



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL CASE NO. 148 of 2014.**

**RICHARD KIBET.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of Honourable Eunice Kelly, Resident Magistrate,*

*delivered on 2<sup>nd</sup> July, 2014 in Nakuru Chief Magistrate's Court Adult*

*Criminal Case No. 144 of 2013)*

**JUDGMENT**

1. The Appellant was charged at Nakuru Chief Magistrate's Court with one count of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on the 23<sup>rd</sup> day of July 2013 in Rongai District within Nakuru County, it was alleged that the Appellant unlawfully and intentionally committed an act by inserting a male genital organ (penis) into the female genital organ (vagina) of JN, a girl aged 12 years which caused penetration.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual offences Act No. 3 of 2006. The particulars were the same as the principal charge save that the unlawful action was described as touching JN's private parts namely the vagina.

3. After the Appellant denied the charges, a fully-fledged trial ensued after which the Trial Court convicted the Appellant of the principal count and sentenced him to serve 20 years imprisonment.

4. The Appellant was dissatisfied with the conviction and sentence. He filed a Petition of Appeal dated 11<sup>th</sup> July 2014 listing the following grounds of appeal:

i. The Learned Trial Magistrate erred both in law and in fact by convicting the Appellant on evidence that was marred with discrepancies.

ii. The Learned Trial Magistrate erred in law and in fact when he failed to consider the evidence produced by the family members where they got the chance to frame this case to the Appellant

iii. The Learned Trial Magistrate erred both in law and fact by failing to consider the facts that clinical officer's report was done four days after the incident, also there wasn't any DNA test done to the Appellant to prove the allegations.

iv. The Learned Trial Magistrate erred in law and fact by convicting me the Appellant without giving his defence as the required benefit of doubts as required by the law but the trial magistrate gave all the benefits to the prosecution.

v. The sentence imposed by the Learned Trial Magistrate is harsh and unjustified as she failed to take into account of PW1 that she had stayed with the Appellant for more than 5 years.

5. The appeal was disposed of by way of written submission where the Appellant filed his submissions and relied on the same. He was unrepresented during this appeal. The appeal is opposed. Mr. Motende learned Counsel for the State orally submitted and urged the Court to uphold the conviction and the sentence.

6. This being the first appeal, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See *Okeno v R [1972] EA 32* and *Kariuki Karanja v R [1986] KLR 190*.

7. The evidence that emerged from the trial was as follows.

8. The prosecution called seven witnesses. The Complainant testified as PW1. She gave her evidence on two different occasions. She first gave evidence on 19/09/2013 before Hon. Aganyo. The Learned Magistrate concluded that the Complainant did not understand the nature of oath and ruled that she should give unsworn statement. The Complainant, then, told the Court that she was twelve (12) years old and that she was in Standard One. She stated that she knew the Appellant well since he was a neighbour. She told the Court that on “the material day”, she was sent to a shop at around 7:00pm to buy some salt. On her way back home, she said, she met the Appellant who pulled her by the wrist into a toilet which was near a bar. The Appellant proceeded to remove her clothes. He then removed his. He covered her mouth with a piece of cloth. He then made her lie on the toilet floor and inserted his penis on her vagina and had sex with her. According to the Complainant, he did twice in a period of ten minutes. Thereafter, he wore his clothes and left.

9. The Complainant said that on getting home she did not tell her aunt because of the threats the Appellants had given her. Instead, she only disclosed what had happened three days later when the shopkeeper, Gideon Mwangi Macharia (a.k.a. Rasta), went to her home to tell her aunt that he had seen the Complainant with the Appellant three days earlier. According to this version, this when the aunt (RA) vigorously questioned the Complainant about the incident. The Complainant reluctantly, after some caning, volunteered what had happened.

10. This “confession” by the Complainant triggered a series of events which ended with RA husband, SSE, to report the matter to the Police in the Company of the Complainant; the Appellant being arrested by members of the public; and the Complainant being taken to Bahati District Hospital for medical examination.

