REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 110 OF 2012

A K ……..........……………………………………. APPELLANT

V E R S U S

REPUBLIC …………………………………………….. RESPONDENT

(Appeal arising from the judgment of [S. N. ABUYA, P.M.] delivered on 15.5.12 in the Principal Magistrate's Court Butali in Criminal Case No. 617 of 2011)

J U D G M E N T

The appellant was charged with the offence of defilement contrary to **section 8(1)** of the Sexual Offences Act No. 3 of 2006. The particulars were that the appellant *on the 20.9.2011 in Kakamega North District within Western Province, intentionally and unlawfully caused his penis to penetrate the vagina of J S a child aged 7 years.*

The appellant being 14 years old was convicted of sexual assault and sentenced to three years' probation. The grounds of appeal are that the conviction is against the weight of the evidence on record, the prosecution did not prove its case, the evidence was contradictory, the offence the appellant was convicted was not on the charge sheet and that the court erred by dismissing the defence and also shifted the burden of proof. Mrs. Muleshe, counsel for the appellant submitted that there was no evidence on the charge of sexual assault. PW1 testified that she was pricked using a stick. The evidence of PW4 a clinical officer did not corroborate that of the complainant. PW4 analyzed the injuries as defilement. No investigation officer testified. There was no alternative charge. The appellant was only charged with defilement.

Mr. Ngetich, State Counsel, opposed the appeal. Counsel submitted that PW1 testified that the appellant pressed her with a stick. The medical evidence was in support of the PW1's evidence. PW4 was of the view that the penetration could have been caused by any other object other than a penis.

Before the trial court PW1 testified that she was a class Two pupil at [particulars withheld] Primary School. On the 20.9.2011 her mother had taken a child to Sabatia Eye hospital. She was sleeping at about 6.00 a.m. when the appellant went there and slept on her. He pressed her with a stick at her vagina and she started bleeding. It was a Cyprus tree stick. She was later taken to Malava hospital and was issued with a P3 form. She knew the appellant who was in class six at that time. She was with other children who had already gone to school. **PW2 S S M** testified that on the 29.1.2011 he went home and was told that PW1 had been pricked by the appellant. He took the child to Malava hospital. **PW3 P L** is the mother of PW1 and wife of PW2. She testified that on the 20.9.2011 she took her child to Sabatia Eye clinic and stayed there until 22.9.2011. When she came back she found PW1 complaining about stomach pains. On 28.9.2011 PW1 informed her that it was the appellant who had pricked her with a stick. It is her evidence that the appellant was the child of her neighbor. **PW4 KIZITO SIFUNA** was a clinical officer based at Malava district hospital. He attended to PW1 on 29.9.2011. PW1 was aged 7 years old and her hymen was torn. He concluded that PW1 had been defiled. He further testified that the hymen can be torn with any other object apart from the penis.

The appellant was put on his defence. In his unsworn evidence, he testified that he was a class 8 pupil at [particulars withheld] Primary School. He was 14 years old. He denied committing the offence. **DW2 F M** is the mother of the appellant. She testified that the appellant never slept with girls. He sleeps with his two old brothers. On the 20.9.2011 at 6.00 a.m. he was at home and she never heard any screams. She

had woken up early to milk her cows. She denied that her son defiled the complainant. **DW3 J I K** is the father of the appellant. He testified that on the 20.9.2011 at 6.00 a.m. he was at his home and heard nothing about the incident. The appellant had gone to school by 6.00 a.m. The complainant normally goes to school at 6.30 a.m. as her school is near. Whenever his neighbour's children go to sleep in his house the girls sleep with his daughters. He denied that his son defiled the appellant.

The trial court evaluated the evidence and found that there was no defilement but sexual assault. From the evidence on record it is established that PW1 was sexually assaulted. She knew the appellant as they were neighbours. There is evidence that at times the complainant and her sisters would sleep in the appellant's home. The incident occurred in the morning. PW1 knew the appellant and she testified that he slept on her and pricked her using a stick. The defence evidence by the appellant did not raise doubt on the prosecution evidence. DW2 and DW3 did not witness the incident. The trial court believed the evidence of PW1. That evidence was corroborated by the evidence of PW4. Although the investigating officer did not testify, the P3 form showing the injuries sustained by the complainant was produced by PW4. Counsel for the appellant maintains that PW4's evidence related to defilement whereas the evidence of PW1 showed that there was no defilement. According to PW4 there was penetration on PW1 as her hymen was torn. That penetration could have been caused by any other object other than a penis. There is no contradiction between the evidence of the two witnesses.

It is contended that the appellant was convicted of an offence he was not charged with. The law allows the trial court to make such a finding and there is nothing unlawful. The trial court found that the evidence proved sexual assault and convicted the appellant on that offence. That is in line with the law. When an accused is charged with the offence of murder but the evidence proves manslaughter, the court can convict the accused on the lesser offence of manslaughter. There is no requirement that there must be an alternative charge of the offence the accused is convicted of.

Given the evidence on record, I am satisfied that the prosecution proved the case of sexual assault as held by the trial magistrate. The conviction is proper. The defence evidence did not raise any doubt on the evidence of PW1 and PW4. I do find that the appeal lacks merit. The same is hereby disallowed.

Delivered, dated and signed at Kakamega this 14th day of October 2014

SAID J. CHITEMBWE

J U D G E