



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 4 OF 2018**

**JOHN MAINA MENJA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Being an appeal arising from conviction and sentence in Nyeri Chief Magistrate's Court Criminal Case No.18 of 2013 delivered by C. Wekesa Senior Resident Magistrate on 13<sup>th</sup> May 2014)*

**JUDGMENT**

1. **John Maina Mejaa** the Appellant herein was charged with the offence of defilement under section 8(1) (3) of the Sexual Offences Act No 3 of 2006. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006. After a full trial he was found guilty, convicted on the principal count and sentenced to 19 years imprisonment.

2. Being dissatisfied with the judgment he filed this Appeal citing the following grounds:

(i) *That the trial magistrate erred both in law and facts by convicting and sentencing him without taking into account that no medical examination was performed on the Appellant.*

(ii) *That the trial magistrate erred both in law and facts by convicting and sentencing him without taking into account that a crucial independent prosecution witness was not summoned by the prosecution to testify.*

(iii) *That the trial magistrate erred both in law and facts by convicting and sentencing him by relying on single evidence from blood related family members.*

(iv) *That the trial magistrate erred both in law and facts by convicting and sentencing him by disregarding the fact that the evidence of PW 1, PW2, PW3 is contradicting inconsistent and not corroborating.*

(v) *That the trial magistrate erred both in law and facts by convicting and sentencing him without taking into account that the Appellant's sworn defence was dismissed without cogent reasons being given as is stipulated in section 212 of Criminal Procedure Code.*

3. A summary of the prosecution case is that PW1 (MWM) a girl aged 12 years had gone to a thicket to look for firewood, on 3<sup>rd</sup> July 2013 at 1pm. She was with two other children i.e PW2 (ANK) and her sister. As they gathered firewood a man whom they identified as the Appellant kept on talking to them and finally started threatening them with arrest and being taken to police if they did not show him what he wanted.

4. As they prepared to leave with their firewood the Appellant confronted them causing them to plead for mercy from him. He directed PW1 and PW2 to lie down on their backs. He dropped PW1 down and removed her pants and ordered her to lie on top of PW2's stomach.

5. He slept on top of PW1 opened his zip and removed his penis which he inserted inside her vagina. The child felt so much pain and cried. She was threatened with death if she screamed again. He had a slasher and threatened to cut her with it. PW2 also screamed because of pain since PW1 was lying on top of her. PW2 tricked him saying she wanted to go and get her shoe.

6. The man got up to go and also look for the shoe and that's how PW1 got a chance to escape. She picked her panty and ran away in pain as she bled. She kept calling PW2's name. She passed through her grandmother's home on her way home and reported to her grandmother. On reaching home she informed her parents. Her father MM (PW4) mobilized other people and they all surrounded the bush and arrested the Appellant.

7. PW1 was taken to the police station and later to the hospital for treatment. PW5 **Dr Sarah Wamuyu** who produced the filled P3 Form and treatment notes (EXB 1a and b) on behalf of Dr. Lucile confirmed that PW2 was defiled. She found the following.

- Blood on her vulva
- Laceration on penineum and minor majora
- Broken hymen
- Tender vagina
- blood and pus cells found in urine and vaginal swab signifying an infection

8. PW6 **No 92452 PC woman Brenda Achieng Okwach** was the Investigating officer. She produced PW1's birth certificate (**EXB4**) and Blood stained inner pant (**EXB3**). The Appellant was arrested on the same day of incident.

9. The Appellant gave a sworn statement of defence. He stated that on 4<sup>th</sup> July 2013 people came to his home and found him. They told him that something had happened and he was a suspect. PW1 and other people beat him urging him to confess. He said he was taken to the police station but was never examined to confirm his commission of the offence.

10. He denied the charge saying he did not know where PW1 was fetching firewood from. He otherwise denied having worn long hair to be referred to as Rasta.

11. When the Appeal came for hearing the Appellant vide his written submissions argued that he was never subjected to any medical examination despite being at the hospital. That crucial witnesses were never called to support the evidence of PW1 and PW2. He mentioned SW and JM (cousins of PW2 and PW3 respectively) and PW1's mother. He contended that failure to call these witnesses occasioned him a lot of prejudice.

12. He submitted that the trial court should not have relied on the evidence of PW1-PW4 who were blood relatives of PW1 to convict him. He argued further that there were contradictions in the evidence of PW1 and PW2 yet they were supposed to have been at the scene at the same time. He pointed out that PW1 gave the date of incident as 3<sup>rd</sup> July 2013 while PW2 said it was on 3<sup>rd</sup> February 2013. He finally submitted that his sworn defence was dismissed without any cogent reasons being given.

13. Mr Njue for the State opposed the appeal. He submitted that there were no spermatozoa found in PW1's genitalia for it to be compared with that of the Appellant. On some witnesses not being called he said in the subsequent proceedings that SW had left the scene when she was being defiled; while JM is the one who had testified as MM (PW4); and PW1's mum did not witness the defilement.

14. On the claim that PW1 and PW2 gave contradicting evidence on the dates of the occurrence of the incident, he said that could have been a typing error since their evidence was so similar. Further that the Appellant was arrested on the same day of incident. On identification he said PW1 and PW2 described him as one with dreadlocks and lived near the church. This description was then used to have him arrested. He was also found to have soaked the clothes he wore during the incident to conceal evidence.

15. Counsel further submitted that the Appellant had on 8<sup>th</sup> August 2013 told the court he was 17½ years of age having been born in July 1995 without giving a date. Going by those dates Counsel urged that the Appellant was an adult. Further at pg 37 of the proceedings which was 6 months after the initial claim he said he was 19 years. He was therefore rightfully sentenced to 20 years imprisonment counsel submitted.

