



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 58 'A' OF 2015

JOHN KARIUKI WAITITU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal against conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 40 of 2013, Hon. C. Wekesa, on 30th July, 2015)

JUDGMENT

The appellant was charged with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act, No. 3 of 2006. It was alleged in the particulars that on the 23rd day of November, 2013 in Nyeri County within the Republic of Kenya, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of M M N who was then aged 12. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act and here the particulars were that on 23rd November, 2013 in Nyeri County within the Republic of Kenya, the appellant unlawfully and intentionally touched the vagina of M M N, a child of 12 years old.

He was convicted on the alternative count and sentenced to 10 years imprisonment. This appeal is against the conviction and the sentence.

The trial record shows that the prosecution presented six witness who included the complainant herself, her mother and the doctor. Others were the complainant's aunt who is alleged to have extracted from the complainant the information regarding the alleged defilement or the indecent act; the doctor who examined the complainant; the arresting police officer; and, the investigations officer.

On his part, the appellant testified on oath when he was put on his defence and called two witnesses whose evidence he believed would cast doubt on the prosecution case and eventually exonerate him from the charges levelled against him.

Upon analysing the evidence, the learned trial magistrate was persuaded that indeed the complainant had been defiled and that the appellant was the culprit who perpetrated this crime. However, in what appears to have been a contradiction of this finding, the learned trial magistrate went further to find that the age of the complainant was not proved.

This apparent contradiction becomes obvious when one considers what entails 'defilement' as it is known in law. To begin with the offence 'defilement' connotes 'an act of causing penetration with a child'; when one speaks of a child, the age of the person being so described becomes a factor for consideration. Section 8 of the Act under which this offence is defined does not leave it to speculation as to who a child victim of this offence is; it goes further to specify the child's age. It states as follows:

8. Defilement

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) 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 implication is that defilement cannot be said to have been proved without proof of age of the victim. The learned trial magistrate must have appreciated age to be a crucial factor in establishing the offence of defilement when she concluded that the complainant's age was not proved. While addressing this issue the magistrate stated as follows in her judgment:

In this case, although the complainant's mother stated that the minor is aged 12 years(sic) and even identified the birth notification, the same was not produced as an exhibit, as such the court has nothing on record to rely on. This is a mistake by the prosecution which is fatal to its case and this defect is not curable. The result is that it raises doubt about

the age of the minor especially when regard is given to the fact that the age is on the borderline. This doubt is to be held in favour of the accused.

My humble opinion is that if age was not established then the offence of defilement cannot be said to have been proved since age is an essential ingredient of this offence. It follows that once the learned trial magistrate came to the conclusion that age had not been proved, she could not, in the same breath, find that the offence of defilement had been committed.

But even assuming that the trial magistrate was correct in her conclusion, the appellant ought to have been convicted on the principal count; however, she proceeded to convict him on the alternative count of committing an indecent act with a child contrary to section 11(1) of the Act. That section states as follows:

11. (1) 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.

To the extent that this provision of the law makes reference to 'a child' as the person against whom the indecent act must have been perpetrated, I would suppose that age remains a factor, and an essential one at that, in proof of the offence under this section. I say so because a child is defined by his or her age; at least that is what section 2 of the Children Act cap. 141 says. That section states:

"child" means any human being under the age of eighteen years;

The state must have understood the importance of age as an essential ingredient in this offence when it stated in express terms the age of the complainant in the particulars of the offence in the alternative count. And having been so stated the burden was on the prosecution to present evidence consistent with those particulars that indeed the complainant was of such age that had been stated; this it failed to do.

With due respect to the learned magistrate, it does not follow, as she seems to suggest, that if the prosecution fails to prove age on the principal count of the offence of defilement, then it is open to the trial court to convict the accused on the alternative count of indecent act with a child; age must be proved in either of the two counts.

For the forgoing reasons, I find that the appellant's appeal has merits and it is hereby allowed; his conviction is quashed and sentence set aside. He is set at liberty unless he is lawfully held.

Dated, signed and delivered in open court this 27th July, 2018

Ngaah Jairus

JUDGE