



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 37 OF 2018**

**JOHANA KARIUKI WAWERU..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**J U D G M E N T**

1. The Appellant, **Johana Kariuki Waweru** was in the first instance charged before the Magistrate's Court at Githunguri with the offence of Defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the Sexual Offences Act. In that on 9<sup>th</sup> June 2011 at [particulars withheld] Village Githunguri, Kiambu County he caused his penis to penetrate the vagina of **V. N** a girl aged 14 years.

2. In the alternative he was charged with committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act. The Appellant denied the charges but was found guilty, convicted and sentenced to serve 20 years imprisonment on the main count. He appeared to the High Court at Nairobi in **High Court Criminal Appeal 161 of 2014**. The High Court ordered a retrial, on the basis that the charges should have been amended in the original trial once evidence surfaced that, the Complainant suffered a mental disability. Thus, on 24/11/15 the Appellant was charged with the offence of Defilement of a child with mental disabilities contrary to **Section 7** of the Sexual Offences Act, with an alternative charge of Committing an indecent act with a child with mental disabilities contrary to **Section 7** of Sexual Offences Act.

3. Unfortunately, the charge sheet filed inside the original file proceedings was not photocopied and attached to the proceedings; what was attached is the original charge in the first trial. The particulars to the charge of defilement in the new trial were that on 9<sup>th</sup> June 2011 at [particulars withheld] Village, Githunguri Kiambu County the Appellant caused his penis to penetrate the vaginal of **V. N.** a child aged 14 years who suffered mental disability.

4. The charges were read out to the Appellant on 24.11.15. He pleaded not guilty. It would appear that pursuant to application made to the High court, directions were made for the case to be heard before any magistrate other than **Hon. Ochieng SRM.**

5. The retrial commenced before **Kutwa PM** on 8/6/16 and concluded on 24/10/17. The Appellant was found guilty on the main charge and sentence to 20 years imprisonment. The second trial therefore is the subject of this appeal, filed out of time, by leave of this court, in **Misc. Criminal Application No. 10 of 2018.**

6. On the eve of the hearing of the appeal, the Appellant filed what was referred to as amended supplementary grounds of appeal. The earlier grounds are subsumed in the latter grounds, to the effect that:

1. The trial was a nullity for noncompliance with **Section 207(1)** of the Criminal Procedure Code.
2. The conviction was bad in law there being no initial plea taken until the amended charge was tendered on 21<sup>st</sup> November 2015.
3. The prosecution evidence was inadequate.
4. The Appellant's sworn defence did not receive proper consideration.

7. In written submissions supporting the 1<sup>st</sup> and 2<sup>nd</sup> grounds, the Appellant takes issue with the prosecution failure to present the appropriate charge sheet on the first date of his appearance on 11<sup>th</sup> November, 2015 subsequent to the retrial order. Thus, in his view at the retrial, he ought to have been asked to plead to the charges on the first date of appearing. Regarding the proceedings of 24/11/15 the Appellant complains that the application by the prosecution to amend charges under **Section 214** of the Criminal Procedure Code had no basis as no charges had been previously read to him. He complains that the failure by the court to call upon him to plead to the charges in the initial

appearance was prejudicial to his rights and fatal to the prosecution. He relies on the cases of **Charo v Republic [1982] KLR 308** and **Republic v Yarasani Egalu and Others v Republic [1965] EACA 65**. His position is that the irregularity amounted to a violation of his right to a fair trial.

8. On the 3<sup>rd</sup> ground, the Appellant submitted that the Complainant was coached by another witness, **G N** who was the first to receive the victim's report but who never testified. Pointing to the prosecution failure to produce the Complainant's underwear in court, and the fact that the Complainant was examined after a week since the incident and his own evidence through DW4, the Appellant contended that the evidence of penetration was inconclusive.

9. He submitted that the prosecution case did not muster the threshold of proof beyond reasonable doubt and urges the court to allow his appeal. Miss Ndumbi for the DPP opposed the appeal. She asserted that the Appellant did take plea on 24/11/18 and that medical evidence tendered corroborated the Complainant's testimony. And that, the Appellant was known to the victim. The Prosecution opposed the appeal, and reiterated the evidence on record.

10. The Court of Appeal of Eastern Africa stated described the duty of the first appellate court in **Pandya -Vs- Republic [1957] EA 336:-**

**“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”**

11. The prosecution called five witnesses. The prosecution case was as follows **V. N (PW2)** was aged 13 years in 2011. She resided at [particulars withheld] with her mother **R. M. K. (PW1)** in the material period. The Appellant was an immediate neighbor living with his family in a compound next to **PW1's** home. **V. M.** suffered a mental infirmity which presented as retardation.

