



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL APPEAL NO. 172 OF 2017

JOHN KAKUMI KIMAL.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was charged with offence of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(1) AS READ WITH 8(2) OF SEXUAL OFFENCES ACT NO 3 OF 2006.**

On the 8th day of November 2010 at [particulars withheld] Sub-location, Muvau Location Makueni district within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of **K G** a girl under the age of eleven years.

2. **ALTERNATIVE CHARGE WAS COMMITTING INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF SEXUAL OFFENCES ACT NO. 3 OF 2006.**

On the 8th day of November 2010 at [particulars withheld] Sub-location Muvau Location Makueni District within Makueni County intentionally committed an offence by causing his penis to touch the vagina of **K G** a child aged below the age of 11 years.

3. He denied the charge and the case was heard and he was convicted and sentenced to serve life imprisonment.

4. Being aggrieved by the above decision, the appellant appealed and set out the following grounds.

***-That**, he pleaded not guilty to the above charges during trial.*

***-That**, the learned trial magistrate erred in both law and facts and misdirected himself by holding that the case for the prosecution side was proved beyond reasonable doubt whereas in the basis of record, the burden of proof wasn't discharged.*

***-That** the learned trial magistrate erred in both law and facts and misdirected himself by not accepting my argument that the investigations carried out were shoddy and thus justice was prejudiced to the accused during trial.*

***-That** the learned trial magistrate erred in both law and fact and misdirected himself by not accepting his defense during trial.*

***-That** the sentence is too harsh.*

5. When the matter came for hearing the appellant presented his amended supplementary grounds of appeal namely:-

***-That** the learned trial magistrate erred in both law and facts and misdirected himself by holding that the case for the prosecution was proved beyond reasonable doubt whereas on the basis of the record the burden of prove was not discharged.*

***-That** the learned trial magistrate had failed to consider the medical evidence properly whereby he had done so would have found that the victims was infected with a sexually transmitted disease whose origin was wholly wanting.*

***-That** his subsequent conviction was unjustified and manifestly unsafe.*

6. Parties canvassed the appeal via submissions. The appellant filed and served his written submissions but the respondent replied orally.

7. This being the first Appellate court; it is enjoined to look at the evidence before the trial court afresh, re-evaluate and examine the same and reach its own conclusion whether or not to uphold the conviction of the Appellant.

8. In reaching its decision, the reaching its decision this court has to bear in mind the reaching its decision, the court has bear in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore is not expected to make any findings as to the demeanor of the said witnesses.

9. Finally, this court is expected and mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment. See **KINYANJUI –VS- R (2004) 2KLR P.364**. See also **OKENO – VS- REPUBLIC**.

10. The prosecution case was sought be proved by evidence of six witnesses.

11. The same is summarized below.

12. The complainant, K G, testified as PW1 at the time of her testimony the complainant told the court that she was aged 11 years and was a class four pupil at [particulars withheld] Primary school.

13. The court conducted a *voire dire* examination and found her to be a child of tender years, who though sufficiently intelligent, did not understand the meaning of an oath.

14. PW1 told this court that on 08/11/2010 she was playing with her cousin M (PW6) at home while her parents were in a nearby farm when the accused arrived and offered to give her “**kaa ngumu**” which translates to hard baked cakes.

15. It is the complainant’s evidence that the accused held her by the hand and carried her to his house on his back in the presence of her cousin M. Once the two reached the home of the accused the complainant says the accused placed her on a bed and removed her clothes.

16. She told the court that the accused removed her panty completely and slept on her. PW1 further told the court that the accused removed his clothes to the knees and removed “**his thing**” which is used for urination and put it in “**my thing used for urinating**” (pointing at her loin).

17. PW1 says she felt pain and cried and her father went and rescued her. It is her evidence that her dad lifted her up, probably from the bed, and took her home.

18. PW1 told the court that the accused was arrested after her father reported the incident to the assistant

chief while she was taken to a hospital in Wote where she was treated. It is the evidence of the complainant that she had known the accused for a long period of time prior to the incident and mentioned his name as **Kakumi John**.

19. She further told the court that the accused was drunk when he went to her home on the day of the incident. On cross examination by the accused, PW1 told the court that the accused went to her home at around 11:00 a.m. It is her evidence that the accused lied to her that he was going to give her “**kaa ngumu**” and that she did not scream.

20. She further told the court that her cousin M went and told her father what had transpired and he went and rescued her. She told the court that the home of the accused is about 30 meters from her home and that many people went to her home after the incident.

