



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 22 OF 2012

ANTHONY BWIRE APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 3764 of 2008 of the Chief Magistrate's Court at Mombasa – **Hon. Kizito - SRM**)

JUDGMENT

The Appellant **ANTHONY BWIRE OJIAMBO** was Convicted and Sentenced to twenty (20) years imprisonment for the offence of 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 are that on the 7th day of December, 2008 at [Particulars withheld] village Changamwe in Mombasa county he caused his penis to penetrate the vagina of F. K. a girl aged fifteen (15) years.

In the lower court the prosecution called seven witnesses. The Complainant testified as PW 6 and stated to have been defiled at about 7:30 pm by the appellant whom she had met on her way to buy fish. He had threatened to kill her while holding a knife and took her to a building under construction and which was uninhabited and proceeded to defile her by inserting his penis into her vagina and anus and thereafter let her go when he was called by a lady. She told the Court that she did not bother to carry or put on her clothes and that she left her underpants and blouse in the appellants house from where they were later recovered and taken as exhibits.

PW 1 had testified that she had seen one L. W. send her sister-in-law F. K. to buy fish and when she delayed she called her by phone but it was not being responded to but it was later answered by one M. M. who informed them that the Complainant had been defiled.

At page 13 line 26 PW 1 proceeds to state,

“Later the Complainant told me that the Accused took her mobile phone and hid it under the bed. Later we searched the Accused house and found the Complainant mobile phone hidden under his bed”.

Note that this is the same mobile phone that was being used by one M. M. to communicate to one L. W. and inform her that the Complainant was in her house and had reported that she had been defiled. How could this phone be in two places at the same time?

In her evidence in chief the Complainant had told the Court that she had left behind in the house of the appellant her underpants and her blouse. PW 1 at page 13 line 16 states,

“I found the Complainant crying. We also found the Complainant carrying her underpants in her hands”.

If the Complainant left her underpants in the house of the appellant, how come she was found carrying the same at the house of M. M.?

The Complainant also in her evidence in chief told the court that she was defiled in a house under construction which was not inhabited. PW 4 L. W. had told the court that the Appellant was staying in a Swahili type house. PW 1, PW 2, PW 3, PW 4 all stated that the scene of crime was at the Appellants house. The Complainant had stated that it was under construction and uninhabited yet she at the same breadth states that there was a bed and a lamp. In a nutshell there are numerous contradictions and inconsistencies in this case.

To compound these inconsistencies is the fact that there was no evidence as regards the age of the complainant. There was no documentary or evidence from her parents and or guardians as to her age. In her evidence she simply told the court that she is aged seventeen (17) years and she is in form three. No more. The appellant was charged and Convicted in a Sexual offence whose punishment is determined by the age of the Complainant.

In the present case there was no age assessment and this was fatal to the prosecution case.

I find that the Conviction was unsafe. Counsel for the state Mr. Mureithi also concedes the appeal and I find with good reasons.

The upshot is that the Conviction is quashed and Sentence is set aside.

The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **2nd** day of **October, 2013**.

.....

M. MUYA

JUDGE

2ND OCTOBER, 2013

In the presence of:-

Learned State Counsel Mr. Tanui

Learned Counsel absent.

Court clerk Musundi