REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 204 of 2009

KK……..……..…...……...… APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(Being an appeal from the conviction and sentence of E Juma Osoro SRM delivered on 5/11/2009 in Kitui Principal Magistrate Criminal Case No. 847 of 2009)

(Before B. Thuranira Jaden J)

J U D G M E N T

The Appellant, **KK,** was charged with the offence of defilement contrary to **section 8 (1) (3) (7)** of the **Sexual Offences Act No. 3 of 2006.**

The particulars of the offence were that on the 13th day of July 2009 at about 2.00 p.m. at (Particulars withheld) village, (Particulars withheld) Sub-location, (Particulars withheld) Location in **Kitui** District of the **Eastern** Province had carnal knowledge of **MM** a girl aged 12 years.

In the alternative, the Appellant was charged with the offence of indecent Act with a child contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 13th day of July 2009 at about 2.00 p.m. at (Particulars withheld) village, (Particulars withheld)sub-location, (Particulars withheld) Location in **Kitui** District of the Eastern Province, committed an act of indecency with **MM** a girl aged 12 years by touching her private parts namely vagina.

The Appellant pleaded not guilty before the lower court. After a full trial, the Appellant was convicted and sentence to twenty years imprisonment.

The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-

Ø **The complainant's evidence was not corroborated.**

Ø **No clothes were produced as exhibits.**

Ø **There was variance between the charge sheet and the evidence in relation to the date of the offence.**

Ø **The Appellant was not examined by a doctor.**

Ø **The Appellant was not given an opportunity to defend himself.**

Ø **The sentence was harsh.**

During the hearing of the appeal, the Appellant relied on his written submissions which essentially reiterate the grounds of appeal. The Appellant emphasized the issue touching on the complainant's medical tests and stated that he was not examined by a doctor. The Appellant also stated that he had not been paid for the five months that he said he had worked for the complainant's family.

Mr Mwenda, the State Counsel appeared for the State. He was opposed to the appeal. He referred the court to the evidence on record and stated that the prosecution case was proved beyond reasonable doubts and that the sentence was within the law.

This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences – *See* **Okeno –vs- Republic (1972) EA 32**.

The prosecution case is that on 13/7/2009, the complainant, **MM,** a twelve year old girl arrived home from school. The complainant's mother had taken a sick child to hospital and the father had gone to work. The Appellant who was the family's domestic worker served her and her sibling with lunch.

The Appellant thereafter sent the complainant to go and drive the donkey home. The complainant went uphill to where the donkey was. While she was there, the Appellant came and closed her mouth with the hand and held her by the neck. The Appellant pushed her to the ground after removing her biker and underpants. The Appellant unzipped his trouser and inserted his genital organs in her private parts. After the Appellant was done the complainant went home without her underwear which got lost in the process. The complainant who was in pain took a shower.

The complainant later reported the matter to her mother although the Appellant had warned her that he would kill her if she told anybody.

The matter was reported to the police and the complainant taken to (Particulars withheld) **Hospital** for examination and treatment.

PW1 **Martin Njue** the Clinical Officer who treated the complainant confirmed that the complainant had been defiled and was HIV positive.

After investigations the Appellant was arrested and charged with the present offence.

In his defence the Accused gave unsworn evidence and called two witnesses. The Appellant described himself as a farmer who plants vegetables for sale as well as being a farm labourer. He gave his age as seventeen years. The Appellant stated that this case is a frame up by the complainant's mother. He stated that he had gone to the market to meet the complainant's mother who turned up with the two people who arrested him. He was then escorted to the police station and subsequently charged with the present offence which he denied. One **SK** (DW2) and **KM** (DW3) and the Appellant's mother and father respectively testified as defence witnesses. The evidence of DW2 and DW3 is that the Appellant had worked for the complainant for five months without pay and they denied that the Appellant had committed the offence herein.

The trial magistrate believed the evidence of the complainant and in her judgment observed as follows:-

"The accused was well known to PW2 (complainant). The offence was committed in broad daylight

hence I am satisfied that the complainant positively identified her attacker. The complainant gave evidence in detail on the attack. The evidence is corroborated…"

On my part I have re-evaluated the complainant's evidence and I am in agreement with the conclusion of the trial magistrate reached.

The complainant (PW2) gave sworn evidence. The trial magistrate had carried out a *vore dire* and was satisfied the minor who was twelve years old understood the meaning of oath. The complainant narrated to the court how the Appellant sent her to where the donkey was, only to pounce on her and defile her. The complainant gave details of how the Appellant pushed her down, removed her underwear then inserted his genital organs into her private part. The complainant's evidence showed that she previously haboured no ill will against the Appellant and infact stated that the Appellant used to play with her a lot.

PW1 the Clinical Officer who treated the complainant confirmed the absence of hymen and stated that the complainant contracted HIV virus from the sexual assault. The evidence of the Clinical Officer confirmed that there was a sexual assault. Whether the complainant had a history of previous sexual encounters is a possibility due to the presence of the HIV status referred to. The same logic could apply to the absence of the hymen. All the same, whether the complainant was HIV positive or whether she had lost her virginity prior to the material date or not is neither here nor there as her circumstances did not rob her of her right nor to be defiled again. Subjecting the Appellant to a HIV test at the time of arrest may also not have made any difference to the prosecution case in the circumstances of this case. Producing any clothes as exhibits would also not have made any difference. In any case, the complainant's evidence is that she lost her underpants during the ordeal.

In addition to the evidence of the complainant and that of the Clinical Officer, the evidence of the mother PW3 **BLM** establishes that the complainant told her about the defilement on the following day. The mother was not in on the day of the defilement. What the complainant told the mother then is consistent with the complainant's evidence in court.

The evidence of PW4 **P.C. MA** confirmed that a report was made to the police on 16/7/09 and investigations commenced.

Although the Appellant gave his age as 17 years old, the age assessment report dated 30/10/2009 ordered for by the trial court confirmed that he was above 18 years of age. Infact the parents of the Appellant (DW2 and DW3) confirmed that he was twenty years old. **Section 8 (7)** of the **Sexual Offences Act** was therefore not applicable when it came sentencing.

Although the Appellant stated that he was framed up by the complainant's mother due to differences over payment for work done, the evidence on record has established that the complainant was defiled. The mother to the complainant could not have made up the actual defilement. The complainant gave evidence that was believed by the trial court and which evidence this court has not faulted in any way. There was no question of mistaken identity as the offence took place in broad daylight and the complainant knew the Appellant.

Although both parents of the Appellant (DW2 and DW3) denied that the Appellant committed the offence, during cross-examination each of them stated that they were not at the scene at the material time and could tell what had transpired there.

I am also satisfied the Appellant's conviction was based on sound evidence. I found no variance between the particulars of the offence and the evidence.

I am satisfied that the Appellant was accorded the opportunity to defend himself and he even called two witnesses.

The trial magistrate in her judgment did not specifically state whether the accused was convicted of the main count or the alternative count. However, looking at the sentence of twenty years imprisonment and

taking into account the evidence on record, it is clear that the conviction is for the main count under **section 8 (1) (3)**.

Section 8 (3) of the **Sexual Offences Act** provides for imprisonment for a term of not less than twenty years. The sentence was therefore within the law.

Consequently, the conviction and sentence under section 8 (1) and (3) of the Sexual Offences Act is upheld. The appeal has no merits and is dismissed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **9th** day of **May** 2013.

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JUDGE