



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 53 OF 2016

(Appeal originating from the conviction and sentence by

Hon. KACHUODO RM in Nyeri S.O CASE NO. 12 of 2014)

MICHAEL GITUKU WAHOME.....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) (2) of the Sexual Offences Act no.3 of 2006. The particulars were that on diverse dates between January 2013 and 30th June 2013 at [particulars withheld] village in mathira East Sub County within Nyeri County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of A.N .P a child aged 9 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 diverse dates between January 2013 and 30th June 2013 at [particulars withheld] village in mathira East Sub County within Nyeri County the appellant intentionally touched the vagina of A.N.P with his penis.

The appellant was convicted of the main charge and sentenced to life imprisonment. He filed appeal on both conviction and sentence. He raised three grounds of appeal.one that the trial magistrate erred on relying on insufficient evidence. Two that the complainant's age was not proved and three failing to consider the appellants defence.

Appellant submitted that the prosecution failed to prove their case beyond reasonable doubt as required by law. He submitted that the complainant failed to mention the appellant's penis but referred to it as kule kubaya kwake na kule kubaya kwangu.He said the complainant failed to describe what was inserted in her genital organ. He submitted that the trial magistrate reached a conclusion to convict him without sufficient evidence as the act of penetration was not proved. He submitted that it was the duty of the prosecution to prove what kule kubaya meant.

On the issue of age the appellant submitted that immunization card was marked but not produced as exhibit. On the 3rd ground he submitted that he was charged under section 8(1) (2) instead of 8(1) as read with 8(2).He submitted that the section under which he has been charged does not exist in law and prosecution never amended it.Lastly he submitted that he raised defence of alibi which the trial court failed to consider.

The state contested the appeal on both conviction and sentence. Ms. Mwaniki for the state submitted that the complainant gave accurate evidence; that she was able to tell court how the appellant wore a balloon and inserted kule kubaya kwake kule kubaya kwangu. She submitted that the trial court interpreted that to mean penetration of appellant's organ to complainant's organ. She submitted that the trial court was right in making such a conclusion especially bearing in mind the fact that the child was aged 9 years and her vocabulary was limited. She submitted that the doctor produced p3 form, post rape care form, laboratory results and summary form from Karatina General Hospital which all confirm that the complainant's hymen was broken. On the issue of age, the state counsel submitted that the immunization card confirmed that the child was born on 8th February 2005. She further submitted that the offence took place between January 2013 to June 2014 and in January 2013 the child was 8 years; that the child was below 11 years. She said the child testified in court and the court was able to see that she was aged below 11 years. She submitted that the sentence imposed was legal and urged court to uphold both conviction and sentence.

This being the first appellate court I have a duty to reevaluate evidence adduced in the trial court while bearing in mind the fact the trial court had the opportunity of hearing witnessing first hand and make observations on the demeanor of the witnesses. The guiding principles in handling first appeal have been set out in the case of **OKENO VS REPUBLIC [1972] EA 32** as hereunder:-

“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.)”

From record the complainant testified that the appellant did bad manners to her severally. She said he would give her money after defiling her and that he threatened to kill her if she told anyone. She reported to the head teacher after being advised to do so by an old man who saw the appellant following her. The head teacher reported to police and took her to hospital. Complainant's mother learnt of defilement from the head teacher. From the trial court proceedings there is no dispute that the appellant was the complainant's neighbour. Pw3 a classmate to the complainant confirmed that the appellant worked for her family. The issue of identification does not therefore arise.

On the ground that the appellant failed to give the name of genital organs, it's evident from record that the two minors pw2 and pw3 shied away from mentioning the names of the genital organs. Pw3 in her testimony after voir dire examination talked of an incident where the appellant gave her money with the complainant herein. She said the appellant worked for her family. She said she later heard appellant joking with the complainant about bad manner topics. She later learnt that the appellant had defiled the complainant. She feared to say what bad manners were but on being asked to write, she wrote in kikuyu kunyuniwi meaning vagina. I take note of the fact that culturally, in almost all communities in Kenya there is a tendency to shy away from calling genital organs by name and terms that will make one infer the meaning are used. I do not have any doubt that the complainant meant penis and vagina when said kule kubaya kwangu and kule kubaya kwake. She also went further to say bad manners. One cannot therefore say that the genital organs were not properly described. That ground fails.

Pw3 a minor aged 7 years who was taken through voir dire examination and found to understand the importance speaking the truth feared to mention genital organ but wrote down in kikuyu “kinyuniwi” meaning vagina.

On age the investigating officer pw10 produced clinic card in court as exhibit. I have perused the clinic card and note that date of birth is indicated as 8th February 2005. This confirms that in January 2013 the child was 8 years and in June 2014 she was 9 years. I find that sufficient evidence was adduced on age of the minor. Appeal on ground of age therefore fails.

As concern defect on charge sheet I have perused the charge sheet and note that the section creating the offence and the penalty were written together. The word “as read with” which should have come in between were omitted but. The defect is however curable under **section 382 of the criminal procedure code** which provide as follow:-

...”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 inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.”

The court record clearly show that the appellant understood the charge he was facing. He participated fully in the proceedings. The defect did not create ambiguity; no injustice was occasioned to the appellant. That ground therefore fail.

From the foregoing I see no merit in the appeal and do dismiss accordingly.

Dated and signed at Nairobi this.....day of... ..2017.

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RACHEL NGETICH

HIGH COURT JUDGE

Delivered at Nyeri this 26TH day of JULY 2017.

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JUDGE