



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 196 OF 2010

FRANCIS MAINA KAMAU.....APPELLANT

versus

REPUBLICRESPONDENT

(arising from the judgment of Hon. F. Kombo Senior Resident Magistrate Mukurweini in Criminal Case No. 172 of 2008)

JUDGMENT

1. The Appellant was charged with the offence of defilement of a girl contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on 23rd day of October 2007 in Nyeri District within Central Province committed an act which caused penetration with SWM a girl aged 4 years.
2. He faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act no. 3 of 2006 the particulars of which were that on 23rd day of October 2007 in Nyeri District within Central Province unlawfully and intensionally touched the private parts of SWM an indecent act which she could not have allowed.
3. He pleaded not guilty, was tried convicted on the main charge and sentenced to life imprisonment. Being aggrieved by the said conviction and sentence he filed his appeal and raised the following grounds in his home grown grounds of appeal.
4. ***a. the life sentence imposed by the trial court is harsh, excessive and illegal.***
5. ***b. Being unrepresented he was not accorded fair trial.***
6. When the appeal came up for hearing before me, the appellant who was unrepresented filed amended grounds of appeal and written submissions which he relied upon, Mr. Cheboi appeared on behalf of the state and opposed the appeal.
7. **SUBMISSIONS**
8. It was submitted on behalf of the appellant that the prosecution evidence was inconsistent and materially contradictory. It was submitted that P.W.1 contradicted the evidence of P.W.2, P.W.3 and P.W.5. It was submitted that P.W.1 in her evidence stated that she felt pain on the waist and not within or around her vagina and therefore her evidence could not sustain conviction.
9. It was further submitted that the defence of the appellant which was consistent and well corroborated was never taken into account and that the same was only identified at the dock but not at the scene of the attacker.
10. Mr. Cheboi for the state submitted that P.W.1 testified that she met the appellant who took him to the river and defiled her. This was confirmed by P.W.2 the clinical officer and P.W.3, P.W.4 and P.W.5 and that the appellant disappeared for six months after the offence.
11. This being a first appeal, the court is required to reassess the evidence tendered and to come to its

- own conclusion though taking into account the fact that it did not have the advantage of hearing and seeing witnesses.
12. It was P.W.1's evidence that on the way from school she met the appellant alone he told her to follow him to see the river where he defiled her. The appellant thereafter told her not to say anything on what had happened. On the way she met Ngure, Mama Njoki and her mother who examined her private part and took her to the hospital. Under cross examination she stated that the appellant told her he was called Mwangi.
 13. P.W.2 PW testified that the complainant was aged six years. On material day she did not come home by 6.00 pm. So she went to look for her when she met Joyce Wahito with the complainant and when they examined her she noted that she had been defiled. P.W.3 Joyce Wahito Gichane stated that she found the complainant with Mercy Nyambura at 6.00 pm and when she inquired from her what had happened she pointed to the appellant and that the complainant was unable to walk.
 14. P.W.4 Mercy Nyambura Ngari testified that on the material day she met the appellant and slightly thereafter met the complainant crying who pointed to the appellant. P.W.5 Dr. Kimani Samuel Mwangi produced the P3 form filed by Dr. Macharia confirming the age of the complainant as 4½ years and confirmed that she had been defiled. P.W.6 confirmed that the appellant went into hiding and was arrested after six months at Kiwamururu village where he was employed as a shamba boy.
 15. When put on his defence the appellant gave unsworn statement and stated that on 23rd October 2007 he left home for the shamba and went to look for nappier grass until 11.00 am. He later on returned home since he was unwell and remained in the house for two days. He therefore went to look for work at Kiwamururu area until 30th October 2008 when he was arrested. D.W.2 Mary Wambui Maina the appellant's wife testified that her husband was arrested on 23rd October 2007 and that she was surprised since she was with him the whole day. D.W. 3 Bernard Mwangi Kamau also confirmed that he was in his house around 11.00.
 16. In convicting the appellant the trial court had this to say.
 17. ***“According to the prosecution evidence, the accused was seen by Joyce Wahito (P.W.3), Mary Nyambura (P.W.4) and also the child (P.W.1) who identified him in court..... the evidence also shows that the accused 'disappeared' after the incident.”***
 - 18.
 19. From the proceedings herein, I have identified the following issues for determination.
 20. ***a) Did the prosecution prove their case against the appellant as required.***
 21. ***b. Was the sentence passed harsh and excessive.***
 22. From the evidence tendered it is clear that the appellant was placed at the scene by P.W.1 who pointed him out to P.W.4 who had met the appellant before he met P.W.1 crying. This was at 6.00pm. P.W.3 identified P.W.1 to P.W.4 and when she was asked what had happened she pointed to the appellant who was still within the area and upon examining her private part together with P.W.2 they confirmed that she had been defiled the fact which was confirmed by P.W.5.
 23. It is therefore clear that the appellant was properly identified and that after the incident the appellant disappeared and was arrested after six months whereas in his defence he stated that he was arrested on 23rd October 2008. I therefore find that the appellant conviction was safe and would therefore dismiss the appeal as lacking merit.
 24. On the sentence, section 8(2) of the Sexual Offences Act provides that
 25. ***“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”***
 - 26.
 27. Evidence was tendered to prove that the complainant was at the time of defilement aged 4½ years and therefore the sentence passed by the trial court was lawful and not excessive.
 28. I would therefore dismiss the appellant's appeal on sentence.

Dated, signed and delivered at Nyeri this 15th day of October 2014.

J. WAKIAGA

JUDGE

Court: Judgment read in open court in the presence of the appellant and Mr. Njue for the state. The appellant has 14 days right of appeal.

J. WAKIAGA

JUDGE