



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 226 OF 2014

PETER KARIUKI KINYANJUIAPPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Judgment of the Chief Magistrate's Court at Molo Hon. H. M. Nyaga – Senior Principal Magistrate delivered on the 10th October, 2014 in CMCR Case No. 545 of 2013)

JUDGEMENT

The appellant **PETER KARIUKI KINYANJUI** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at the Molo Law Courts.

The appellant had been arraigned before the trial court on 25/4/2013 on a charge of **DEFILMENT CONTRARY TO SECTION 8(1)(2) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were that

“On the 7th day of April 2013 in Molo District within Nakuru County, intentionally and unlawfully caused his penis to penetrate the vagina of JMM a girl aged 10 years in contravention of the said act”.

The appellant also faced an alternative charge of **COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) SEXUAL OFFENCES ACT, 2006**.

The appellant entered a plea of ‘**Not Guilty**’ to both charges and his trial commenced on 27/6/2013. The prosecution led by **CHIEF INSPECTOR MUTETI** called ten (10) witnesses in support of their case.

The complainant who testified as **PW1** was a ten (10) year old child. She was taken through a ‘**voire dire**’ examination before giving her testimony. **PW1** told the court that on 7/4/2013 she went to church with her sister and then she returned home with her sister ‘**W**’. The accused came to their home. He called the child to go with him to his house on the pretext that he would buy her a mandazi. The child obliged. Once in the house the appellant locked the door. He placed the child on his bed and defiled her. The complainant told the court that while the appellant was defiling her some people were peeping into the house and saw him.

PW2 PETERSON MOMANYI told the court that on 7/4/2013 at about 1.00pm he was at his house. He saw the appellant whose house was adjacent to his come with the complainant. They both entered the appellant’s house. **PW2** became suspicious when the appellant locked the door. He got up and peeped through a crack in the timber wall. **PW2** saw the appellant lying on top of the child defiling her. He alerted other neighbours who also came and peeped into the house.

PW3 MWM was the complainant’s mother. She told the court that the accused who was a married man was her boyfriend but they lived separately. **PW3** told the court that on 7/4/2013 she prepared the complainant and her other children and they went to church.

At about 12.45pm **PW3** received a call from one ‘**Muthoni**’ telling her to rush back home. **PW3** thought there was a problem with her child J (complainant) who was epileptic, (indeed the trial court noted that **PW1** was somewhat disabled as her right hand appeared weak).

PW3 rushed back home and found a crowd in the plot. The police were called and the appellant was ordered to open the door. The complainant emerged carrying her trouser which had blood on it and she was also bleeding from her private parts. **PW3** took her child to hospital for treatment. Police rescued the appellant from the mob who wanted to lynch him. The appellant was taken to the police station and was later charged with this offence.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant gave an unsworn defence in which he denied having defiled the complainant. On 10/9/2014 the learned trial magistrate delivered his judgment in which he convicted the appellant for the main charge of Defilement and thereafter sentenced him to life imprisonment. Being aggrieved the appellant filed this appeal.

The appellant who was not represented by counsel had filed written submissions in support of his appeal. **MR. CHIGITI** learned State Counsel made oral submissions opposing the appeal.

Being a first appeal this court is obliged to re-examine and re-evaluate the prosecution case and to draw its own conclusion in the same [see **AJODE Vs REPUBLIC [2004] KLR 81. Likewise in MWANGI Vs REPUBLIC [2004] 2 KLR** the Court held thus

“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court’s own decision on the evidence.

2. The first appellant court must itself weigh the conflicting evidence and draw its own conclusions”

In a case of defilement the following ingredients must all be proved beyond reasonable doubt

- i. The age of the victim
- ii. The fact of penetration
- iii. The identity of the perpetrator

In any case of defilement the age of the victim is a crucial fact requiring direct proof. This is because the child’s age will determine the nature of the sentence to be imposed if one is convicted of the charge.

In her evidence the complainant told the court that she was ten (10) years old. **PW3** the complainant’s mother confirmed that the child was 10 years old. She told the court that the complainant was born on 16th September, 2001. **PW8 CORPORAL GEOFFREY DAVID OTIENO** was the investigating officer. He told the court that he obtained the complainant’s Immunization card which he produced as an exhibit **P. exb 7**. This is an official document issued by the Ministry of Health and it indicates that the complainant was born on 16/9/2001. This document together with the statement of the mother **PW3** provides sufficient proof of the child’s age. Having been born in September, 2001 the complainant was aged 11½ years (and not 10 years) as at April 2013 when this incident occurred and I do so find. The fact that the complainant and her mother were not sure of her exact age is not to my mind a major or fatal inconsistency. Many rural folk do not keep count of their birthdays and many are not sure of their exact ages. Suffice to say that the evidence adduced shows that at the time of this incident the complainant was aged 12 years.

The next issue requiring proof is the fact of penetration. The complainant told the court that the appellant came and called her from her home. He lured the child to his house pretending that he was going to buy her a mandazi. The child innocently followed the appellant to his house. Once there he defiled her. In her own words the complainant stated at page 5 line 22

“The accused came. He told me to go with him to his house so he could give me money to buy a mandazi. We went to his house. He locked the door. There was no one in the house. He took me to the bed. He removed my pants and his trouser. He told me not to scream. He covered by mouth. He then did ‘tabia mbaya’ to me. I felt pain.....”

The child had described what happened to her. Young children often lack adequate vocabulary to describe the sexual act. They invariably refer to the act as ‘*tabia mbaya*’. The child went on to explain that after the act she felt pain and added

“I bled from my chuchu”

This was one of the rare cases where there were witnesses to an act of defilement. Sexual offences are normally committed in secret but in this case there were several neighbours who told the court that they peeped into the appellant’s house through the gaps in the timber wall and saw the appellant lying on top of the child in the act of defiling her.

