



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 159 OF 2011

JOHN KARUGA BETH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence in

Eldoret Criminal Case No 1144 of 2011 by J. Owiti (RM)]

JUDGMENT

1. The appellant (**JOHN KARUGA BETH**) was convicted on a charge of defilement C/S 8(1) as read with Sec. 8(3) of the Sexual Offences Act, and sentenced to serve 20 years imprisonment. The particulars of the charge being that on 13th February 2011 at around 11.00pm in **WARENG DISTRICT** within the **RIFT VALLEY PROVINCE**, he unlawfully and intentionally caused penetration with his genital organ, namely penis into the genital organ namely vagina of FJ* a child aged 13 years. He denied the offence.

2. FJ* (also referred as FC* (I take judicial notice that in this region “J” and “C” are pronounced in alternate sound) told the trial court that on 13.02.2011 at about 11.00 pm she was sleeping inside her mother’s kitchen in the company of 5 children. She was sleeping on a bed belonging to her grandmother who had escorted one **C** to her house. **R C** had also accompanied her grandmother.

3. PW1 woke up to find a man lying on top of her. She tried to raise an alarm, but he blocked her mouth with a piece of cloth. He had removed her panty and skirt, and defiled her for about 5 minutes. She was able to see him with the aid of a kitchen lamp which was lit and she recognized the intruder as their neighbour. He heard the voice of **R C** and her grandmother, so he let go of her but her grandmother met him at the door. He left as PW1’s grandmother raised the alarm.

4. It was her evidence that;

“... I lost consciousness after being defiled. I bled form my vagina The pant was blood stained John went at large ... he resurfaced three weeks after the incident.

Upon spotting the appellant she informed her mother and he was arrested.

On further cross examination by the court PW1 stated;

“There was bright moon light outside and the door was open. There was no light in the house. The bed was behind the door, so I could easily see the accused person I bled on the beddings and not on the pant I was able to identify his face apart from his clothings through the moonlight which was in the house.

5. FJ’s grandmother named **C C** (PW2) confirmed that she used to sleep with her grandchildren in the kitchen, and on the material date at night, she and **R C** had escorted one **C** to their home, on her way back, just as she was approaching the kitchen, she heard the bed screech and raised an alarm as she entered the kitchen she stated:

“... I met Karuga at the door of the kitchen. I lit the tin lamp. I found FJ naked on the bed. She was unconscious ... I also found an identity card drooped on the floor next to the bed as we tried to assist her out of the bed I saw blood drops on the bed I saw Karuga. There was bright moonlight. So I was able to identify him.”*

6. As neighbours arrived following the alarm PW2 had raised, she told them that Karuga had immediately left the scene. The identity card she found at the scene was produced in court – it bore the name **JOHN KARUGA BETH** No.24366753. PW2 had known him since the year 2011 as a motor cycle rider, and a neighbor to PW1's mother.

On cross examination she stated;

“I saw you.... there was moonlight ...”

7. **A C** (PW3) the minor's mother told the trial court that **F.J** was born in 1988 and presented her immunization clinic card to confirm that. She was at home but sleeping in a room 40 meters away from where the children were sleeping when she heard her mother-in-law (PW2) shouting that Karuga had defiled PW1; Upon rushing to the room, she found the minor and inspected her genitalia, noting that there were bruises at the anterior of the vagina which was bleeding and there was discharge of sperms. PW2 also gave her an identity card which she picked on the floor immediately upon entering the room – it bore the appellant's photograph

She stated;

“...Blood flowed down the legs of PW1 and finally on the floor...” I never saw blood on the beddings of PW1,

8. She had known the appellant prior to the date in question, as he was her neighbour. On cross examination she confirmed that the appellant went at large after the incident and resurfaced three weeks later.

9. **PC JESTIMO WEBI** (PW4) who received the report on 16.02.2011 about the incident told the trial court that when he visited the scene, he was shown the bed PW1 had slept on, but he did not see any blood stains nor was he shown the clothes PW1 wore on the night in question.

10. On cross examination PW4 denied suggestions by the appellant that he had reported the loss of his identity card at the Police Post where PW4 was based, saying the same was found at the scene and given to him by PW3.

11. **DR. CYNTHIA KIBET** (PW5) who examined PW1 found that the hymen was torn and the perinium tender. A high vaginal swab did not reveal presence of spermatozoa. She confirmed that PW1 had been defiled.

12. In his sworn defence the appellant referred to events of 14.02.2011 when his wife confronted him on allegations of being involved in a love triangle. Shortly some men arrived at his home, also alleging that he had defiled a girl, and they took away his identity card to secure his attendance at the police post. Three days later he was arrested.

13. On cross examination he admitted that he was a motor-cycle rider within Eldoret town, and insisted that one village elder **BENJAMIN KIMENJO** who had a dispute with him, is the one who took away his identity card. He denied ever having known PW1 or PW2.