21. The father of the complainant testified as PW2, he told the court that he is called B K, a resident of [particulars withheld] village. PW2 was in his farm with his wife on 08/11/2010 at around 11.00 a.m. when a child called M M went and told them that the accused had gone to his home drunk and had carried the complainant to his house.

22. PW2 abandoned the oxen which he was using to plough his farm and rushed to the home of the accused which he says is about 100 metres from his home. M had told PW2 that the accused had taken the complainant to his home, in tow behind PW2 was his wife.

23. PW2 saw a machete placed against the wall outside the house of the accused, he says he peeped through a crack on the accused’s mud walled house and saw the clothes of the complainant on the floor. PW2 pushed the door open and entered the one roomed grass thatched hut, he says he saw the accused on top of the complainant whom he had pinned down.

24. To PW2’s horror he saw the accused defiling his daughter who was crying beneath him. When the accused saw PW2, he lifted his daughter from bed and carried her home. PW2 found his wife screaming outside the house of the accused, it is his evidence that she had been screaming as she raced behind him towards the house of the accused.

25. As a result of the alarm raised many people went to the scene and arrested the accused who had fled from the scene and was hiding in a valley some 300 meters from his house. It is the evidence of PW2 that the accused was taken back to his house where the complainant’s dress and panty were retrieved.

26. PW2 reported the incident at Makueni police station where he was advised to take the complainant to Makueni District Hospital where she was treated. PW2 identified a P3 dated 08/11/2010 that was issued to the complainant.

27. On cross examination, PW2 told the court that the complainant had been left at home with her three younger siblings and M. PW2 says his wife went to the home of the accused while calling out the name of the complainant and screamed when she got no response.

28. PW2 told the court that many of his neighbors went to the scene but did not record statements with the police. PW2 denied a suggestion that the accused had an affair with his wife; PW2 says that he handed over the clothes of the complainant to the police but he could not see them in court.

29. E M who is the mother of the complainant and wife to PW2 testified as PW3, gave evidence mirroring that of PW2 in material particulars. PW3 was standing next to PW2 near the door to the house of the accused when he entered the house of the accused and picked the complainant whom she says was naked. According to PW3, the complainant was crying and was unable to talk because she appeared shocked.

30. PW3 saw the accused emerging from his house without a shirt while pulling his trousers up the waist. She says the accused’s trouser was unzipped and the accused was holding it by the waist. PW3 was handed over the complainant by PW2 and she took her home, it is her evidence that M was present and he

was among those who called out the name of the complainant and the accused before PW2 entered the house of the accused.

31. It is the evidence of PW3 that she did not accompany the complainant to hospital because she was nursing a young child. PW3 identified the complainant's clinic card and told the court that she was born on 06/07/2004, PW3 told the court that she knows the accused who is her immediate neighbour and that his house is about 100 metres from her house. The accused did not cross examine PW3 protesting that she was not a witness when he was first tried in court.

32. Clinical officer **Joseph Biwott** who testified as PW4 told the court that he examined the complainant on 09/11/2010 who was presented with a history of defilement by someone well known to her. PW4 gave the complainant's age as being six years at the time of examination.

33. It is the evidence of PW4 that the complainant's underpants were soiled; when he did vaginal examination he noted bruises on the left side of the *labia minora*. The complainant's hymen was perforated but she had no vaginal discharge. Laboratory test revealed no spermatozoa save for a venereal infection.

34. PW4 formed the opinion that the complainant had been sexually penetrated due to the perforations on the hymen. PW4 produced the complainant's P3 as **Exhibit 1 No. 73107, IP (W) Agnes Ikiba** who testified as PW5 told this court that she is the investigating officer in this case.

35. On 08/11/2010, she received a report that the accused had defiled the complainant. She escorted the complainant to Makueni District Hospital where she was examined. It is her evidence that the accused was arrested by members of the public and taken to the police station. She produced the complainant's clinic card as exhibit 2.

36. PW5 had initially charged the accused with the offence of attempted defilement before she was advised to charge him for the offence of actual defilement. PW5 denied a suggestion by the accused that she had been compromised in her investigations. She told the court that a human rights activist had accompanied the mother of the complainant when she went to the police station.

37. **M M** who testified as PW6 told the court that he is a form three student at [particulars withheld] Secondary School and a resident of Muvau location. On 08/11/2010 PW6 was at the home of the complainant together with the complainant and the siblings of the complainant whose names he gave as **N K K, M K and J K K**.