PW2 told the court that the appellant’s house is adjacent to his. On the material day he saw the appellant enter the house together. When the appellant locked the door **PW2** became suspicious and went to peep through the wall. **PW2** states

“I saw the accused lying on top of the girl. He was having sex with the girl”.

PW2 called other neighbours. **PW4 JM** told the court that she was alerted by **PW2**. She went to the appellant’s house and peeped in through a gap in the timber wall. **PW4** says

“I peeped into the accused’s room through a space on the timber wall. I saw the accused having sex with the girl.....”

Similarly **PW5 GRACE MUTHONI MWANGI** stated at Page 11 line 23

“Through a hole in the wall, I peeped and saw the accused having sex with J....”

PW5 took it upon herself to phone the mother of the complainant to tell her to rush home. All these witnesses have stated in clear words what they saw. This incident occurred in broad daylight.

PW3 the child’s mother told the court that when the appellant finally opened his door the child came out holding her trouser and was bleeding from her private parts. This evidence is corroborated by the other witnesses who were at the scene. Why would a man have in his house a young child minus her trouser? The fact that the child was bleeding from her private parts is an indication that she had been sexually molested.

PW6 DR. THIATHI told the court that he examined the complainant at Molo Hospital. He noted that there were bloodstains on her under wear. The doctor also noted bruises and blood on her genitals. He noted a tear on the vaginal wall and blood oozing from her vagina. All these observations provide proof of a sexual assault. The tear in the vagina is proof that penetration had occurred. The doctor formed the opinion that there had been sexual penetration. He filled and signed the P3 form which was produced in court as an exhibit **P. exb 3**.

From the evidence of the doctor as well as the testimony there is no doubt in my mind that indeed the complainant was defiled as she had alleged.

The final ingredient requiring proof is identification of the offender. The complainant identified the appellant as the man who defiled her. The appellant was a man who was well known to the child. He was a neighbour and a boyfriend to the child’s mother. In her evidence the complainant states at page 5 line 17

“The accused is called Kariuki. I know him. He lives near our farm”

No doubt this is why the child willingly accompanied the appellant to his house.

PW2 also identified the appellant as the man who he saw go into a house with the child. **PW2** was the appellant’s neighbour and knew him well. **PW4** and **PW5** have also both identified the appellant as the man whom they saw in the very act of defiling the complainant. As stated earlier this incident occurred in broad day light. Visibility was good and the witnesses could see the appellant very well. In the case of the complainant she spent several minutes alone and in close proximity with the appellant inside his house.

PW7 APC HASSAN IBRAHIM told the court that he was called to the scene by irate villagers who wanted to lynch the appellant. **PW7** forced open the door. Inside he found the child half-naked sitting on the appellant’s bed. **PW7** collected from the house the bloodstained mattress cover which he later took to the government chemist for analysis.

PW10 LAWRENCE MWANGI was the government chemist. He confirms that he examined the blood stained mattress cover. He tabulated his findings in his report dated 17/1/2014 which **PW10** testified that a comparison of the DNA profile extracted from the blood on the mattress cover revealed that it matched the DNA profile of a blood sample taken from the complainant. This is proof that the complainant did bleed onto the appellant’s bed and is further corroborative evidence that defilement did occur.

PW10 further testified that he found several spermatozoa stains on the same mattress cover. He compared these stains with the DNA profile from a blood sample taken from the appellant and he found that they matched. This is proof that sexual activity involving the appellant had recently taken place on that mattress cover. This is scientific evidence which clearly points to the appellant as the man who defiled the complainant.

In his defence the appellant denies having defiled the child. He suggests that he had been framed due to the fact that he and the child’s mother who were previously lovers had disagreed. **PW3** who was the complainant’s mother concedes that she and the appellant were once lovers but had separated. However **PW3** insists that she had no reason to fix the appellant. **PW3** stated at page 10 line 27 under cross examination by the appellant

“I was not your wife. We just had an affair. I have no reason to fix you”.

I do not buy the theory that this case was fabricated just to fix the appellant due to a love affair gone sour. Even if this court were to believe this defence it would only explain the role of **PW3** in the case. It is not possible that the complainant a mere child would have any grudge against the appellant. **PW2, PW4** and **PW5** who witnessed the incident were mere neighbours. They had no grudge against the appellant and had no reason to seek to fix him. These were independent witnesses who merely told the court what they had seen. I find no merit in the appellant’s defence and I do support the trial court’s dismissal of the same.

Based on the foregoing I find that the prosecution have proved a water tight case. There can remain no doubt at all that it was the appellant who defiled the complainant. His conviction was sound and I do uphold that conviction.

After listening to the appellant’s mitigation the trial court sentenced him to life imprisonment. Although the charge sheet gave the complainant’s age as 10 years, this court has found that she was actually aged 12 years when the defilement occurred. The mandatory minimum sentence for defilement of a child aged 12-15 years as per Section 8(3) of the Sexual Offences Act is twenty (20) years. Therefore the sentence imposed by the trial court exceeded the mandatory minimum sentence. I therefore set aside the sentence of life imprisonment imposed on the appellant. The appellant took advantage of a young child who trusted him and was physically disabled. He deserves no mercy from the court. I therefore substitute a sentence of twenty years imprisonment. Only to this extent does the appeal succeed.

Read and delivered in open court this 13th day of October, 2017.

Appellant in person

Mr. Chigiti for DPP

Maureen A. Odero

Judge