14. The trial magistrate in her judgment found that evidence provided by PW1's mother and the Birth Immunization Card proved she was 13 years old.

15. Further the evidence proving defilement was borne out by PW2 who saw that PW1 lay unconscious in blood stained beddings, PW1's own narration as to what happened and the Doctor's medical findings – all which proved that PW1 was sexually penetrated.

16. The trial magistrate doubted that PW1 had been able to recognize the appellant with the aid of moonlight outside the house but noted that PW2 confirmed meeting the appellant at the kitchen door step where she was outside and she recognize him because of the moonlight. The appellant's presence at the scene was fortified by PW2's recovery of his national Identity Card just beside the bed where PW1 lay unconscious.

The trial magistrate stated of PW2 thus;

“...she talked candidly before court. Her evidence was not controverted by DW1. She had known DW1 since January 2011. She knew him as a motor bike rider and neighbour. DW1 equally admitted in his evidence that he is a motor bike rider. She impressed the court as a credible witness.

17. The appellant's defence was *considered* and rejected as far fetched as it was not fathomable that a village elder who had been accompanied by members of the public would take away his National Identity Card instead of arresting him.

18. The appellant was dissatisfied with the findings which he challenged on his amended grounds of appeal which I have summarized as;

(1) During the trial, he was in a state of confusion and did not prepare well.

(2) The evidence on identification was conflicting and not satisfactory.

(3) The court did not consider his explanation regarding his identity card.

(4) The evidence did not prove defilement

(5) That the evidence showed, at the time of the incident PW1 was 23 years. He poked holes at the immunization card saying it was a forged document, and that in any event it is not a document to prove date of birth.

19. In his written submissions, the appellant argued that the charge sheet was defective as it seemed to have three different dates when the offence took place being 24.03.2011, 13.02.2011 and 14.02.2011 and that the evidence on opportunity for identification was not conclusive as PW1 first claimed that there was a lamp in the room, then later changed to say there was no light and that she relied on the moonlight to identify the intruder. He also urged the court to find that it was unlikely that anything unlawful could have taken place in the room where other children were sleeping.

20. In opposing the appeal, Miss Mumo submitted that the minor indicated she was born on 20.05.1998 which was confirmed by the immunization card. It was her contention that there was a typing error, which reflected the year of birth as 1988 instead of 1998, and that this was corrected in the judgment.

21. I have perused the original handwritten record- the trial magistrate during voire dire examination recorded the year of birth as 1988 – which was also repeated when she recorded the evidence of PW3. However the child Health Card (also referred to as the Immunization Card shows pw1 date of birth as 20.05.1998 and I hold that it was an error apparent on the record by the trial magistrate who recorded 1988 instead of 1998.

22. Age is not only proved by a birth certificate – one who is present when the individual was born – especially the mother is just as much a reliable source, especially where there is consistency from the child and the official records. Indeed the trial magistrate seems to have noted her error as in the judgment she referred to the year of birth as 1998.

23. As regards penetration I concur with Miss Mumo that the minor described how she was stirred from her sleep by the appellant who had not only mounted her, but had already penetrated her. She felt a lot of pain and bled – he blocked her mouth so as to prevent her from raising an alarm.

24. The minor and those who arrived immediately confirm that she was bleeding from her genitalia. This was also confirmed by the Doctor's finding that the hymen was torn, whether the blood was only seen on the beddings or trickling down her legs, the bottom line is she was bleedings.

25. That evidence remained unshaken and was properly accepted by the trial magistrate as proof of penetration – I cannot fault the trial magistrate on that.

26. As regards identification the trial magistrate rightly noted that the minor's claims about being able to see and recognize the appellant inside the house was doubtful – in one breath she claimed there was a lamp lit inside the room then she said actually there was no light and that she saw the appellant with the aid of the moon light.

27. However there was the evidence of PW2 which in fact placed the appellant at the scene. She met him as he was leaving the scene – at the door step – she was still standing outside and was able to see and recognize him with the aid of moonlight. He was not a stranger to her, she had known him as a neighbour cum motor cycle rider (confirmed by the appellant's own evidence). To compound matters, his National Identity Card was recovered just next to the bed where the traumatized girl lay – as though announcing that despite his departure, there was a lot shouting "you have been here".

28. That evidence was watertight – the trial magistrate had opportunity to see and observe witnesses whom she described as truthful and consistent.

29. The minor contradictions pointed out by appellant do not affect the material particulars of the case, and my finding is that the conviction was safe and is upheld.

30. The sentence was as provided by law and is confirmed. The appeal lacks merit and is dismissed.

DATED, SIGNED and DELIVERED at ELDORET this 28th day of June 2018.

H. A. OMONDI

JUDGE