REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINALAPPEAL 01 OF 2010

WANYAGA GITHINJI ..... APPELLANT

VERSUS

REPUBLIC ..... STATE

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. H. O Baraza– Resident Magistrate delivered on the 23rd December, 2009 in CMCR Case No.* 44 of 2009*)

JUDGEMENT

The appellant **WANYAGIA GITHINJI** has filed this appeal against his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts.

The appellant had on 12/2/2009 been arraigned before the lower court facing a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(1) as read with SECTION 8(3) OF THE SEXUAL OFFENCES ACT**. The particulars of the charge were that;

> ***"On the 9th day of February 2009 at [particulars withheld] in Nakuru District within Rift Valley province had carnal knowledge of VM, a girl under the age of fourteen years".***

The appellant also faced an alternative charge of **INDECENT ASSAULT ON A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant pleaded **'Not Guilty'** to both charges and his trial commenced on 6/4/2009. The prosecution called seven (7) witnesses in support of their case.

The complainant **'V M** a child who gave her age as 13 years testified as **PW1** in the case. She told the court that the appellant who was a neighbour had formed a habit of defiling her severally as she went to school. The child narrated that on the material day at 7.00am she was on her way to school. The appellant called her and took her to his house. There he removed both his clothes and hers and proceeded to defile her. After the act the appellant locked the child inside the house and went away. Fellow villagers came and rescued her.

PW2 M W K was also a neighbour and a fellow villager. She told the court that on 9/2/2009 at about 7.30am she was working in her shamba which was by the road. She saw the complainant going to school. **PW2** saw the appellant run after the child. He took her to his house and they both entered and the appellant closed the door. After a while the appellant came out of the house alone and locked the door.

PW2 called the village elder to alert him of what she had seen.

PW3 BERNARD KARIUKI KIBUE was a village elder. He testified that on 9/2/2009 he was at home. He was called to a particular house and upon arrival found a crowd there. The villagers informed **PW3** that a child was locked inside that house. They called out to the child who responded from inside the house. Police were called and they came and broke down the door of the house and rescued the complainant who informed them that the appellant had defiled her. The appellant was later apprehended by the angry crowd and was taken to the police station. Meanwhile the child was taken for medical attention. Following investigations into the matter the appellant was taken to court and charged with the offence of Defilement.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied having defiled the child. On 23/12/2009, the learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of Defilement and thereafter sentenced him to serve twenty-five (25) years imprisonment.

Being aggrieved by both his conviction and sentence the appellant filed this present appeal.

This being a first appeal the court is obliged to re-examine and re-evaluate the prosecution evidence and draw its own conclusion on the same. In **MWANGI Vs REPUBLIC [2004] 2 KLR 28,** the court held

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence".***

In a charge of Defilement the prosecution must tender evidence to prove beyond reasonable doubt the following ingredients of the offence

(i) The fact of defilement

(ii) The identity of the perpetrator

(iii) The age of the victim

In this case the complainant told the court that the appellant had defiled her severally. On the material day the complainant was on her way to school at about 7.00am when the appellant accosted her and took her to his house. There he laid her on the bed and defiled her. In her testimony at page 8 line 3 the complainant stated

> ***"…….. He (the appellant) took me to his house. He said he would kill me if I screamed. He took off his cloths and took off mine too. I didn't get hurt. He did bad manners to me. He lay on me. He put his thing into my thing. Mama Njoki came and rescued me……"***

The complainant here has described the act of defilement. Young children who lack adequate vocabulary to describe the act of sexual intercourse invariably refer to it as **'bad manners'.** Thus it is clear from this testimony of the complainant that she was defiled.

PW2 M W K told the court that on 9/2/2009 at about 7.30 am she was working in her shamba which was adjacent to the road. She saw the child and urged her to run to school. She then saw appellant run after the complainant and take her into his house after which he closed the door. **PW2** alerted other neighbours about what she had seen.

PW4 SAMUEL MBUTHIA KIMATHI was a village elder. He told the court that upon being alerted of the incident he went to the house of the appellant and found the door locked. He and the other neighbours called out to the child and she answered from inside the locked house. They broke down the door and rescued the complainant who informed them that she had been defiled by the appellant.

The complainant therefore stuck to her story throughout. The evidence of **PW2** and **PW4** confirm that the child was found locked inside the appellant's house. Why would an adult man waylay a child in her way to school and lock himself up with her inside his house. Clearly he had some nefarious intentions.

PW6 DR SAMUEL ONCHERE was a medical officer attached to Nakuru PGH. He told the court that he examined the appellant. On the appellant he noted cub wounds to the head as well as bruises and swellings. These injuries were the result of a beating unleashed upon the appellant by the mob who had apprehended him.

