



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

HIGH COURT CRIMINAL APPEAL NO. 104 OF 2017

JOHN NDICHU RAGAE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment delivered on 28th March, 2017 by Hon. C. Kutwa (Principal Magistrate) Senior Principal Magistrate's Courts at Githunguri in Sexual Offence Case No. 2 of 2014).

JUDGMENT

1. The Appellant, John Ndichu Ragae was charged with the **offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.**

The particulars being that the Appellant on the 16th day of November, 2016 in Githunguri District within Kiambu County, intentionally and unlawfully caused his penis to penetrate the vagina of HWN a child aged 12 years.

2. In the alternative the Appellant was charged with the **offence of indecent act with a child contrary to Section 11(1) of the sexual offences Act No. 3 of 2006**

The particulars being that the Appellant on the 16th day of November 2014 in Githunguri district within Kiambu County intentionally and unlawfully did an indecent act with HWN a child aged 12 years by touching her private part (vagina) with his penis.

3. The prosecution case was that the complainant, a standard 7 pupil, had gone to the saloon have her hair done. When the complainant finished with the salon she accompanied the Appellant who gave her a ride on a motorcycle to his place. That the Appellant gave her yoghurt and biscuits and they watched TV then at about 9.00 p.m. they went to sleep in his bed. That the Appellant raised the complainant's skirt and inserted his fingers in her vagina. That the complainant told him to stop and he stopped but started fingering her again and then they slept.

4. In the meantime, the complainant's worried family started looking for her. They telephoned the complainant who had a phone who explained that she was waiting for her cousin in town. When the complainant failed to return home and her phone was switched off, they started looking for her and made a report to the police.

5. That the next day, following a tip off from a friend of the complainant that the complainant had been seen on a motorcycle with the Appellant, they proceeded to the house of the Appellant with police officers. They knocked at the door and the Appellant opened. They found the complainant naked on the bed. The Appellant was arrested. Both the complainant and the Appellant were escorted to the police station. The Appellant's telephone set was confiscated. The same had messages sent to the complainant. That some love letters written by the Appellant to the complainant were also recovered. That the complainant had also written replies to the Appellant which she drafted with the help of some of her classmates.

6. The complainant was taken to a Health Centre for examination and treatment. After the investigations were completed the Appellant was charged with the offences herein.

7. In his defence case the Appellant gave sworn evidence. He stated that on 16th November, 2014 (material date) he was alone in his house in Matuguta shopping centre. That the following day at about 9.30 a.m. he went to buy milk. That the complainant who was his standard 7 student who he used to teach mathematics went to him. That the complainant told him she had a problem and requested for his phone to call her father. That they went to his house. That the complainant told him her aunt was harassing her and he gave her his phone. That before the complainant made the call the father and aunt came in and they started assaulting them on allegations that he had slept with the complainant. He was then arrested and escorted to the police station where he was charged.

