



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 20 OF 2014

(Appeal Originating From The Conviction And Sentence By Hon. B.M.Ekhubi Srm In Nyeri S.O Case No. 17 Of 2013)

JOHN MAINA NDIRANGU.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act no.3 of 2006. Particulars were that on the 25th day of June 2013 at around 0100 hours at [particulars withheld] village in kieni west district within Nyeri county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of J.N.W a child aged 12 years. The appellant was charged with an alternative charge of indecent Act with a child contrary to section 11(1) of the Sexual Offences Act no.3 of 2006. Particulars are that on the 25th day of June 2013 at [particulars withheld] village in kieni west district within Nyeri County the appellant intentionally and unlawfully did an indecent act to J.N.W by touching her vagina with his penis

The appellant was convicted of the main charge and sentence to 20 years imprisonment. He filed appeal on both conviction and sentence. First ground raised by the appellant is that the complainant failed to describe the genital organ. He quoted the complainant having said ***“he moved me behind the house and removed all my clothes, then he removed his body and put inside my body. He laid me down and entered me...”***he said that the trial magistrate erred by failing to enquire which part of the body was put inside the complainants body. He submitted that defilement cannot occur unless a genital organ is penetrated by another’s genital organ. He submitted that it was important to confirm if the lacerations and broken heymen confirmed by the clinical officer were caused by genital organ.

The appellants second ground is that the age of the complainant was not established as the charge sheet indicated 12 years while the p3 indicate 13 years and on section c of p3 and treatment notes 12 years he submitted no birth certificate or baptismal card was produced to clarify the correct age.

The third ground is that the charge was defective as the section referred to be nonexistent. That it should have been section8 (1) as read with section 8(3) of the sexual offences Act.

Lastly the appellant submitted that the trial magistrate failed to analyze evidence adduced as if he had done so he would have seen glaring doubts. He further submitted that the trial magistrate failed to

consider his alibi defence and evidence of his witness Dw2.

The respondent supported the conviction and sentence. The learned state counsel Ms. Mwaniki submitted that the complainant's evidence was clear and consistent. She submitted that the complainant was at her home sleeping with her siblings when the appellant went calling out for her mother. When he was told she was not in, he pulled down the door and entered the house. After asking the complainant where her mother was, he pulled her behind the house, held her down, forcefully removed her clothes and defiled her. She submitted that the appellant bite the complainant when she resisted. She added that the complainant sustained injuries on her buttock as the appellant forcefully lay on her. She submitted that pw2 went in to her house without clothes while crying; that the doctor's evidence on penetration, laceration on genitalia, human bite & injury on buttock corroborate complainant's evidence. She urged court to dismiss the ground that penetration was not proved as it is clear from pw1, pw2 and pw5's evidence. On description of the organ she submitted that in her testimony page 7 line 1 to 3 of the record she said **"he moved me behind the house and removed my clothes. He removed his body and put inside my body. He laid me down and entered me."** Ms. Mwaniki submitted the above statement was a clear description of genital organ and it shows sexual act was committed.

On the issue of identification, the learned state counsel submitted that the appellant was complainant's neighbor and that fact was confirmed by the complainant's mother pw2 and the appellants witness DW2 who said she is a neighbor of pw2 and appellant. She further submitted that appellant raised defence of alibi by saying he was at his home with his wife but failed to avail his wife to testify. On age of complaint Ms. Mwaniki submitted that it is clear that the complainant was between 12 and 13 years. She said one part of p3 indicate 12 years, the other 13 years and complainant said she was 12years old. She submitted that the absence of age assessment, birth certificate and other documents to prove age is not fatal and other evidence can be used to prove age of complainant. She cited three High decisions Eldoret cr appeal no.59 of 2011 Fred omar omino vs republic (2014) eKLR, Meru cr.appeal no.97 of 2009 Gilbert Miriti Kanambu (2013) eKLR and machakos cr.appeal no.296 of 2010 Fappyton Mutuku Ngui (2012) eKLR where judges relied on **malindi court of appeal no.504 of 2010 elias kasom vs republic and held that** even though proper documentations have not been adduced as prove of age of the minor, and there is no medical assessment court can rely on other ways. She submitted that evidence of the complainant and age indicated in p3 was sufficient that she was a minor as defined in section 8(3) of sexual offences Act.