16. As the first appeal court I have a duty to re- evaluate and reconsider the evidence on record to arrive at my own conclusion. I should also bear in mind that I did not see or hear the witness and give an allowance for that. See **Okeno v R 1972 EA 32; Ajode v R [2004] 2KLR81 and Patrick & Anor [2005] 2KLR 162.**

17. I have carefully considered the evidence on record, grounds of appeal, and submission's by both parties. The record is clear that the complainant (PW1) was aged 12 years at the time of incident. She gave her evidence which was supported by the evidence of the doctor (PW5) and the Investigating officer (PW6).

18. PW6 produced the child's birth certificate which showed she was born on 28<sup>th</sup> December 2001. At the time of incident (3<sup>rd</sup> July 2013) she was aged 11 years, 6 months and 5 days which was rounded upto 12 years.

19. Was penetration proved? Yes, PW1 and PW2 explained in detail that PW1's genitalia was penetrated. The evidence was all over as the minor bled. The medical evidence vide the P3 Form and treatment notes (**EXB 1a and b**) plus the doctor's (PW5) evidence confirmed in great detail that PW1 was defiled.

20. Having found that PW1 who was a minor was defiled, I now move to the critical issue for determination. The issue is whether sufficient evidence was adduced to identify who the defiler was.

21. From the evidence on record it is clear that PW 1 and PW2 did not know the names of the assailant. They however went away and immediately reported to PW1's grandmother and her mother who called and informed her father (PW4) of what had happened. People were called and they went to the bush where the incident had taken place.

22. PW1 at pg 11 of the Record of Appeal said the Appellant.

**“I used to see him around. He used to work in a quarry”**

She went to the Police Station and found the Appellant there and identified him to the policeman. PW2 stated at pg 13 Record of Appeal.

**“The father then went to call people. I also accompanied him so as to identify the accused. I did so and accused was taken to Gichira Police Station. I was there at Gichira Police Station. We were told to go to hospital. At the police station we were with Daniel and Maggy’s father”.**

23. PW4 testified that when his wife called him he went home and found his daughter PW1 bleeding. At pg 16 record of appeal he says he asked PW1 if she knew who defiled her and she said she did. He then asked who it was and she said:

**“It is that boy with rasta who stays near the church”**

24. He was satisfied with this description and they went out to look for the defiler this is what he says:

**“We decided to look for him. We searched him in the bush in vain. At long last we found him in his home. He was arrested and escorted to Gichira Police station. We were several people. The accused is a person I knew before. We have never differed.”**

25. PW 3 at pg 14 Record of Appeal stated:

**“People had heard what had happened and ran following since this accused has a habit of doing bad things and use boda boda to run away. I warned boda boda operators not to carry him. We found the accused at his home. I knew him before the girl had even described him when we found him he had removed the clothes he had and soaked them. We asked Margaret if he was the one and she positively identified him... Margaret only described him physically and by what he was wearing.”**

26. From the evidence of PW3 and PW4 it is very clear that the minors (PW1 and PW2) described the assailant so well that PW3 and PW4 were not left in any doubt as to who they were talking about. All that the Appellant said in his defence was that he was arrested on 4th July 2013 from his home and was beaten by PW1 and others who were forcing him to confess.

27. The clear evidence on record is that the Appellant was arrested at the scene of incident with the assistance of villagers. PW1 was equally taken to hospital the same day. He was found to have soaked the clothes he wore during the incident. What was he hiding? The evidence of PW1 and PW2 is clear on what date this incident occurred. The original record shows it was on 3<sup>rd</sup> July 2013 and not 3<sup>rd</sup> February 2013.

28. On the Minors the learned trial magistrate who saw and heard them said this of them at pg J8

**“both of them were candid despite their age and were found to be intelligent and capable of tendering evidence on oath. They did the above with courage despite the emotions they had. I have no reason to doubt what they said.”**

29. I have no reason to interfere with the finding by the learned trial Magistrate. The testimony of PW1 and PW2 which was given on oath speaks for itself. The Appellant raised issue with his not having been medically examined.

30. As the learned prosecuting counsel correctly submitted there was no evidence of spermatozoa having been found in PW1’s genitals for a comparison to be made with the Appellant’s spermatozoa. “Penetration” is defined under the Sexual Offence act as:

**“the partial or complete insertion of the genital organs of a person into the genital organs of another person”**

31. As per that definition it is not the release of spermatozoa that proves defilement. The evidence before the court confirms there was penetration of PW’s genitals. The offence took place in broad day light. The witnesses have clearly identified the Appellant as the culprit.

32. The Appellant had raised issue about his age on 8<sup>th</sup> August 2013 claiming to be a minor. An age assessment was ordered for by the court. The report dated 20<sup>th</sup> August 2013 and filed in court reads:

**“radiographic age assessed is between 18½ to 19 years”**

He never raised it again during the hearing. That means he was satisfied that the age assessment done was correct.

33. On 1<sup>st</sup> April 2014 when he gave his defence he confirmed he was 19 years of age. All in all, I am satisfied that the prosecution proved its case beyond reasonable doubt and the Appellant was properly convicted.

34. Though the charge sheet reflected that the Appellant was charged under section 8(1)(3) sexual offences this did not cause him any prejudice. Section 8(3) is the penalty section which should have stood on its own. Under section 8(3) Sexual Offences Act the minimum

sentence is 20 years and the trial court could not give anything less. The period he was in prison before conviction can be considered during the time for computing remission.

35. The result is that the conviction is upheld and the sentence of 19 years is set aside and substituted with a sentence of twenty (20) years imprisonment from the date of conviction.

The appeal lacks merit and is dismissed.

Orders accordingly.

**Dated and signed this 29<sup>th</sup> day of October 2018 at Nyeri.**

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**HEDWIG I. ONG'UDI**

**JUDGE**