8. In his judgment, the trial magistrate found the Appellant guilty of the offence of sexual assault under Section 5 (1) (a) (ii) of the Sexual Offence Act and sentenced him to ten (10) years imprisonment.
9. The Appellant was aggrieved with both the conviction and sentence and appealed to this court. The grounds of appeal are as follows:
- a. That the prosecution evidence was contradictory, scanty and insufficient.
 - b. That the complainant gave unsworn evidence without the trial court making any finding on the *voire dire* examination
 - c. That the Appellant was convicted on evidence which was not on record.
 - d. That the prosecution case was not proved beyond reasonable doubt.
 - e. That the trial magistrate failed to state on which count he convicted and sentenced the Appellant.
 - f. That the Appellant was convicted and sentenced under the wrong provisions of the law.
 - g. That the sentence meted out was excessive.
10. During the hearing of the appeal, the learned counsel for the Appellant relied on his written and oral submissions. I have considered the said submissions which essentially expound on the grounds of appeal.
11. The learned counsel for the state supported the conviction and submitted on the sufficiency of the prosecution evidence.
12. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno v Republic (1972) EA 32**.
13. The complainant (PW1) gave unsworn evidence after the trial magistrate carried out a *voire dire*. The complainant then proceeded to narrate to the court what transpired between her and the Appellant. The complainant gave a detailed and vivid account of evidence from the telephone conversation with the Appellant, motorcycle ride, the biscuits and yoghurt, watching TV, the going to bed, the groping under her skirt by the Appellant and the inserting of the fingers in her private parts to being bursted by her father, aunt and the police officers.
14. The complainant's father PW2 PN and the aunt, PW4 AMG gave evidence that is consistent and corroborative on how they found the complainant in bed in the house of the Appellant. The evidence of the arresting officer PW5 APC. Charity Kamuhi also established that they found the complainant inside the house of the Appellant. Although the evidence of PW5 differs with the complainant's father (PW2) and aunt (PW4) on whether the complainant and the Appellant were fully dressed or not, it is clear from their evidence that the complainant was found on the bed in the house of the Appellant who was in the same house.
15. PW3 Patrick Wambugu Ngugi, the clinical officer who examined and treated the complainant estimated the complainant's age as 12 years at the material time. His evidence was that upon examining the complainant's sexual organs he found a broken hymen and presence of blood but no spermatozoa. The doctor's evidence corroborated the complainant's evidence concerning her age and the penetration of her genitalia. The complainant described the penetration as having been effected by a finger while the clinical officer opined that something more than just the use of a finger may have been used hence the precautions taken to give pregnancy emergency pills and other medication.
16. The Appellant in his defence case did not deny that he was found with the complainant in his house. He admitted that the complainant was his standard 7 student but stated that he was assisting her with his telephone set to call the father. It is noteworthy that the complainant's father's uncontroverted evidence is that the complainant had a telephone set which was switched off at the material time.
17. The complainant's evidence confirms that she had a telephone set with her throughout which she used to communicate with the Appellant while she was at the salon. There are no reasons that emerge from the record why the complainant and the other prosecution witness would give false evidence against the Appellant. The trial magistrate who saw the witnesses testify and observed their demeanour believed the complainant. I have no reason to differ with the findings of the trial magistrate.
18. The Appellant's counsel submitted that the trial magistrate did not make any finding after carrying out the *voire dire* before proceeding to receive evidence from the complainant. The proceedings of 10th March, 2015 reflect that the trial magistrate conducted a *voire dire* then wrote "**Unsworn statement – Pw1**". This reflects that the complainant proceeded to give unsworn evidence. The *voire dire* carried out and the complainant's evidence reflected that the complainant who was 12 years old was intelligent enough to warrant the reception of evidence. The complainant was cross-examined exhaustively. In my view there was no prejudice that was occasioned to the Appellant.
19. The complainant's evidence established that she was touched on her genitalia and a finger inserted. Thus the complainant's evidence does not reflect any penetration with the penis or the touching of her vagina with the penis. Consequently, the prosecution evidence fell short of proving the particulars of the offence as reflected on the main count and in the alternative count.
20. The trial magistrate proceeded to convict the Appellant for the offence of Sexual Assault under Section 5(1)(a)(ii) Sexual Offences Act. The trial magistrate reflected that the conviction was under Section 215 Criminal Procedure Code (See handwritten proceedings) and referred in his judgment to Section 186 and 179 - 190 of the Criminal Procedure Code for the conviction of an offence other than the one charged.

21. Section 186 of the Criminal Procedure Code provides as follows:

“When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.”

22. Section 179 of the Criminal Procedure Code provides as follows:

“When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

23. From the foregoing, it is clear that the trial magistrate correctly applied the law in convicting and sentencing the Appellant.

24. The upshot is that I find no merits in the appeal and dismiss the same.

Dated, signed and delivered at Kiambu this 22nd day of June, 2018

B. THURANIRA JADEN

JUDGE