11. After cross examination by the Appellant, the Prosecutor asked for the witness to be stood down so that she can be taken for age assessment.

12. The trial resumed on 17/12/2013. By this time, Honourable Aganyo had left the station so it fell on Hon. E. Kelly to carry on the trial. The Learned Magistrate complied with section 200(3) of the Criminal Procedure Code. The Appellant elected to proceed with the case from where it had reached.

13. When the Complainant was put back on the stand, the Learned Magistrate concluded, like Hon. Aganyo had done earlier, that the Complainant did not understand the nature of oath and could, therefore, not be sworn. When led in her evidence, the Complainant narrated afresh what happened. She began with her being sent to buy salt. She then stated that as she was going home, the Appellant pulled her and took her to a toilet near the bar where he defiled her. I will return to the narrative as it unfolds from there in a brief while. However, in the version the Complainant gave at the resumed hearing, she told the Court that the shopkeeper came to alert her aunt about the incident the very following day – and not after three days.

14. In any event, the narrative unfolds from there as follows. When R A was informed by Rasta, the Shopkeeper about what he had seen, R confronted her niece. R testified that her niece reluctantly opened up to her that the Appellant had defiled her. R testified that the Complainant also told her that the Appellant had done the same things two days earlier in a county toilet near her house. R testified that she told her husband, SSE, what had happened when he came home. Her husband then went to Solai Police Station accompanied by a Mr. James Napola (a neighbour) to report the matter. Later, the husband took the Complainant to the hospital for medical examination the following day.

15. SSE narration under oath traced that of his wife in material details. He testified about coming home from work on 24/07/2013 to find his wife in a “bad mood”. It was on inquiry that he learnt what Rasta, the Shopkeeper had told his wife. He went to the shop and confirmed the story for himself. He then called the Chief on the phone and went to the Police at Solai. The following day (25/07/2013), he took the Complainant to the hospital for medical examination.

16. Gedion Mwangi Macharia, also known as Rasta, the Shopkeeper, also testified. His testimony was that on 22/07/2013, he was at his home at about 7:30pm. He said he saw the Appellant with a small girl whom he recognized as the Complainant. The Appellant was, according to Rasta, the Shopkeeper, embracing the Complainant’s shoulders. Rasta says he was shocked to see this because the Appellant is much older. When the Appellant saw him, Rasta said that the Appellant let go of the girl. The girl then went to the shop, purchased the salt and left. The Appellant was waiting for her; and he led her again on her shoulder as they left. Rasta testified that the following day he went to tell the girl’s parents what had happened. He later told SSE, the uncle.

17. When the Complainant was taken to Bahati District Hospital, she was attended to by Dr. Julie Barasa. The doctor testified that she attended to the Complainant on 26/07/2013. The history she was given was that the Complainant had been defiled twice – on 23/07/2013 and on 25/07/2013 -- by a person she knew. Upon examination, she found some bruising of genitalia and labia majora on both sides. Upon conducting tests, she found pus cells in her urine which is a sign of infection. She said that the kinds of bruising she saw on the Complainant is “not a common occurrence unless there was rough or forceful handling.”

18. The Arresting Officer testified how a report was made at Banita Police Patrol Base that the Appellant had been arrested by citizens. He then proceeded in the company of a colleague, PC Muthenya, to the scene where he re-arrested the Appellant. The Investigating Officer was PC Mercy Njeri. She stated that a report was made at Solai Police Station on 27/07/2013 by RA, SE and the Complainant. She testified that as part of her investigations she sent them for medical examination and gave them a P3 Form which was duly filled. She also took the Complainant to the Nakuru Provincial General Hospital for an age assessment. She produced the Age Assessment Report confirming that the Complainant was twelve years old. She also produced the pair of panties which she said the Complainant had on at the time of the defilement. The Investigating Officer said she examined the Complainant and noted blood in her panties.

