



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 374 OF 2010

RICHARD MARITA MIGIRO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O.A case No. 27 of 2010 of the Chief Magistrate's Court at Nakuru by Hon. E. Tanui-Resident Magistrate)

JUDGMENT

1. **Richard Marita Migiro**, the appellant herein, was convicted 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.
2. The particulars were that on the 3rd March 2010 within **Nakuru** District, of the **Rift Valley** Province, intentionally and unlawfully inserted his penis into the vagina of **CNK.**, a girl aged 10 years.
3. The appellant was sentenced to serve 25 years imprisonment. He now appeals against both conviction and sentence.
4. The appellant was represented by the firm of Olaly Cheche & Company Advocates. He raised eight grounds of appeal that can be summarized as follows:
 - a) The learned trial magistrate erred in law and in fact by convicting the appellant on insufficient evidence of identification.
 - b) The learned trial magistrate erred in law and in fact by shifting the burden of proof to the appellant.
 - c) The learned trial magistrate erred in law and in fact by dismissing the appellant's defence without consideration.
 - d) The learned trial magistrate erred in law and in fact by meting out a harsh and excessive sentence.
5. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards. He urged the court to find that the sentence meted was unlawful and enhance the same.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. The prosecution is obligated to prove three ingredients of the offence of defilement before a conviction can be founded on the evidence on record. These are (a) there was penetration, (b) that the person accused was responsible for the penetration; and (c) that the age of the complainant was established. These ingredients were spelled out in the case of **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** by the learned judge Joel M. Ngugi.
8. In the instant case, **CNK (PW1)** the complainant testified that when the appellant penetrated her vagina with his penis, she felt pain. He defiled her in a garage on 3rd March 2010. He had previously defiled her on three other occasions. This evidence was bolstered by the evidence of **Dr. Samuel Onchere (PW2)**. His evidence was to the fact that when the complainant was examined, the hymen was absent and this was not recent. However the labia minora and labia majora were inflamed. The inflamed labia indicated recent penetration.
9. **CNK (PW1)** and her mother (**PW3**) testified that she was 10 years old having been born in 1999. Their oral evidence was supported by Child Health Card which indicated that the complainant was born on 12th February 1999. This would mean that at the time of the offence she

was eleven years old and not 10 years.

10. According to **CNK**, it was the appellant who defiled her on 3rd March 2010 and on three other previous instances. She narrated how they had become close while training her how to ride a bicycle, before he started defiling her. According to her evidence, the appellant called her inside the garage and proceeded to defile her like he had done before. He warned her not to tell her mother but on the following day when she felt pain between her legs, she informed her mother what the appellant had done to her. This is what prompted the report to the police.

11. **RWK(PW3)**, the complainant's mother gave a different version to that of the complainant. According to her evidence, the incident took place on 4th March 2010. When she returned home she did not find the complainant at home. She went to look for her and found her riding a bicycle outside Peter's garage. When she enquired why she did not stay at home as directed, she volunteered information that the appellant had asked her to have sex with him.

12. The evidence by mother and daughter raised a credibility issue due to the following reasons:

- a) According to the complainant, she was defiled on 3rd March 2010 whereas her mother said the defilement was on 4th March 2010.
- b) The venue of the alleged defilement was in a garage where evidence on record indicate that there was another mechanic. No evidence was tendered to indicate his whereabouts during the time of the alleged defilements. No attempts were made to call him as a witness.
- c) According to the complainant, after the defilement she went home on her own but according to her mother she was the one who went looking for her.
- d) 3rd March 2010 was a Wednesday whereas 4th March was a Thursday. If we can momentarily assume that one forgot the date of the incident, no explanation was given to the court as to why the complainant was not in school. At the time of the incident she was in standard five. The evidence of **HM (PW5)** was that, the material day was a school day. She said she went home for lunch and went back to school.

These glaring contradictions and unexplained circumstances ought to have raised a red flag in the mind of the learned trial magistrate. The court of appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, (MADAN, MILLER and POTTER JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

13. The date on the charge sheet is that the offence was committed on 3rd March 2010. Certainly, this contradicted the evidence of the complainant's mother. No effort was made to reconcile the variance between her evidence and the particulars in the charge sheet. Since her evidence contradicted that of the complainant, this variance cannot be wished away. When the evidence and the particulars of the charge are at variance with no logical explanation, the accused person is entitled to an acquittal.

14. Another witness who introduced contradiction to the prosecution case was **HM (PW5)** and who claimed that the complainant was her best friend. In her evidence in-chief, she said the complainant was a pupil at Kimathi Primary School but during cross examination she changed and said she (complainant) was in Bondeni Primary School. This would not have been material taken in isolation but taken together with the entire prosecution case, it can lead to only one logical inference; the prosecution case cannot be believed.

15. The prescribed sentence under section 8 (2) of the Sexual Offences Act is provided as follows:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The sentence is mandatory and therefore the one that was meted out to the appellant was an illegal sentence.

16. In his defence, the appellant raised an issue of a bicycle he had lent to the complainant's mother and which was stolen before she returned it to him. He claimed that this was the reason he was falsely framed up. He brought this defence for first time in his statement of defence. He was throughout represented by an advocate but he did not confront the complainant's mother with this fact during cross examination. The learned trial magistrate was justified to dismiss his defence as an afterthought.

17. After analyzing the entire evidence on record, I find that the conviction was unsafe. I accordingly quash the same and set aside the sentence. I set the appellant free unless if otherwise lawfully held.

DATED and SIGNED at Nakuru this 5th Day of December, 2019

KIARIE WAWERU KIARIE

JUDGE

DELIVERED at Nakuru this 19th day of December, 2019

JOEL NGUGI

JUDGE