



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO. 42 OF 2017**

**BENJAMIN JUMA KHAMILI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction in S.O.A case No.88 of 2014 of the Chief Magistrate's Court at Busia by Hon. H.N Ndung'u, Chief Magistrate and sentence by Hon. W.K Chepseba- Chief Magistrate)*

**JUDGMENT**

1. **BENJAMIN JUMA KHAMILI**, the appellant herein, was convicted for the offence of defilement contrary to section 8(1) (4) (sic) of the Sexual Offences Act No.3 of 2006.
2. The particulars of the offence were that on 15<sup>th</sup> August 2014 within **BUSIA** County, he intentionally and unlawfully caused his penis to penetrate the vagina of **M.A.N**, a child aged 11 years.
3. He was sentenced to life imprisonment. He has appealed against both conviction and sentence.
4. The appellant was in person. He raised seven grounds of appeal which I have summarized as follows:
  - a) That the learned trial magistrate erred in law and in fact by failing to observe that the provisions of Article 50 (2) (b), (e) and (j) were breached.
  - b) That the learned trial magistrate erred in law and in fact by not considering that the charge sheet was defective.
  - c) That the learned trial magistrate erred in law and in fact by failing to appreciate that material witnesses were not called.
  - d) That the learned trial magistrate erred in law and in fact by convicting him without the age of the complainant being proved.
  - e) That the learned trial magistrate erred in law and in fact by basing his conviction on insufficient evidence.
5. **The state opposed the appeal through Ms. Ngari, the learned counsel.**
6. The facts of the prosecution case were briefly as follows:

When the complainant went to answer a call of nature, the appellant found her in the toilet and defiled her. The complainant's mother arrested him at the door as he left the toilet.
7. The appellant contended that the complainant's mother was his friend. When he was unable to give to her some money, she warned him that he was going to face her. He was later implicated in the offence.
8. 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**.
9. Article 50 (2) (b), (e) and (j) of the Constitution of Kenya Provides as follows:

*(2) Every accused person has the right to a fair trial, which includes the right—*

*(b) to be informed of the charge, with sufficient detail to answer it;*

*(e) to have the trial begin and conclude without unreasonable delay;*

*(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*

When the appellant was taken to court on 18/8/2014 before he was called upon to plead the record reads:

*“Accused is warned to be attentive as the offence is serious.*

*Charge is read over and every element explained to the accused person in Kiswahili language he understands and pleads as follows:”*

He cannot be heard to complain that he was not informed of the charge with sufficient details.

10. Though the matter was adjourned severally, the appellant was responsible for some adjournments. I have established that the adjournments by the prosecution were merited. The appellant was not therefore prejudiced.

11. Before the trial commenced, the record does not indicate whether the appellant had been supplied with copies of statements. On 3/12/2014 before the hearing commenced, the appellant informed the court that he was ready for hearing. At no time did he complain to the court that he had not been supplied with the statements. It is the duty of the trial court however, to ascertain that all parties are ready for hearing. This notwithstanding, from my perusal of the record, I find that the appellant was not in any way prejudiced.

12. The appellant contended that the charge was defective. Indeed upon my perusal of the charge sheet, I find that it was erroneously drafted. The charge ought to have read contrary to **“...section 8(1) as read with section 8(4) ...”**

From the record, the appellant understood the charge before pleading to it. He subsequently participated fully in the trial. I make a finding that he was not prejudiced and the defect is curable under section 382 of the Criminal Procedure Code.

13. It was contended by the appellant that the failure to call Kevin Barasa and C (the complainant’s sister), was fatal to the prosecution case. In **BUKENYA vs. UGANDA [1972] EA 549**, (Lutta Ag. Vice President) held:

*The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.*

In the instant case, I will endeavour to establish whether the witnesses whom the appellant claims were left out were material witnesses and whether failure to call them was fatal to the prosecution case. I will revert to this issue while addressing the issue of sufficiency of the evidence on record.

14. **M.A.N (PW1)** testified that on 15<sup>th</sup> August 2014 at about 7 pm, she went to the toilet. When she was about to leave, the appellant pushed the door from outside even after she had announced her presence inside. He held her mouth and defiled her after removing her underpants. She screamed and her mother went and pushed the door. When the appellant opened the door, her mother held him before she was joined by Kevin. She said she was born on 28/1/2003. This meant that at the time of the offence, she was eleven years old.

15. The evidence of **C A (PW2)** is that when she returned to her kiosk, she found her daughter C alone. C told her that **M.A.N** had gone to the toilet. When she went out of her kitchen, she heard some voices in the toilet. When she knocked at the toilet door, a male voice said that there was someone inside. Eventually the appellant came out and when she saw her daughter inside the toilet, she held the appellant. One Kevin assisted her and they took him to the police.

16. From the evidence on record, the role of C would not have added any value to the case. She only informed her mother (**PW2**) where the complainant had gone. Certainly the evidence of Kevin was material. The prosecution attempted to call him. On 23/3/2015 the court was informed by the prosecution that that Kevin Barasa was in custody for an offence of malicious damage. An adjournment was sought and a production order was applied for. He was not produced and on 3/8/2015 the production order was extended. He was however not produced and the prosecution case was closed. The failure to have Kevin in court cannot be blamed on the prosecution. They did all what was possible to have him in court.

17. The evidence of **PC Francis Muriithi (PW3)** is that the appellant was taken to the police station at about 8 pm by a man and a woman. The man, from the evidence of this witness and **PW2** is Kevin.

18. **Nathan Mbwabi Kennedy (PW4)** is the clinical officer who examined **M.A.N**, the complainant herein. His evidence was that on 15/8/2014 he examined the complainant at about 11 pm. This was on the same day it was alleged she was defiled. His findings were as follows:

a) Vaginal walls were hyperemic (reddened).

b) Mucus discharge from the vaginal canal.

For a child of 11 years to have sexual intercourse with an adult male, there ought to have been obvious evidence of injuries. The complainant did not testify of any pain. The ingredient of penetration was not proved.

19. Though the appellant in his submissions contended that the age of the complainant was not established, I find that this argument baseless. The Child immunization card and the evidence of the complainant and that of her mother proved this ingredient.

20. After the matter was reported to the police, **PC Francis Muriithi (PW3)** visited the scene on the same night. He recovered the complainant's pants and he saw what he termed as male semen on the floor of the toilet.

21. The appellant testified that the complainant's mother was his friend. When he was unable to give her some money she wanted on two occasions and also refused to ferry her to Funyula, she warned that he was going to see her. This, according to him, is what led him to be falsely framed in the offence. This was however clearly an afterthought for he never confronted the complainant's mother with the facts during cross examination. The learned trial magistrate was justified in dismissing this defence.

22. The absence of the evidence of Kevin Baraza could not affect the prosecution case either way.

23. The appellant complained that the sentence was harsh. Section 8 (1) (4) of the Sexual Offences Act provides as follows:

***A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

Certainly the sentence meted out was excessive.

24. Having made a finding that penetration was not proved, the conviction on the substantive charge cannot stand. I however find that the prosecution had proved to the required standards the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. I accordingly quash the conviction and set aside the sentence. I substitute the conviction with one for the alternative charge aforementioned.

25. Section 11(1) of the Sexual Offences Act provides as follows:

***Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.***

The appellant will serve ten (10) years imprisonment with effect from when he was sentenced by the learned trial magistrate. The appeal succeeds to that extent only.

**DELIVERED and SIGNED at BUSIA this 29<sup>th</sup> day of May, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**