On the ground that the charge is defective, she submitted that the defect is not fatal and is curable under section 382 of the criminal procedure code. She submitted that the appellant was aware of the charges he was facing and that he fully participated in the trial; that the appellant did not therefore suffer injustice.

On the last ground that the trial court did not consider the appellants defence, she submitted that his defence was marred with contradictions. She said that at one point the appellant said he did know the complainant and later admitted that they were neighbors and this was further confirmed by his witness Dw2 who said pw2 and the appellant were her neighbors. She further submitted that the appellant never called his wife to testify on defence of alibi. On sentence she said the minor was aged between 12 and 15 years and that 8(3) of SOA provide minimum sentence of 20years and that the sentence imposed is legal.

This being the first appellate court I am expected to evaluate evidence adduced in the trial court while bearing in mind the fact that I did not have the benefit of hearing evidence first hand and making observations as regard to the demeanor of the witnesses refer to OKENO VS.REPUBLIC [1972] EA 32 where principles that govern first appellate court were set out as follows:-

"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"

On perusal of the trial court record I note from Pw1's evidence that the incident occurred at night .There was no form of lighting. She however said the suspect called out for her mother and further asked where pw1's mother was after entering the house. Despite the fact that the appellant said he was not identified there was prove that the appellant, pw1 and dw2 were all neighbors. The appellant being neighbor to pw1, there is no doubt that the complainant would be able to identify the appellant's voice. She also said there was moon light which she used to see the appellant. The complainant is the one who led people who included his mother to the appellant whom she referred to as Maina. Complainant said he was still wearing the jacket she had described to her mother. It is evident that the complainant could not have mistaken the appellant for somebody else. From the foregoing i find that the appellant was properly identified.

On the issue of description of genital organ, section 2(1) of the sexual offences act define" penetration as partial or complete insertion of the genital organs of a person into the genital organs of another person".in this case pw1 said the appellant removed his body and put inside her body. She further said 'he laid me down and entered me'. What does that mean? In such a situation where the person testifying is a child it would have been necessary for the trial magistrate to ask the child to clarify what she meant by his body and her body or even describe that part of the body if she did not know the name. That was not done. By saying the appellant's body entered her that I construe to mean insertion. Which part of the body was inserted and to which part of complainant's body. I take note of the fact that in our African culture people shy away from calling genital organs by name. The complainant being a young African girl is not an exception. If any other part of the body was used to penetrate her, I believe she would not have had difficulty saying it openly. From the foregoing I find that failure by the complainant to indicate genital organ's names was not fatal to this case.

On defence of alibi, the appellant in his own defence said he was with his wife at the material time. He never availed his wife to adduce evidence neither did he give any explanation for failing to avail her in court to confirm whether indeed she was with him. His defence alibi cannot therefore stand.

On defective charge sheet. Both the description of offence and penalty section were put together. Amendment should have been done under section 214 of the criminal procedure code but that was not done. **Section 382 of the criminal procedure code** provide as hereunder;

"...no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice."

From record it is evident that the appellant participated actively in the trial. This clearly show that he understood the charge he was facing .It follows therefore that no injustice has been occasioned to him as a result of the defect.

From the foregoing I find that the conviction entered was safe and sentence imposed legal. I uphold both conviction and sentence.

Dated and signed at Nairobi this day of ,2017.

.....

RACHEL NGETICH

HIGH COURT JUDGE

Delivered at Nyeri this 26th day of JULY 2017.

.....

JUDGE