



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 73 OF 2014

JOHN WANJAU NDIRANGU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from conviction and sentence in original Nanyuki CMCR Case No.159/2014 delivered on 8th September, 2014 by T.W Cherere (MS) Chief Magistrate)

JUDGMENT

The appellant **John Wanjao Ndirangu** was charged with the offence of defilement contrary to section **8 (1)** as read with section **8 (3)** of the Sexual Offences Act, Act No.3 of 2006.

The particulars of the offence are that on the 16th day of February, 2014 at around 10pm at [particulars withheld] village in [particulars withheld] location within the Nyeri County intentionally and unlawfully caused his penis to penetrate the vagina of **H W M** a child aged 15 years. He faced an alternative charge of indecent act with a child contrary to section 11(1) of the sexual offences Act. The particulars of the charge are that on the 16th day of February, 2014 at [particulars withheld] village in [particulars withheld] location in Nyeri County intentionally and unlawfully did an indecent act with **H W M** by touching her private parts namely vagina.

The prosecution called 7 witnesses and appellant gave un-sworn evidence. By judgment delivered on 8/9/2014 the appellant was found guilty on the main charge convicted and sentenced to serve twenty years imprisonment. Appellant was dissatisfied with the conviction and sentence and preferred this appeal.

The appellant in his petition of appeal faulted the trial magistrate's judgment on five grounds: That the learned trial magistrate relied on the evidence of the father and mother of the complainant which was riddled with contradictions and inconsistencies, did not consider the appellant's defence and did not take note that he was arrested by members of public who did not testify. The appellant filed written submissions in support of the appeal. He submitted that there were inconsistencies in the evidence of the complainant in that she told the court that she did not scream because she did not know how to do so; and then she still remained in the house even after the appellant had slept. He submitted that this shows she was not in the house by force but willingly and was escaping from her parents and he offered her refuge. Appellant further submitted that the learned trial magistrate did not consider his defence and that the learned trial magistrate shifted the burden of proof to the appellant to challenge the evidence of the prosecution witnesses. He referred to the decision in *Sekitoleko – VS – Uganda 1967 E.A 531* on the rule that the burden of proof at all times lies on the prosecution and never shifts whether the defence set up is an alibi or something else.

M/s Chebet for the Respondent opposed the appeal. Counsel for the Respondent submitted that there were no inconsistencies in the complainant's evidence; that the medical evidence showed that when complainant was cross-examined, there was presence of spermatozoa in her genital organ, that there is evidence that the complainant was rescued from the appellant's house; and that the appellants defence was adequately considered by the trial magistrate.

This is a first appeal. The duties of the first appellate court were stated in Ekeno – vs – Republic 1972 EA is to consider the evidence, evaluate in itself and draw its own conclusions but always bearing in mind that it did not see or hear the witnesses.

The evidence in the lower trial court was briefly as follows: The complainant H W M is aged 15 years old and in form one at [particulars withheld] Secondary school. She stays with her parents. On 16/2/2014 she was going to children when she met appellant outside his gate. Appellant asked her to greet him. She agreed and stretched her hand. He got hold of it and pulled her and dragged her to his house which then he closed the door. He went out and locked her inside the house. He came back and dragged her to the bedroom and he pulled out her trouser and under pant and then forcibly had sex with her. She stayed there the whole night. The next day he locked her in the house and left for work. Later police came with her parents and rescued her. She was taken to hospital where she was examined and the report showed that the hymen was broken and there was presence of spermatozoa in her genital organ.

The appellant gave unsworn evidence in his defence where he stated that on 17/2/2014 he closed the butchery and while going home was arrested by police and he saw a person with a young girl. He was taken to police and later to court.

The trial magistrate in her judgment found that the complainant was 15 years old; supported by the complainant's evidence and the medical report and therefore a child. The complainants was rescued from the house of the appellant by the police officers in company of her parents after breaking into the house which was locked from outside. The complainant who is a minor was found to have sufficient intelligence to testify and the trial magistrate in assessing her demeanor found her a credible and truthful witness.

Her evidence then she was defiled was supported by the medical evidence where upon examination spermatozoa was seen in her vagina. The complainant knew the appellant well, it was day light and a witness knew the house to belong to the appellant. I have no doubt that the complainant told the court the truth.

The appellant faults the trial magistrate on the basis that she did not consider his defence. This is not true as the learned trial magistrate considered the appellants brief defence and rejected the same as being true. Upon consideration of the evidence and submissions, I am satisfied that the conviction by the trial magistrate was supported by the evidence on record and I therefore find the conviction proper.

As for sentence the appellant was charged with the offence of defilement contrary to section 8(3) of the sexual offences Act which states

8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

The complainant in this case was 15 years old. The minimum sentence for defilement of a child between the age of 12 to 15 years is 20 years. The appellant was sentenced to 20 years imprisonment which is the minimum sentence. I find the sentence lawful.

In the result I find this appeal is without merit. I uphold the conviction and affirm the sentence of 20 (twenty) years imprisonment.

Dated at Nyeri this 4th day of January, 2016

S RIECHI

JUDGE

31/3/2016

Before – Hon S Riechi – Judge

Catherine – C/clerk

Appellant – present

Njue for state

Court – judgment read and delivered in open court in presence of appellant and Mr. Njue for the respondent this 31st day of March, 2016.

S RIECHI

JUDGE