19. In his defence, the Appellant gave an unsworn statement. He stated that from 21<sup>st</sup> July 2013 to 25<sup>th</sup> July 2013 he was unwell and therefore spend most of the time asleep in his house. On the fateful day he had gone to work until 11:00 am then thereafter went to Maili Kumi for shopping. He left there at 6:00pm and got home at around 9:00 pm. He was called by PW1's mother on the 25<sup>th</sup> July 2013 while at his house and they went to the chief's office. He said that he was beaten by mob in the process and was arrested. He claimed that he only learned of the charges before him in Court.

20. In his closing statement he told the Court that he was in bad terms with Rasta, the Shopkeeper, who the "source of the entire story of defiling PW 1", as his (Appellant's) wife had a debt at Rasta's shop and they were not on talking terms. He believed that that was the reason Rasta had decided to frame him.

21. In his oral submissions, Mr. Motende insisted that the conviction and sentence were based on the evidence tendered at trial. He submitted that all the three ingredients of the offence of defilement were present as follows:

a) He submitted that the age of the child was proved both orally and through documents produced in Court. He submitted that both the Complainant and her aunt confirmed the complainant was 12 years at the time of defilement. In addition, the Prosecution produced an age assessment report and a P3 form.

b) On penetration, Mr. Motende submitted that it was also proved both orally and by way of document evidence. He submitted that the Complainant gave evidence of how the Appellant inserted his penis into her vagina and repeated it. Also, the doctor who examined the Complainant testified that there was evidence of penetration and also the evidence of the Investigation officer showed the complainant's panties had blood.

c) Mr. Motende further submitted that the Appellant was a neighbor and the Complainant knew him well as as he frequently went to visit her aunt's home to buy charcoal. She well recognized him and identified him from the electricity light from the bar which was sufficient.

22. The Appellant's major complaint is that the Prosecution case was so woefully riven in contradictions that it was a material misdirection for the Trial Court to conclude that the Prosecution case was proved beyond reasonable doubt. The Appellant pointed out the following as contradictions or inconsistencies:

a. That the Complainant told the Court that she went to the shop alone and that it was on coming back that the Appellant pulled her and took her into the toilet. Yet, Rasta, the Shopkeeper testified that he saw the Complainant going to the shop in the company of the Appellant and that the Appellant waited outside as the Complainant bought salt.

b. That it was incredible that the Appellant was able to cover the Complainant's mouth so that she does not scream while simultaneously removing his clothes as well as the clothes of the Complainant. Yet, that is the story as told by the Complainant.

c. That it was inconsistent for Rasta, the Shopkeeper to say that he was seated at his home when he saw the Appellant and the Complainant together as they headed to the shop then say that he was inside the shop selling the salt at the same time. If, indeed, Rasta was inside the shop, he could not have seen the things he claims he saw. If he was outside, then he could not have been the one who sold the salt to the Appellant.

23. I do agree that those are all inconsistencies in the Prosecution narrative as presented at trial. The question that would arise is whether the contradictions are material enough to lead to the conclusion that the evidence presented by the witnesses is not credible. The law on inconsistencies is that minor discrepancies and inconsistencies in the Prosecution case can be ignored (see ***Erick Onyango Ondeng' v Republic [2014] eKLR CRIMINAL APPEAL NO. 5 OF 2013***). **In this case, the Court of Appeal stated:**

*With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.*

24. To test whether the inconsistencies or contradictions pointed out by the Appellant are sufficiently material to raise reasonable doubts in the Prosecution case, I tested the remaining evidence for its consistency. Earlier on in this judgment, I indicated that the Complainant gave her evidence on two different occasions. When she resumed her evidence on the second occasion, her narrative changed from the first time round in the following terms:

a. First, the Complainant had said in her earlier evidence that the Appellant covered her mouth with a piece of cloth. In her resumed evidence, she told the Court that the Appellant covered her mouth his hands.

