removed her underpants and had sex with her. She cried. Her younger sister found her. They went home. **N** told her mother. When confronted she denied knowing who had defiled her. The accused was arrested at the market place. On cross-examination she denied knowing the person who defiled her.
6. **PW2, Daniel Musyoki** a nursing officer at **Kalawa Health Centre** examined the complainant. She had no injuries. Her genitalia was normal, there were not tears or bruises on the vagina. The vagina and cervix were intact. The urinalysis done revealed she had pus cells in the urine. He also examined the appellant. He had no injuries but the urinalysis done had pus cells which was evidence of urinary tract infection.
 7. **PW3, N M** was subjected to *voire dire* examination by the court. She did not know her age. The court formed an opinion that she could not appreciate the importance of an oath. She stated that she found her sister and the appellant lying on each other. **M's** clothes were lowered but both had upper clothes on.
 8. **PW4, S K M**, the mother of the complainant received the report from **PW3**. She went home and asked the complainant who said she could only identify the person by facial appearance. She however said the boy was from **Mulei's** home. To her knowledge there were two (2) boys at the home of **Mulei**. On seeing one of them she called **PW3** who said he was not the one. While on their way to the kiosk she saw another boy whom she identified. He was arrested.
 9. **PW6, N M**, a cousin to the complainant said she found her crying. She told her that **Kaloki** had taken her to the river and beaten her. It was further her testimony that as they returned from the river they saw **Kaloki** standing by the side of the road.
 10. In his defence the appellant, a 22 years old casual worker stated that on the material date he went to church. The service ended at 3.00pm. He went to the market and had lunch at the hotel. Thereafter he went for a fundraising which ended at 7.00pm. While on his way to the market he was arrested. The mother of the complainant claimed he was guilty of defilement. He alleged that he had a disagreement with the mother of the complainant when her goats trespassed onto their land and destroyed pawpaw plantation.
 11. This being the first appeal, I am duty bound to reconsider the evidence adduced in the lower court, analyze it and come up with my own conclusions bearing in mind that I neither saw nor heard witnesses who testified. (See ***Okeno versus Republic [1972] E.A. 32***).
 12. In reaching his finding the trial magistrate observed that following the evidence of the clinical officer there was no penetration therefore the charge of defilement could not be proved.
 13. However, he observed that since both the complainant and appellant had urinary tract infection, it could indicate that there was contact of their genital organs which could have been passed from one person to the other. He stated that it was circumstantial evidence. He disbelieved the complainant when she stated that she had been defiled since according to **PW6** she told her that the appellant had beaten her.
 14. In opposing the appeal, the learned State Counsel, **Mr. Mukofu** argued that conditions that favoured identification were positive. The complainant and **PW3** identified the appellant. He stated that there was some interference with the complainant's vagina even if there was no penetration.
 15. In her testimony the complainant talked of a young man they found sitting at a tree holding a phone. He talked to them. Thereafter he purportedly defiled her. He denied knowing his name. In court on cross-examination she stated:-

“ ... I do not know the person I met on the road. I do not know the person who raped me.”

16. **PW3's** age was not given. The court stated that she was a child of tender years, who did not appreciate the importance of oath. She gave an unsworn statement. Being a child of tender age it could be presumed that she was below 10 years old. (See ***the Children's Act, Section 2***). This was the child who said the person was called **Kaloki** according to her mother's testimony. Her evidence required some corroboration that was lacking.
17. The trial court believed that the infection was circumstantial evidence. It has been stated that

circumstantial evidence must be closely examined before basing a conviction on it. In *Teper versus Republic [1952] AC at page 489* Lord Normand said;-

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another... it is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”.

18. Urinary tract infection may be caused by bacteria or germs. They may be of different types like urethritis, cystitis or pyelonephritis. The clinical officer said both the appellant and the complainant had pus cells which were indication of urinary tract infection but he did not classify what type each had. It was also not stated when exactly each one of them contracted it. It could therefore not be said with certainty that the infection was as a result of the contact as stated by the trial magistrate.

19. With regard to the charge, it reads;-

“Indecent assault of a girl contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 (Act)”

Section 11(1) of the Act states;-

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years”

20. There is no offence of indecent assault provided for by the section. Looking at the particulars of the offence it is stated that :-

“... unlawfully indecently assaulted Muthini Mboya a girl aged 13 years by touching her private parts.”

21. To be guilty of committing an indecent act with a child would mean the action of the culprit caused some contact of the part of his body with the genital organs, breasts or buttocks of the other

22. PW6 said the complainant told her the accused had beaten her. The complainant said she was defiled but medical evidence proved her wrong. She did not identify the appellant as the person who did bad things to her as she stated.

23. There is indeed inconsistency in evidence that does not prove the charge of indecency.

24. In the circumstances it was a misdirection on the part of the trial court to have reached a finding of guilt on part of the appellant. The conviction reached cannot stand.

25. In the premises the appeal succeeds. The conviction entered is quashed and sentence imposed set aside. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 12TH day of JUNE, 2014.

L. N. MUTENDE

JUDGE