



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL CASE NO.12 OF 2015

(From original conviction and sentence in Criminal Case No.1133 of 2013 of the

PM'S Court at Ogembo delivered on 5th February, 2015 by Hon. Caroline R. T. Ateya – RM)

TARIASI NYANGARESIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein, **TARIASI NYANGARESI**, was charged with the offence of **defilement contrary to Section 8(1)** as read with **Section 8 (2) of the Sexual Offences Act No.3 of 2006**.

The particulars of the charge were that on 31st July, 2013 in Sameta District within Kisii County, intentionally caused his penis to penetrate the vagina of T.K. (name withheld) a child of 9 years.

2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**.

The particulars of the alternative charge were that on 31st July, in Sameta District within Kisii County intentionally touched the vagina of T.K.(name withheld).

3. The Appellant was tried, convicted and sentenced to serve 15 years imprisonment on the alternative charge.
4. He now appeals against both the conviction and sentence on the 7 grounds set in the petition of appeal filed on 16th February, 2015 as follows:

1. **That the hon. Magistrate never gave me the opportunity and information to digest the evidence of the prosecution.**
2. **That the hon. court of trial erred in both law and fact by not allowing me to consult any law experts or advocate so as to make the right decision on the plea.**
3. **That the learned trial magistrate erred in the law and the fact by relying on hearsay evidence as a basis of conviction and sentence.**
4. **That I am the originality charged with the offence of stock theft contrary to section 275 of the Penal Code.**
5. **That the trial magistrate erred in law and facts by convicting and sentencing the appellant to**

- serve seven years imprisonment without considering the age of the appellant.**
6. **That the trial magistrate erred in law and facts by not considering the appellant mitigation.**
 7. **That the conviction and the sentence is irregular and bad in law.**
5. The Appellant was unrepresented at the hearing of the appeal while Miss Mochama appeared for the state. The appellant chose to rely on the grounds of appeal and stated that he had no submissions to make on his appeal save that he pleaded for leniency/mercy from the court so that he could be set free to go back home.
 6. Miss Mochama for the state on her part opposed the appeal and submitted that the appellant had ample time to understand the case filed against him as he was furnished with the witness statements before his trial and he had enough time to engage the services of a lawyer of his choice to defend him at the trial.
 7. Miss Mochama further submitted that the prosecution presented cogent evidence from a total of 6 witnesses two of whom were eye witnesses to the offence and as such, the appellant had no basis for stating that the court relied on hearsay evidence.
 8. Miss Mochama further argued that the appellant's conviction was proper and in line with the provisions of **Section 11 (1) of Sexual Offences Act**. She further stated that the appellant cannot be seen to complain that his mitigation was not considered during sentencing because the appellant never offered any mitigation in court, upon conviction, despite having been given a chance to do so.
 9. This being a first appeal, the duty of this court is to analyse the evidence afresh and re-evaluate the same in order to draw its own independent conclusions while bearing in mind the fact that I neither heard nor saw the witnesses testify. In **Collins Akoyo Okemba & 2 others vs Republic [2014] eKLR** it was held:

“It is a duty to re-evaluate re-analyse and reconsider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision.”

10. The Prosecution tendered evidence of 6 witnesses as follows:

PW1, T.K. (name withheld) the complainant in question testified that on 31st July, 2013 she was going to school at about 8 a.m. when the appellant, who was then following her from behind, held her by the hand and took her to a banana plantation, removed her clothes and underwear and lay on top of her. She testified that the appellant removed his trousers and touched her private parts. At this point in her evidence, the complainant pointed at her private parts to indicate to the court the part of her body which the appellant touched. The complainant added that she felt pain and screamed whereupon one Clinton (PW4) and another woman who was passing by (PW3) came to her rescued and took her to the chief after which the appellant was arrested. She added that she was taken to the hospital after the ordeal where she was treated and the P3 form filled.