38. He says the accused, whose name he gave as **John Kakumi Kimau**, went and took the complainant to his house. PW6 says he went to the farm to tell the complainant's mother what had happened and together with PW2 and PW 3 they went to the house of the accused.

39. It is his evidence that they called out the name of the complainant but received no response. PW6 further told the court that the accused responded by saying that the complainant was not in his house and he witnessed as PW2 broke the door and entered the house of the accused.

40. It is the evidence of PW6 that PW2 emerged from the house of the accused with the complainant and was shortly followed by the accused who fled the scene and went into hiding. PW6 says he knew the accused very well as he was a neighbour.

41. On cross examination by the accused PW6 told the court that he did not enter the house of the accused. He further told the court that many neighbors went to the home of the accused after an alarm was raised.

42. When placed on his defence the accused chose to give an unsworn statement of defence. He told the court that he is a resident of Muvau location and was a farmer prior to his arrest. On 08/11/2010, the accused says he had an appointment with his area chief over a fine of Kshs.30, 000/- which had been

imposed on him over an affair he had with PW3.

43. It is his evidence that he did not have the money required and he decided to work on his farm, he told the court that he was in his farm at around 11.00 a.m. when he saw PW2 and about five old men who went to him and told him that he was required at the chief's office.

44. The accused says he returned his tools to the house and accompanied PW2 and his team to the office of the chief. He says a discussion was held in the office but no agreement was reached because he had not paid his fine.

45. The accused says he was taken to the police station and warned on the way that he was going to face something new and was charged with the offence of attempted defilement when he arrived. The accused told the court that he has no hard feelings against the parents of the complainant.

46. The appellant submitted that although in this judgement the learned trial magistrate was of the view the appellant was guilty as charged, it is his irresistible contention that the burden of prove was not discharged.

47. The prosecution's set-up to prove the charge, thus it was duty bound to prove as to how the appellant penetrated the genitalia of the complainant by means of his genitalia which was not proved.

48. The medical evidence was adduced by PW4. As per his own words this witness proceeded to state:-

“I did vagina examination. There were bruises on the left side of the labia minora. The hymen was perforated. We did lab investigations. There was no discharge; no spermatozoa but there were gram positive rods suggestive of venereal disease infection. Other tests were negative including HIV. I informed the opinion that there was sexual penetration due to the perforated hymen.” See pg 22 lines 1-4).

49. However the appellant was not subjected to medical examination hence no link to the commission of the offence charged.

50. Failure or omission by the prosecution to prove this salient aspect was a reasonable doubt which weakened the prosecution's case to quite a very great extent. In the case of **WOOLMINGTON –VS- THE D.P.P (1935) AC 462** it was held that:-

“If there is any reasonable doubt created by the evidence brought forward by the prosecution, then, the case for the prosecution is not proved and the prisoner is entitled to an acquittal.”

51. The investigation officer (PW5) clearly informed the court that he subjected the appellant to medical examination. At pg. 25 line 13-14 where he stated: -

“I took the accused to Makueni District Hospital for examination and later charged him with this offence.” See also her further testimony while cross-examined by me the appellant in this regards and stated:- I placed you in custody. I took you to hospital accompanied by my colleague.” (See pg 25 lines 22-23).

52. The above testimony clearly shows that there was indeed a hidden agenda on the issue of appellant's medical examination report. Why was the report not produced in court?

53. In answer to this, the appellant submits that the prosecution knew that such report if produced would have been unfavorable to the prosecution and favorable to the defence side.

54. Therefore the appellant contends that the burden of prove was not adequately discharged by the prosecution as the law demands hence seeks for a remedy or a benefit of doubt in this regards by this Hon Court. See **WOOLMINTON Supra.**

55. In his judgement all what the trial magistrate said was:-

As per the content of his ***“PW4 gave evidence showing that the complainant was sexually penetrated and her hymen was perforated. Besides that she was infected with a sexually transmitted infection.”*** (pg 8 of his judgement last paragraph sentiments, it appears that the trial magistrate lost sight of the fact that PW4 did not talk of the victim being sexually penetrated but said: -

“I did vaginal examination. There were bruises on the left side of the labia minora. The hymen was perforated.

56. Case a kin to the present one has settled by **Justice L. Kimaru on 28/02/2007 in the case of PETER MWANGI MUTHANYA –VS-REPUBLIC. HCCR APPEAL NO. 154 OF 2005 (NAKURU)** – the appellant was charged and convicted for an offence of incest.

