



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 87 OF 2012

MUTIE MAITHYAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 169 of 2011 in the Principal Magistrate's Court at Kyuso – B.M. Mararo (PM) on 14th August, 2013)

JUDGEMENT

The Appellant (Mutie Maithya) was charged with defilement contrary to Section 8(1)(4) of the Sexual Offences Act No. 3 of 2006 in Kyuso Principal Magistrate's Court Criminal Case No. 169 of 2011. The particulars of the charge stated that on 7th August, 2011 at [particulars withheld] in Kyuso District of Kitui County the Appellant intentionally caused his penis to penetrate the vagina of S M a child aged 17 years.

In the alternative the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge revealed that on the date and place mentioned in the main count, the Appellant intentionally touched the vagina of S M a child aged 17 years with his penis.

The Appellant being dissatisfied with both conviction and sentence has appealed to this Court.

The Appellant's grounds of appeal as contained in the amended petition filed on 16th October, 2013 are:-

1. **That the learned trial magistrate erred in law and fact to convict me without considering that the charge sheet relied upon by the trial magistrate was defective.**
2. **That the learned trial magistrate erred in law and fact to convict without consideration of the prosecution's evidence which was contradictory and inconsistent.**
3. **That the learned trial magistrate erred in law and fact to convict me without considering that the mode of arrest was not foolproof.**
4. **That the pundit trial magistrate erred in law and fact without considering that the evidence of PW1 did not incriminate me in any manner hence the same was inconsistent.**
5. **That the learned trial magistrate erred in law and fact to convict me without considering that the doctor's evidence was questionable**
6. **That the pundit trial magistrate erred in law and fact to dismiss my defence which was firm enough to rebut the prosecution's evidence.**

7. That the sentence executed is excessive and harsh as per provisions of Section 8(4) of the Sexual Offences Act No. 3 of 2006.

When the matter came up for hearing of the appeal Mr. Mailanyi for the state conceded the appeal. He agreed with the Appellant that the charge as drawn was defective. He also stated that the Court proceedings did not disclose the language used when the Appellant took plea. He submitted that there were other irregularities in the manner in which the evidence was recorded. He further stated that PW3 B M was not sworn and neither did PW4 Mr. Kioko state whether he was a clinical officer.

From the outset I must state that the concession by the state was, in my view, unwarranted. I think the defects in the charge can be cured by Section 382 of the Criminal Procedure Code. It is also clear from the trial Court record that the evidence of PW3 was taken under oath. The record states:-

“PW3 male adult Christian duly sworn and states in Kikamba. I am B M from [particulars withheld]”

As for PW4, it is true that he did not state that he is a medical officer. An expert witness should state his/her profession and expertise in his/her evidence. The fact that PW4 did not state his expertise did not render his evidence worthless. He indicated that he was from Kyuso District Hospital. The P3 form produced shows that he signed it in his capacity as a medical officer/practitioner. The evidence of PW4 was therefore rightly relied upon by the trial magistrate.

Having stated why the state counsel, in my view, wrongly conceded the appeal, I will now proceed to look at the evidence adduced so as to determine whether the conviction and the sentence imposed were safe and sound.

When going through the evidence of the complainant who testified as PW1, I was asking myself why the trial magistrate decided to conduct a *voir dire* examination for a child aged 17 years before accepting her evidence. It is only after I read the evidence of PW4 that it hit me that the complainant is said to be epileptic and mentally challenged. After the said *voir dire* examination the magistrate concluded that:-

“Witness does not understand meaning of oath and importance.”

The magistrate did not, however, record whether the witness was intelligent enough to give useful evidence and whether she appreciated the importance of telling the truth.

In my view, therefore, the evidence of PW2 needed corroboration from an independent source. Although complainant reported the alleged sexual assault on the same day, she was taken to hospital as can be seen from the treatment card, on 10th August, 2011. No explanation was tendered to the Court for this delay. No spermatozoa could possibly have been seen during the medical examination. The medical officer (PW4) stated that there could have been sexual activity. There were no injuries since the hymen had been broken previously. The medical evidence adduced does not therefore support penetration.

The complainant told the Court that she was 17 years old. The P3 form shows the age of the girl as 17 years. Who gave this age to the medical officer? The father of the complainant (PW3) did not state the age of the complainant.

The evidence placed on record by the prosecution did not establish that the Appellant had sex with the complainant. Even if there was evidence of sexual activity, the prosecution did not prove that the complainant was indeed 17 years hence a child.

The Appellant told Court that on the date of the alleged defilement he was with DW2 F K M. He testified that he is an orphan and the father of the complainant who is a relative wanted to use this case to get him out of the way.

I find that the prosecution case was not proved to the required standards i.e. beyond reasonable doubt.

The appeal succeeds and I set aside the conviction and sentence. The Appellant is thus set free unless otherwise lawfully held.

Orders will issue accordingly.

Prepared, Dated and signed this 27th November 2013

W. KORIR,

JUDGE OF THE HIGH COURT

Dated and delivered on 2nd day of December, 2013

S.N.MUTUKU

JUDGE OF THE HIGH COURT