b. Second, the Complainant had told the Court during her resumed evidence given on 17/12/2013 that it was the first time the Appellant was defiling her and that it was, indeed, her first sexual act. However, the Complainant's aunt (R, PW2) testified that the Complainant had told her that the Appellant had had sex with her two days prior in a County toilet. Dr. Julie Barasa testified as much.

c. Third, in her original statement to the Court on 19/09/2013, the Complainant said that she does not know who informed her aunt that she had been with the Appellant. In her resumed evidence on 17/12/2013, she told the Court that she knew it was Rasta who had told the aunt about the incident because she found him at their home the day after.

d. Fourth, in her testimony on 19/09/2013, the Complainant said that her aunt got to learn of the incident three days after it happened. When trial resumed on 17/12/2013, she now stated that her aunt learnt about it the following day when Rasta went to tell her.

25. There are other aspects of the case which raise eyebrows as well. The narration by Rasta, the Shopkeeper of what he saw, if true, would contradict the version of events as told by the Complainant. The Complainant's narrative is one of forceful and violent defilement accomplished through threats and some measure of physical violence. The narrative coming out of Rasta's testimony is one of wrongful if smooth deception of a young girl into sexual act. The Complainant's version stuck to the violent and forceful version; Rasta's version stuck to the version of an older man cheating a young girl to have sex with him. Both would acts would be defilement since minors are incapable of granting consent but the question goes to the credibility of the Prosecution narrative. This question assumes critical proportions if one recalls that in an essential sense the Complainant was the sole eye witness who testified making her evidence uncorroborated. Under the proviso to section 124 of the Evidence Act, the uncorroborated evidence of a child of tender years who is a victim to prove a sexual offence is sufficient to convict an Accused Person "if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."

26. In the present case, the inconsistencies and contradictions in the narrative of the Complainant raise serious questions whether the Complainant was, in fact, telling the truth. There are other minor aspects of the case which add to the river of doubts about the authenticity of the narrative given by the Prosecution witnesses. For example, who went to report the matter to the Police? R A, the aunt, was categorical she did not go to the Police. According to her, her husband and James Napola went to report. According to her husband, he went to the Police alone. According to the Investigating Officer, R, her husband and the Complainant went to the Police.

27. Another minor contradiction contributing to the river of doubt regards the dates. When did the incident happen? When was it reported to the Police? When the Complainant taken to the hospital? The Complainant was vague about the dates – but that is understandable both because of her age but also because she had probably suffered trauma. She talked of the "material day" (although this is probably the Learned Magistrate's interpretation of what she said). Her aunt was sure that the incident happened on 23/07/2013 and Rasta came to tell her on 24/07/2013. In that case, her husband reported to the Police the same evening (24/07/2013) and the Complainant was taken to the hospital the following day (25/07/2013). S E was also clear that it was on 24/07/2013 that he learnt of the defilement and went to report to the Police. However, Dr. Barasa attended to the child on 26/07/2017 – and reported that the bruises to the Complainant's genitalia were two-three days old. Both the Arresting and Investigating Officers were clear that both the arrest and the report were made on 25/07/2013. Again, viewed alone this would be irrelevant – but seen against the other inconsistencies, it assumes some significance.

28. In my view, therefore, while both the age of the Complainant as well as the fact of penetration was indubitably established by evidence both oral and documentary, the identity of the person who caused the penetration in this case was not established to the required threshold of beyond reasonable doubt due to the cumulated effects of the inconsistencies and contradictions in the Prosecution case. The accumulated effect of these inconsistencies and contradictions is to make the conviction of the Appellant unsafe in the circumstances.

**29. In the circumstances, it is the duty of this Court to quash the conviction and set aside the sentence imposed which I hereby do. The Appellant shall be set at liberty unless otherwise lawfully held in custody.**

30. Orders accordingly.

**Dated and delivered at Nakuru this 30<sup>th</sup> day of May, 2019.**

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**JOEL NGUGI**

**JUDGE**