



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 81 OF 2011

MMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence and Conviction of E.K. NYUTU Resident Magistrate Embu in Criminal Case No. 1737 of 2010 on 3rd June, 2011)

J U D G M E N T

MMM the appellant was charged with offence of **Defilement contrary to Section 8 (1) and (2) of the Sexual Offence Act No. 3 of 2006.**

The particulars in the charge sheet were as follows:

On the 29th day of August, 2010 Embu municipality within Embu County, intentionally caused his penis to penetrate the vagina of SW a child aged 10 years.

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

The particulars are that:-

On the 29th day of August, 2010 Embu Municipality within Embu County intentionally touched the vagina of SW a child aged 10 years with his penis.

And being dissatisfied with the judgment, he filed this appeal citing the following grounds:-

1. *That he pleaded not guilty before the trial Magistrate.*
2. *That the Learned Trial Magistrate erred in law and facts for convicting him relying on single evidence which was not corroborated.*

3. ***That the Learned Trial Magistrate erred in law and facts when she failed to consider the fact that his constitutional rights were violated when he was kept in custody more than 24 hours before he was arraigned in court for plea.***
4. ***That the Learned Trial Magistrate erred in law and facts when she failed to consider the fact that no medical test was done on him so as to connect him with the alleged crime. No DNA test was taken.***

The brief facts of the case are that the complainant (PW1) aged ten (10) years then is a cousin to the appellant. PW1's uncle (PW2) left PW1 and other two children under the care of the appellant as he went to run an errand. The appellant pulled PW1 to his house and ordered her to remove her clothes and lay on his bed. He threatened her if she disobeyed. She tried to scream but he tied her mouth with a piece of cloth.

He then took something like a rubber from a packet and put it on his genital which he inserted into her genital. The girl felt a lot of pain. When the appellant was through, PW1 saw blood coming from her genital. At about that time, she heard PW2 calling from outside and the appellant lied to him that PW1 was near the macadamia trees. Thereafter, PW1 got out and saw PW2. She immediately reported to him what the appellant had done to her.

The matter was reported and PW1 was taken for treatment. She was examined and a P3 form filled (exhibit 1). Meanwhile, the appellant was arrested and charged. In his unsworn defence, he denied the charge. He admitted that PW2 was his uncle. He said PW2 sold his grandfather's cows. He was framed up by PW2 since he had sold his mother's cows.

Being a first appeal, this court is engaged to reconsider the evidence adduced and arrive at its own conclusion. In the case of ***KIILU AND ANOTHER VS REPUBLIC [2005] KLR 174***, the court of appeal held thus:

- i. ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
- ii. ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.***

When this appeal came for hearing, the appellant presented the court with written submissions which he relied on. He submitted that since there was evidence of blood, the girl was not defiled. To him a perforated hymen per se was not evidence of penetration.

The state through Ms. Ing'ahizu opposed the appeal. She said defilement had been proved and the appellant had been identified.

I have considered all the submissions by the appellant and the state together with the grounds of appeal. I have also considered the evidence on record.

PW2 is an uncle to PW1 and she is his late sister's daughter. PW2 is also an uncle to the appellant as he is his late sister's son. This means PW1 and the appellant are first cousins.

On the fateful day, PW2 left PW1 and two other younger children under the care of the appellant. On his return, he did not find PW1 but found the two minors outside the appellant's house. PW1 later reported to him the defilement. She was taken to hospital the same day.

The first issue is whether indeed PW1 was defiled. PW4, (the doctor who examined PW1) confirmed that there was forceful coitus as there was perforation of the hymen (exhibit 1). The medical

evidence therefore confirmed that penetration of PW 1's genital organs had occurred.

The next issue to be determined is whether the appellant is the one who did this to PW1 or not.

Ground 4:

PW 1 explained that the person who did this to her had used some rubber from a packet which he placed on his genital organ. It is clear that this was a condom that was used. Therefore no semen/spermatozoa could have been deposited in PW 1's genital organ. There could have been no need for a DNA test. Ground 4 fails.

Ground 2:

Section 124 of the Evidence Act provides:

“Corroboration required in criminal cases notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.

It is therefore clear that under the Law, the court can convict on the evidence of the victim alone if the court is satisfied about its credibility. Satisfaction means reasons must be given.

An analysis of the evidence shows that the Learned Trial Magistrate did not rely solely on the evidence of PW 1 to convict. Her evidence on penetration was supported by the Medical Expert's evidence (PW4).

Secondly, in spite of the threats by the appellant, PW1 promptly reported to PW2 what had happened once she got out of the appellant's house. When PW2 arrived and found PW1 missing, he asked the other two minors where she was. They told her she was in the appellant's house. There and there, the appellant opened the door and told him PW1 had gone to get macadamia nuts.

PW 1 then walked out of the appellant's house crying. PW2 asked the appellant why he was lying when he had locked her in his house. The appellant never responded.

It has therefore been shown that besides PW1's word, PW2 witnessed the appellant leave his house and shortly thereafter PW1 emerged from the same house crying.

The learned Trial Magistrate who saw PW1 testify remarked that she was satisfied that she spoke the truth (page 37 lines 10 – 14).

The appellant in his evidence talked about his grandfather's cows and PW2. The person offended was PW1 and she gave her story of what had happened to her. It had nothing to do with PW2.

Finally, Ground 3:

The appellant was arrested on 30.08.10 and arraigned in court on 31.08.10. He has not explained how his rights were violated. The evidence clearly confirms that the appellant abused the responsibility he was given by PW 2 to take care of his younger cousin. He should have been charged with the offence of incest Contrary to Section 20(1) Sexual Offences Act which carries a similar sentence as that of the

defilement he got.

The trial court was satisfied that the complainant was a child as defined under the Children's Act. I therefore set aside the conviction for Defilement and substitute it with a conviction for incest contrary to Section 20(1) of the Sexual Offences Act. The sentence remains the same. The appeal is dismissed.

Right of Appeal explained.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF NOVEMBER 2013.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Ingahizu for State

Appellant

Njue CC