



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO 155 OF 2011

DOMINIC KIBET MWARENG.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Resident Magistrate, Kupenguria dated 1st November 2011 in Criminal Case No 550 of 2011)

JUDGMENT

Introduction

The Appellant, DOMINIC KIBET MWARENG, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on the 20th Day of June 2011, at *[particulars withheld]* Village, Mnagei Location in West Pokot County, the said DOMINIC KIBET MWARENG did cause his penis to penetrate the vagina of S W, a child aged below 11 years.

The facts of the case as recorded by the trial court are that on 20th June 2011 the Complainant (PW 1) was sent by her mother to buy some chapati. On her way back, the Appellant followed her, took her to a maize field and defiled her. The Complainant was examined at Kapenguria District Hospital where a P3 form was completed. A report was made at Makutano Police Station and the Appellant was arrested. According to the Complainant, the Appellant had defiled her on two previous occasions; on 10th June 2011 and 15th June 2011. The Appellant was tried and convicted at the Principal Magistrate's Court at Kapenguria and was sentenced to life imprisonment.

The Appellant's Appeal

Being aggrieved by both conviction and sentence, the Appellant filed a Petition of Appeal on 14th November 2011, raising the following grounds of appeal:

- a. That the learned trial Magistrate erred in law and fact in finding that the Prosecution had proved its case beyond reasonable doubt in spite of the glaring lack of evidence;

- b. That the learned trial Magistrate erred in law and fact by dismissing the evidence tendered in defence by the Appellant;
- c. That the Prosecution did not prove the actual age of the Complainant;
- d. That the learned trial Magistrate erred in law and fact by convicting the Appellant on a defective charge sheet;
- e. That the learned trial Magistrate erred in law and fact in sentencing the Appellant harshly and ignoring the mitigation tendered by the Appellant;
- f. That the learned trial Magistrate erred in law and fact by convicting the Appellant yet the Complainant's evidence and the P3 form produced did not support the charges against the Appellant;
- g. That the learned trial Magistrate erred in law and fact by convicting the Appellant on contradictory evidence;
- h. That the learned trial Magistrate erred in law and fact in relying on extraneous matters to convict the Appellant ;
- i. That the findings of the learned trial Magistrate were against the weight of the available evidence on record.

The appeal was heard on 16th October 2013 with Mr. Chebii appearing for the Appellant and Mr. Kimanzi appearing for the State. Counsel for the Appellant submitted that there was miscarriage of justice from the beginning to the end of the trial in the lower court. Specifically, the Appellant was not given time to prepare for presentation of his defence. He had no opportunity to call witnesses. The case was conducted in two days and upon closure of the prosecution case, the Appellant was put on his defence and judgment was delivered on the same day. This according to Counsel, was an indicator that the trial Magistrate had taken sides. Mr. Chebii further submitted that the findings by the trial Magistrate were similar to those made in Criminal Appeal No 158 of 2011 which was a pointer that the Magistrate did not give due consideration to the case.

It was the Appellant's case that the evidence adduced by the Prosecution was scanty and contradictory. In particular, the Complainant (PW1) and PW2 testified that they made a report at the Police Station a day after the offence while PW3 testified that PW1 and PW 2 made their report on 16th March 2011 at 7.00 am. Additionally, PW 2 testified that PW1 came back with the money meant for purchase of chapati while PW 1 testified that she came back with the chapati. Moreover, it was not clear at what stage the Appellant was arrested. On the age of the Complainant, Counsel submitted that in the absence of an age assessment report, her age could not be ascertained.

Opposition by the State

In opposing the appeal, Mr. Kimanzi learned Counsel for the State, submitted that the Appellant was positively identified by PW 1 as the one who had defiled her. In this regard, PW 1 identified the Appellant as a man she used to see making bricks, a fact that was confirmed by the Appellant himself. Defilement of PW1 was confirmed by the Clinical Officer who testified as PW 4. PW 1 was said to be 8 years old.

On the Appellant's defence that on the day in issue he was working in a field with one Morris and one Patrick, Mr. Kimanzi submitted that the Appellant should have called his colleagues to confirm his defence. Finally, Counsel submitted that the fact that the Complainant admitted having engaged in sex prior to her defilement was not a licence for the Appellant to defile her.

Finding and Determination

The main issue for determination before me is whether the conviction of the Appellant for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006 is sustainable on the strength of the evidence adduced in the trial court.

The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant. Mr. Chebii, Counsel for the Appellant submitted

that none of these ingredients was established. On the age of the Complainant, he submitted that failure to conduct an age assessment on the Complainant was fatal to the Complainant's case. He referred the Court to the case of *Hilary Nyongesa Vs Republic (Eldoret Criminal Appeal No 123 of 2009)* where Mwilu J (as she then was) stated that:

“Age is such a critical aspect in Sexual Offences that it has to be conclusively proved....And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”

I agree and add that while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the Prosecution and a simple statement by the Complainant as to their age does not in my view, constitute such proof.

The other ingredient in a charge of defilement is penetration by a particular assailant at a particular time. According to the Medical Examination Report produced as MF1, there were no obvious tears on the Complainant's genitalia. There was however evidence of old penetration. In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence. The Complainant in the instant case testified that the Appellant was previously known to her. She even claimed that he had defiled her on two previous occasions, although she had not reported the previous defilements.

According to the charge sheet, the Complainant was defiled on 20th June 2011 and from the Medical Examination Report, she was examined on 24th June 2011 at which point she showed evidence of old penetration with no obvious tears. The Court was therefore unable to reconcile the alleged defilement by the Appellant on 20th June 2011 with the Medical Examination Report. The Court treated the Complainant's evidence that the Appellant had defiled her on two previous occasions with extreme caution as it could well have been intended to fill in gaps in the Prosecution case.

For the foregoing reasons, I find that the Prosecution did not prove the charge against the Appellant against reasonable doubt and it was therefore unsafe for the learned trial Magistrate to convict the Appellant on the evidence on record. Accordingly, I allow the Appellant's appeal, quash his conviction and set aside the sentence imposed upon him. I direct that the Appellant be set at liberty forthwith, unless otherwise lawfully held.

DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF NOVEMBER 2013

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT KITALE THIS 6TH DAY OF NOVEMBER 2013

J.R KARANJA

JUDGE

In the Presence of:

.....**Appellant**

.....**Respondent**