12. On 9.6.11 **V. N.** left home to fetch water at a local stream. The area was deserted. Presently the Appellant approached **V. N.**, grabbed her water bucket and forced her to a patch of napier grass where he pulled off her pants and started to defile her. When **V. N.** resisted the Appellant forcefully took **V. N.** to his house. He locked the door and forced her on a bed before undressing and penetrating her. He then sent her away, but **V. N.** met a fellow villager, **G N**, now deceased and told her what had happened.

13. It was Gladys who subsequently reported the matter to PW1 on 14.6.11. Questioned by her mother, **V. N.** narrated the incident. The matter was reported to police on the same day. **V. N.** was referred for treatment at the local health centre. On 15<sup>th</sup> June 2011 she was examined by a clinical officer, **R. M. (PW3)** and the P3 form was completed. Meanwhile the Appellant had gone underground. He was arrested in 2013 after resurfacing.

14. Upon being placed on his defence, the Appellant elected to make a sworn statement to the effect that, he hails from Gakoe where he lived at his parent's home. The Complainant was his neighbor and prior to 2012, he performed odd jobs in the neighbourhood. Subsequently he left the village to work on family projects outside [particulars withheld], only returning in 2013 after his grandmother's death. He was arrested by police. He claimed tht his family and the Complainant had a long standing land dispute. He denied the offence and stated that on the date of the offence he was away at work on a borehole project and returned home at 4 pm.

15. An alleged neighbour, **Stephen Kimani Mburu (DW2)** gave evidence that in the material period and on the specific date, he was working on a project with the Appellant. That working hours were between 8.00 a.m. and 4 p.m. **DW3, Jane Wangare**, the Appellant's

mother testified that she employed the Appellant in an agrovet business she started in January 2012. She stated that in 2011 the Complainant's mother complained to police that her family had encroached on her land and threatened her with dire consequences. Subsequently she learned that police were looking for the Appellant who was at the time working with his father, but police did not visit her home. The Appellant was arrested in 2013.

16. **DW4** was **Kiama Wangai** a medical doctor and lawyer. He described the procedure to be followed in a case of defilement. He took issue with the treatment notes in respect of the victim and diagnosis made by **PW4** stating that the description of injuries and discharge was inadequate and moreover that no injuries were noted on the vagina. In his view the medical evidence did not support defilement.

17. There is no dispute that the Appellant was well known to the Complainant as the two were neighbours at [particulars withheld]. It is not disputed that the Appellant was arrested in 2013. The twin issues arising in the retrial and on this appeal is whether the Complainant was defiled, and whether the Appellant was culpable.

18. On the question of defilement, the trial court accepted the evidence of **V. N.** and medical evidence, after correctly directing its mind on the definition of penetration in **Section 2(1)** of the Sexual Offences Act which includes the partial or complete insertion of the offender's organ into that of his victim. There are numerous legal authorities on the point including the two cited in the trial Magistrate's judgment. See also **Erick Onyango Ondeg' v R [2014] eKLR**. Similarly the trial court was alive to the import of Section 124 of the Evidence Act as it considered the prosecution and defence evidence before it.

19. The trial Magistrate stated that:

**“In the present case, the Complainant's evidence was corroborated by the medical evidence of PW3, a clinical officer. The finding of PW3 was that the Complainant's hymen was partially broken. The defence faulted the (prosecution failure) to call other evidence i.e. swabs and tests to corroborate the Complainant's evidence that she was defiled. Under Section 124 Evidence Act, in Sexual assault cases against a minor, no corroboration is required as long as the court believes the minor was telling the truth. In the instant case PW(2) was forthright in her account ....”**

20. The trial Magistrate believed the account given by **PW2**. The Appellant has argued on the appeal that the deceased **G N** to whom she confided the incident coached the Complainant. Firstly, Gladys was deceased by the time of the retrial but **PW2** denied that she was coached by her. Rather she stated that Gladys called her at the stream and she narrated to her what happened. Had it not been for the report that Gladys made later to **PW1**, the Complainant had continued with life as if nothing had happened. When confronted however **PW2** repeated the report in the presence of both witnesses. It is not clear what relationship **PW2** had with Gladys and what interest she would have in coaching **PW2** to lie about defilement.

21. **DW4's** evidence could not displace the principal findings of the hymen tear by **PW3** while **DW4** did not himself examine the victim. The victim was examined several days after the offence and there was evidence of oozing pus in her genitalia. I agree with the trial Magistrate's finding that the prosecution proved penetration on the stated date of the offence.

