



SAMUEL MURUNGAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 393 of 2010 in the Chief Magistrate's Court at Kiambu – Mrs. Kabucho (SRM) on 27th

July 2010)

JUDGMENT

1. The appellant **Samuel Murunga**, prays that the judgment of 27th July 2010 by the Kiambu Senior Resident magistrate in **Cr. 393 of 2009 at Kiambu** be quashed. The applicant was charged with the offence of

Defilement of a child contrary to **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative he was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.

2. The trial court acquitted the appellant on the main count, and convicted him on the alternative count. Under that count it was alleged that on 19th March 2009 at Kiambu District in Central Province as it was then, the appellant unlawfully and indecently assaulted one R.B.I by touching her vagina.

3. Mr. Naikuni, learned counsel for the appellant urged that the ingredients of **Section 11(1)** of the **Sexual offences Act** are specific. That for one to be convicted under this section there must be an indecent act perpetrated by the appellant, and that act of indecency ought to be committed to a child. Dr. Ketra Muhombe, the medical witness, stated that there was no spermatozoa or STD found in the minor, and that she had changed her clothes. Although learned counsel opined that the doctor formed an impression that there was sexual assault, the learned trial magistrate could not establish whether the assault caused the absence of the hymen noted by the doctor.

4. That the trial court made its conclusions because of what it **“believed”** and it **“felt”**, and not based on evidence.

5. The learned counsel further urged that the age of the complaint was not proved scientifically. That the birth Certificate, although genuine, was issued on 2^{1st} August 2009, 14 days after **PW2** and the complainant had first testified. In his opinion this was an afterthought tinged with malice and intended to fix the appellant.

6. The learned counsel also urged that the evidence of **PWI** who was a child was never corroborated, and that the judgment and proceedings were full of contradictions and hearsay. He gave the instance in which the minor said **“I did not see the knife”**, but the trial magistrate went on to say the

“accused held her and threatened her with a knife”.

7. That in the opinion of the learned counsel the fact the minor did not disclose this incident to her mother or anyone at the school, and instead disclosed it to her father on 11th March 2009, that it was an afterthought.
8. He submitted that the court relied on evidence that was not adduced by anyone, in finding that the fact that the appellant left very early in the morning was as indication that something could have happened.
9. Learned counsel submitted that the attached charge sheet was defective. That whereas, the charge sheet read that the alternative offence occurred on 19th March 2010, the minor was taken to the doctor on 13th March 2010, which would be before the offence occurred. That the prosecution ought to have seen it and applied to amend the charge sheet, and that failure alone was enough to form a basis of allowing the appeal.
10. Mr. Mulati, learned state counsel opposed the appeal, and urged me to find that the appeal was untenable and dismiss it. He urged that the conviction of the appellant was proper, since the evidence of the complainant was credible and consistent, and was corroborated by the evidence of **PW3, PW4** and **PW5**.
11. The learned state counsel urged that the complainant was taken to hospital after three days, making it improbable for the doctor to find spermatozoa, on examination. He also urged that the law does not require scientific proof of age, although in this case a birth certificate was produced to confirm the child’s age. That the appellant was represented by an advocate at the trial, and he did not object to the production of the birth certificate.
12. I have considered the evidence on record to make my own findings and draw my own conclusions, bearing in mind that I did not have the advantage that the trial court had of seeing the witnesses testify. The record shows that the complainant was defiled. **PW5** the doctor who examined her made these findings at page 19 of the proceedings. The hymen had tears and she made an impression of sexual assault. The doctor found a whitish discharge in her genitalia.
13. The evidence of **PW4** also a doctor, which was that there was a tear at 7 o’clock and the hymen was absent, fortified that of **PW5**. The two doctors did their examinations on different dates and that may explain the slight difference in the findings.
14. Learned state counsel urged this court to alter the findings of the lower court, and find that the minor was defiled, and reinstate the sentence applicable under **Section 8(2)** of the **Sexual Offences Act** which is life imprisonment. The court has the discretion under **Section 354** of the **Criminal Procedure Code** to make such alteration.
15. On the date the learned state counsel urged the court to invoke **Section 382 Criminal Procedure Code** and see that that alone did not epitomise injustice to the appellant.
16. The record shows that there was overwhelming evidence against the appellant. The appellant was known to the minor prior to the attack. It was her testimony that he had come home before with her father and on the date in question she was alone with him in the house for a considerable length of time and it cannot be assumed that they were in darkness before she prepared him a place to sleep. She saw him again in the morning, in the light of day before he assaulted her.
17. The medical evidence of **PW4**, doctor Kamau included findings of an old tear at 7 o’clock. I note from the evidence that the minor was assaulted on 9th March 2009, but only reported to her father on 11th March 2009 Dr. Kamau examined her on 19th March 2009 by which time the tear would have been eleven days old and therefore healed. The term **“old tear”** is therefore applicable.

18. PW5 Dr. Ketra Muhombe examined the complainant on 11th March 2009 but two days after the assault she made findings of whitish discharged and hymenal tears. She made a conclusion of sexual assault.

19. I therefore agree with the learned state counsel that the evidence against the appellant was overwhelming. It was sufficient to sustain a conviction on defilement. I find that as pointed out by counsel for the appellant, the inconsistency on the dates in the alternative charge was a typographical error. Since all the evidence on record supports the date of 9th March 2009, I find that no prejudice was occasioned to the appellant by the error in the alternative count. I therefore invoke the powers conferred upon me under **Section 382 Criminal Procedure Code** to correct the said error.

20. I however note that the complainant was aged 14 years at the time of the offence. For that reason the appellant could not be convicted under **Section 8(2)** of the **Sexual Offences Act** under which he was charged which applies to children aged 11 years and below. The conviction on the alternative charge therefore stands.

Reasons wherefore the appeal is dismissed.

SIGNED DATED and **DELIVERED** in open court this **4th day of October 2012.**

L. A. ACHODE

JUDGE