57. The particulars of the offence were that on diverse dates between 1999 and the 17th May 2004 at Kigogo village in Nyandarua district being a male person had unlawful carnal knowledge of his daughter. He was sentenced to 10 years imprisonment.

58. In his petition of appeal the appellant challenged the decision of the trial magistrate in convicting him. He was aggrieved that the trial magistrate had failed to consider the medical evidence which was adduced by the complainant which indicated that she had not been defiled.

59. In his judgement while allowing the appeal Justice L. Kimaru said:- ***“it is evident that the complainant got the yeast infection due to other predisposing factors which did include sexual intercourse. It is the view of this court that when PW-4 testified before the trial magistrate, he misled the court into arriving at a decision that indeed he had confirmed that the appellant had defiled the complainant.”*** ***The trial magistrate considered the said views of the clinical officer without critically analyzing the evidence on record. On re-evaluation of the said evidence, it is clear that the appellant had not sexually assaulted the complainant. It is also clear that the testimonies of PW1 and PW-2 were in fact not true. It would be inconceivable that he could have been so careful not to penetrate the vagina of the complainant even when he was drunk as happened on the 17th May 2004. Upon re-evaluation of the said evidence, it is clear that the prosecution did not establish to the required standard of proof that indeed the appellant defiled the complainant. The appellant’s defence to the effect that he had not defiled the complainant cannot but be true the upshot of the above reasons is that the appeal is allowed.”***

60. The above case is similar to the circumstances of this case and thus the Hon Court is urged to apply the same principles while determining this appeal as indeed as stated in appellant defence statement where he denied ever committing the offence charged.

61. The Assistant Director Public Prosecution replied orally. He submitted that the 6 witnesses by prosecution gave cogent evidence. The appellant was caught red-handed. The medical report confirmed defilement. The defence tendered was an afterthought.

62. After going through the material before me, I find the following issue emerge;

- Whether the prosecution proved its case beyond reasonable doubt?

63. In **NGUI –VS- REPUBLIC HCRA 296 OF 2010 MACHAKOS** the court held that the ingredients of defilement are:-

- Penetration of complainant’s genitalia,

- Age of the child,

- And prove of the person who penetrated the genitalia of the complainant.

64. It is the evidence of PW6 that he was with the complainant and other children on 08/11/2010 when the accused went to where they were and picked the complainant whom he took towards his house. Sensing that what the accused had done was wrong, PW6 rushed to where the parents of the complainant were in the farm and informed them of what had happened.

65. PW6, PW2 and PW3 raced to the home of the accused and found his house closed. PW2 told the court that he peeped through a crack on the wall of the accused's house and was horrified to see his daughter's clothes on the floor. He instantly decided to push the door open only to be met by a ghastly sight of the accused who was on top of the complainant whom he was defiling as she cried.

66. The accused let go of the complainant when he saw her father and sat on the bed as PW2 picked his traumatized child and took her to safety. PW3 witnessed as the accused emerged from his house zipping his trousers.

67. The complainant who testified as PW1 told the court that the accused picked her from her home while promising to give her "**kaa ngumu**" but when she declined to accompany the accused she says he took her by force to his house.

68. Once in the house she says the accused undressed her before removing his "*thing used for urination and inserting into her thing for urination*". She says she felt pain and cried and was rescued by her father.

69. At the time of her testimony PW1 appeared traumatized and was hesitant to talk.

70. PW4 gave evidence showing that the complainant was sexually penetrated and her hymen was perforated. Besides that she was infected with a sexually transmitted infection.

71. I do find that the accused was found red handed (*flagrante delicto*) in his vile act of defiling a child who was only six years old.

72. In an attempt to escape liability for his despicable acts the accused has chosen farfetched statements of defence by insinuating that he was fixed for an affair which he allegedly had with PW3 and for which he had allegedly been fined but failed to pay the fine.

73. I do note that the accused never put any questions to PW3 on the alleged affair. It is a vain attempt on the part of the accused to turn his victims into villains.

74. PW1, PW2 PW3 and PW6 have given cryptic details about how the accused executed his evil plan against a defenseless child. The trial court found them to be truthful, forthright, coherent and honest witness. The accused has been unable to impeach their unassailable credibility and fortitude.

75. The court thus finds that the prosecution proved its case beyond reasonable doubt and makes the following orders.

1) The appeal is dismissed, the conviction is affirmed and the sentence confirmed.

SIGNED, DATED AND DELIVERED AT MAKUENI THIS 21ST DAY OF AUGUST, 2017.

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C. KARIUKI

JUDGE