22. Regarding the identity of the assailant, it is evident that the defilement incident occurred during day time and that the Appellant was well known as a neighbour to the Complainant. From the account given by **PW1** the incident must have taken a significant amount of time; starting at the stream, to the napier grass patch and eventually the Appellant's house. The Complainant could not have been mistaken on the identity of the assailant in the circumstances described. The *alibi* defence raised by the Appellant was not canvassed with the prosecution witnesses at the onset. And while the Appellant had no duty to prove it, his evidence and that of his alleged co-worker **DW1** on the material date sounded vague. It was totally displaced by the evidence of **PW2** in the events of the material date.

23. As for the defence allegations that the charges emanate from a land dispute, not only were the allegations denied, but it is also difficult to believe that **PW2's** confirmed injuries were deliberately inflicted in order to settle a score with the Appellant's family. Reviewing the testimony of **PW2** and medical evidence on record, it is difficult to accept this suggestion by the defence. The omission by the prosecution to produce the Complainant's underwear at the trial pointed out severally by the Appellant does not detract former evidence by **PW4, 2 and 3**.

24. **PW3** told the court that the Complainant was a known epileptic and mentally retarded. This was confirmed by **PW1** in her evidence.

That notwithstanding **PW2** was able to testify in court in a family lucid manner. She was 13 years old in 2011 as per the immunization card and the birth certificate tendered in court as Exhibits 1 & 2. The Appellant's defence was considered and properly dismissed.

25. The Appellant's submissions have dwelt on the alleged failure by the court to read the charges to him at the first instance of appearance in respect of the retrial. From the record of proceedings on 11<sup>th</sup> November, 2015, the Appellant's first appearance after the judgment of the High Court delivered on 8<sup>th</sup> October 2015 was on 11<sup>th</sup> November, 2015. This was during a prison visit for purposes of mentioning cases in respect of persons in custody. Secondly another file, Sexual Offence 14/15 had been "inadvertently registered" before the old file Criminal Case 353/13 was returned from High Court. The Appellant's counsel who was present did not object or raise the question of plea taking at that point, but launched into a bail application.

26. It may be stated that at this point, that the old charge sheet was still in place as the Appellant had not been asked to plead to the new charges. In my view it may have been better for the retrial to commence in the separate file Sexual Offence case No. 14/15 rather than consolidate Criminal 353/13 with Sexual Offences Case 14/15. And while I agree that the Appellant ought to have been informed of the new or old charges and asked to plead thereto on 11<sup>th</sup> November, 2015 the failure is a minor irregularity curable under **Section 382** of the CPC. In any event, on 24<sup>th</sup> November, 2015 the substituted charge sheet which contained, amendments that the prosecution thought to be in keeping with the directions of the High Court was read out to the Appellant. The Appellant denied the new charges which were the subject of the retrial. Nothing turns on the question of the delayed reading of the amended charges in this case therefore.

27. However, having reviewed the 2<sup>nd</sup> trial evidence on record and the judgment of the High Court on the first appeal, I think it was a misapprehension on the part of the prosecution to charge the Appellant under Section 7 of the Sexual Offences Act. The High Court did not so direct; what the Court stated was that the fact of the mental disability of Complainant ought to have been stated in the charges. The offence prescribed in Section 7 of the Sexual Offences Act does not apply in the circumstances of this case, and neither did the High Court direct a charge be brought under that section, its key concern being the avoidance of prejudice against the Complainant as a possible vulnerable witness. Which could be done by stating at the onset in the charge that she was mentally disabled.

28. In my view the proper charge for the prosecution to have laid a charge is under **Section 8(1) and (3)** of the Sexual Offences Act, and stated clearly in the charge particulars that the victim was mentally disabled. It is clear from the fresh charge sheet and the evidence adduced by both sides at the trial that the Appellant understood that the thrust of the charge against him was Defilement and that **V. N.** was the Complainant. But so that the Appellant is not unduly prejudiced, I will quash the conviction for the wrongful charge brought under Section 7 of the Sexual Offences Act and substitute it with a conviction for the lesser and cognate offence of Committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, in terms of Section 186 of the Criminal Procedure Code.

29. Similarly, the sentence of 20 years imprisonment is reduced to a term of ten years with effect from the date of the sentence in the second trial i.e. the 24<sup>th</sup> October, 2017.

30. To that extent only the appeal has succeeded.

**DELIVERED, DATED AND SIGNED AT KIAMBU THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2018**

**In the presence of:**

For the Appellant -

For the DPP - Ongaki

Court Clerk - Nancy

**C. MEOLI,**

JUDGE