



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.51 OF 2015

JOTHAM GIKUNDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No. 465 of 2013 of the Chief Magistrate's Court at Maua by Hon. J.G King'ori – Chief Magistrate)

JUDGMENT

JOTHAM GIKUNDI, the appellant, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8(3) of the Sexual Offences Act and for the offence of abduction with intent to confine contrary to section 259 of the Penal code.

The particulars of the offence were that on diverse dates between 4th February 2013 and 11th February 2013 at Maua location, Igembe South District of Meru County intentionally caused his penis to penetrate the vagina of **G K** a child aged 14 years and 4 months. At the same time and place with intent to cause **G K** to be secretly and wrongfully confined, abducted the said **G K**.

The appellant was found guilty of the offences and sentenced to serve twenty years imprisonment in the first count and three years imprisonment in the second count. He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact by relying on disjointed prosecution evidence.
2. That the learned trial magistrate erred in law and in fact by failing to consider the circumstances of the case.
3. That the learned trial magistrate erred in law and in fact by meting out a harsh sentence that failed to factor his mitigation.

The state opposed the appeal through Mr. Namiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

After the complainant failed to get her friend where she had gone to borrow a book, she embarked on the

journey back to her home. On the way she met with the appellant who menacingly compelled her to follow him to his house. When she got to a place where there were drunkards, she raised an alarm. Nobody went to her rescue. They just stared. The appellant took her to his house where he repeatedly defiled her. He hid her clothes and while going away, he would lock her in the house. When she raised an alarm, the women who were nearby just laughed instead of assisting her. Police officers later rescued her. At the time of her rescue she was naked.

In his defence the appellant denied any involvement in the offence and contended he was framed by the complainant's mother whom he had reported to husband about an affair with a police officer.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

The complainant, **G K**, narrated to the appellant accosted her while she was returning home. When he succeeded in forcing her to accompany him to his house, she gave in but raised an alarm when she reached where some drunkards were. They only stared but did not intervene. He locked her in his house and went away. she tried to open the window without any success. He returned at midnight and defiled her. This was after he had overcome her resistance. He subsequently defiled her severally until when police officers rescued her. To ensure she did not escape he hid her clothes and locked her inside the house. She answered calls of nature in a basin. She survived on cake and soda which he would take for her. When she called for help from some women who were outside, they just laughed.

A.P sergeant Mbobua Ikiamba (P.W 3) testified on how he went to rescue the complainant after he had received information that she had been detained in a house. He found her naked. The appellant is the one who opened the door after he identified himself. He denied being a boyfriend of the complainant's mother.

E K (P.W 2) testified that when her daughter went to look for a book she never returned until when she was called at the Police Station to identify her. She had earlier reported her missing.

The clinical officer who examined the complainant is **Imathiu Ntongai** (P.W4). He testified that when he examined her, he found that penetration had taken place.

I have deliberately recapitulated the prosecution evidence extensively to show that it was not disjointed as contended by the appellant.

The learned trial magistrate was entitled to dismiss his defence. It was obviously an afterthought. Even after the complainant's mother said she had not known him before, he never confronted her with the facts of the alleged illicit affair. He only raised this issue with **A.P sergeant Mbobua Ikiamba** (P.W 3). Since the complainant's mother was the alleged mastermind of framing him up, then he ought to have challenged her. The failure to do so only meant that this was not so.

The sentence meted out in count one was the bare minimum. The circumstances of the case would have called for a stiffer sentence. In the second count the maximum sentence is 7 years. He was sentenced to serve three years imprisonment. This in my view was very lenient.

The upshot of the foregoing is that his appeal lacks merit and must be dismissed.

DATED at MERU this 26th day of April, 2017

KIARIE WAWERU KIARIE

JUDGE