



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 57 OF 2018

BETWEEN

DENNIS SIRIBA SIRIBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J.K Mutai, RM dated 28th February 2018 at the Principal Magistrate's Court at Ogembo in Sexual Offence Case No. 8 of 2018)

JUDGMENT

1. The appellant, DENNIS SIRIBA SIRIBA, appeals against the conviction and sentence of 20 years imprisonment for the offence of defilement contrary to section 89(1) and (2) of the Sexual Offences Act ('the Act'). The particulars of the charge were as follows:

On the 13th day of November 2017 at [particulars withheld] Sub-location in Sameta Sub-County within Kisii County, unlawfully and intentionally caused his penis to penetrate the vagina of PM a child aged 13 years.

2. In his petition of appeal the appellant attacks the conviction and sentence on the ground that the prosecution did not prove the offence beyond reasonable doubt. The State was of the view that it proved every element of the offence.

3. The grounds asserted call for this court to review the entire evidence as it is the duty of this court, as the first appellate court to re-appraise that evidence and come to an independent conclusion as to whether to uphold the conviction and sentence bearing in mind that it never saw or heard the witnesses testify.

4. The prosecution case was that the appellant slept with the complainant, PW 1, for two nights at his place where they had sexual intercourse. PW 1 gave sworn testimony after voir dire of their encounter and how she had been taken to the appellant by a friend.

5. PW 1's mother, PW 3 recalled that on 11th November 2017 she went with PW 1 to church but she did not return home. She searched for her on the next day, Sunday and on Monday, when PW 1 did not come back, she reported the matter to the Assistant Chief. She told the court that PW 1 returned on the fourth day.

6. The investigating officer, PW 4, recalled that on 15th November 2017, PW 1 and her father reported the incident of defilement at Itumbe Police Station. She issued the P3 form and sent to Bomachoge Chache Sub-County Hospital where she was examined by PW 2, a clinical officer. He testified that the significant physical findings were that PW 1's hymen was torn and the high vaginal swab showed pus cells.

7. In his defence, the appellant gave unsworn testimony in which he recounted how he was arrested on 13th November 2017. He denied committing the offence.

8. In order to prove defilement the prosecution must establish the act of penetration was caused to a child by the accused. In this case as I have outlined, PW 1 claimed that she spent two nights with the accused. In her testimony she stated as follows;

"I slept with Siriba on the same bed. We slept at 10pm and woke up at 6 pm. We spent two days (nights) at Siriba's. The accused gave me fare of Kshs. 150/- and I went home. On arrival, I was asked by my parents where I was, I told them that I was at Kevin and Siriba's."

9. When cross-examined by the court she referred to another friend, K, and she stated as follows;

“Kevin is just a friend. He is not a friend. He comes from [particulars withheld] Village. He is about 25 years old. He is a conductor in one of the matatus. On the night I spent with Kevin, I had sex with him. We had sexual intercourse at around 10pm in 13/11/2017. He was my boyfriend for about 2 months. It was our first day to have sex with him for the 2 months.”

10. The prosecution must prove the act of penetration and it is the complainant to demonstrate such an act. Under section 2 of the Act, ‘penetration’ means “the partial or complete insertion of the genital organs of a person into the genital organs of another person.” In this case she did not testify to such an act as against the appellant but clearly stated it was K with who she had sexual intercourse. Even if there was corroborative evidence of penetration, PW 1’s own testimony does not implicate him.

11. In this instance, I give the appellant the benefit of the doubt. I allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held on a separate warrant.

Dated and delivered at Kisii this 20th day of December 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.