PW7 GRACE NGULANI was a clinical officer based at the Bahati District Hospital. She produced the P3 form with respect to the examination conducted upon the complainant. The examining doctor noted a white discharge from the child's vagina and pus cells were seen. In her evidence **PW7** stated at page 29 line 9

> ***"The weapon used was male genitalia ….. my colleague didn't state whether the hymen was broken or not, there was a parasite harboured by men. The girl could not have gotten the pus cells from any other source other than sexual intercourse. There may have been either a partial or full penetration…."***

The doctor concluded that sexual intercourse had occurred.

This was expert medical opinion evidence which was neither challenged nor controverted by the defence. The fact that the child's hymen may not have been broken does not negate the fact of defilement. Section 2(1) (d) of the Sexual Offences Act defines the act of penetration in the following terms.

> ***"'Penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person"***

The presence of pus cells in the child's vagina were indicative that there had been at the very least a partial penetration of the child. I am satisfied from the evidence on record that the complainant was indeed defiled as she stated.

The next question requiring an answer is the identity of the perpetrator. The complainant identified the appellant as the man who defiled her. The incident occurred at 7.00am as the child was on her way to school. It was broad daylight and visibility was good. The child told the court that the appellant was a neighbour whom she had known for a long time. He was therefore not a stranger to her.

PW2 confirms that she saw the child heading to school on the material day. **PW2** was at the time working on her farm which was adjacent to the road. **PW2** said she saw the appellant run after the child and take her into his house. **PW2** identified the appellant by his given name **'W'.** She too knew the appellant very well as a neighbour. Indeed in her testimony **PW2** states

> ***"I have known W for about 26 years. He was M (complainant's) neighbour"***

Similarly **PW4** a village elder confirms that he knew the appellant well as he was a fellow villager.

All these witnesses have positively identified the appellant in the lower court. The complainant was sure of her identification. It was based on recognition which in the case of **ANJONONI & OTHERS Vs REPUBLIC [1980] KLR 59** was held to be **'more satisfactory, more assuring and more reliable that identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other'.**

The complainant never wavered in her identification of the appellant. Her evidence on identification was corroborated by **PW2** and **PW3**. As stated earlier the incident occurred in broad daylight when visibility was good. There was no known reason why any of these witnesses would have wanted to frame the appellant. Indeed the child was rescued having been found locked inside the house of the appellant. In his

defence the appellant claimed that on the date in question he was coming from the slaughter house when an angry mob pounced on him and beat him up. The appellant did not in his defence address the charge at all. This defence was a mere denial and was in my view right for dismissal. Therefore I find that the appellant was properly identified as the man who defiled the complainant.

The final ingredient of the charge of defilement requiring proof is the age of the victim.

In her evidence the complainant stated that she was 13 years old. Ordinarily age is proved by way of documentation e.g birth certificate, school card, baptism card etc. However even in the absence of documentary proof of age, the evidence of a parent and/or guardian is sufficient to prove a child's age.

In this case no birth certificate or other document was produced to back the complainant's claim that she was 13 years old. None of the parents of the complainant testified as witnesses in this case to confirm the date of her birth. Therefore as things stand apart from the word of the complainant there exists no evidence to prove that she was 13 years old at the time of the incident. In the circumstances I find that the age of the child has not been proved beyond reasonable doubt.

In the case of **ALFAYO GOMBE OKELLO Vs REPUBLIC [2010]eKLR**, the court of Appeal stated as follows

> ***"In its wisdom Parliament chose to categorize the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt….."***

In the case of **KAINGU ELIAS KASOMO Vs REPUBLIC (Malindi) Criminal Appeal No. 504 of 2010**, the Court of Appeal held that

> ***"Age of the victim of the sexual assaults under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim"***

Thus in the absence of proof of the age of the complainant the charge of Defilement cannot stand. Therefore I quash the appellant's conviction on the main charge of Defilement.

Having said that I am satisfied that the evidence on record has sufficiently proved the alternative charge of **Indecent Act on a Child Contrary to Section 11(1) of the Sexual Offences Act** and I substitute a conviction for this offence.

The appellant's appeal is partially successful. I quash the conviction for the offence of Defilement and instead substitute a conviction for the offence of **Indecent Act with a child.** Similarly I set aside the sentence of twenty five (25) years imprisonment imposed upon the appellant and in its place impose a sentence of ten (10) years imprisonment. Those are the orders of the court.

Dated in Nakuru this 26th day of January, 2018.

Mr. Chigiti for Office of DPP

Appellant in person

Maureen A. Odero

Judge