PW2, Charles Matundura Moguka, the assistant chief of Kiongongi sub-location testified that on 31st July, 2013 at about 14.40 p.m. he was at his home when he heard screams from the road near his home and on going to the scene where the screams were emanating from, he found a large number of people carrying stones and sticks while baying for the blood of the appellant over allegations that he had defiled the complainant. PW2 rescued the appellant from the angry crowd that wanted to lynch him and took both the complainant and the appellant to his home after which the complainant went to hospital and he handed over the appellant to the police.

PW2 stated that he knew the appellant as his next-door neighbor while the complainant's home was 2 homesteads away from his home.

PW3 Zipora Moraa narrated how on 31st July, 2013, at about 8 a.m. she was on her way home from the shamba when she met a child of her in law C.K (PW4), who told her to go and witness the bad things that appellant was doing to the complainant in the maize

plantation and on reaching the scene, she saw the appellant wiping the complainant's "lower parts" whereupon she screamed and the appellant ran away only to be arrested at Irengero area by members of the public who had pursued him upon responding to her screams. PW3 then took the complainant to the area chief and shortly thereafter the appellant was also brought to the chief. PW3 stated that she was about 5 meters away from the complainant and appellant when he saw the appellant wipe the lower part of the complainant and that he knew the appellant before the incident.

PW4, C.K, a minor aged 8 years old testified that on 31st July, 2013, at about 8 a.m., while looking for napier grass in the farm of PW3, he saw someone lying on top of a child about 2 meters away from where he was. He went to inform PW3 of what he had seen and upon coming back to where the appellant was he found the complainant standing. PW4 testified that when he first saw the appellant, his trousers were open and he was lying on top of the child.

PW5 Wycliffe Atambo was the Clinical Officer based at Ogembo Hospital who on August, 2013 filled the P3 form in respect to the complainant who had earlier on been treated at Gucha level 4 Hospital with the history of defilement. PW5 testified that his examination of the complainant revealed bruises of labia majora and minora, while the hymen was intact. He filled the p3 form which was produced as PExhibit 1.

PW6 no. 77316 CPL Emily Rop was the investigating who on 31st July, 2013 at around 12.50 p.m. received the complainant and the appellant. She recorded the statements from the complainant and her grandmother, issued the complainant with the p3 form which was filled by the doctor and the appellant was thereafter charged with the offence of defilement and the alternative charge of committing an indecent act with a child.

11. In his unsworn statement before the court, the appellant stated that he was grazing cattle at a field next to the river when the complainant saw him and ran away screaming. He claimed that he went back to his home but a day later, he was arrested and charged with the offence of defilement/indecent act with a child. He attributed the case against him to a grudge because he chased the complainant from his grazing field.
12. I have carefully considered and evaluated the evidence adduced by both the prosecution and the defence together with the grounds of appeal and the submissions made on the appeal. This court is first and foremost tasked with the duty of determining whether or it was established that not the appellant committed an indecent act with a child.
13. From the evidence of PW1, the complainant herein, she was very clear that the appellant stalked her on her way to school, grabbed her by her hand, took her into the maize plantation, removed her clothes and panties, removed his trousers and lay on top of her. She felt pain in her private parts and she screamed.
14. The testimony of PW1 was corroborated by the testimony of PW4 who actually saw the appellant lying on top of the complainant with his trousers open before he alerted PW3, on whose farm all these acts were taking place and indeed, PW3 came to the scene in the nick of time only to find the appellant wiping what she described as "the lower part of the complainant" whereupon she screamed and the appellant took to his heels with members of the public in hot pursuit.
15. From the evidence of PW1, PW3 and PW4, it is clear in my mind that the appellant was caught red-handed in the act of committing an indecent act with a child. Infact, had it not been that there was an error in the charge sheet in respect to the section of the law that the appellant had been charged with, the appellant could have been convicted of defilement.
16. PW5, the Clinical Officer tendered medical evidence that showed that the complainant's labia majora and minora were bruised while PW2, the area chief testified that the appellant was arrested by members of the public on the same day and handed over to him.
17. I find that the prosecution's case against the appellant was full proof and was proved beyond reasonable doubt.
18. I reject the appellant's evidence that he was arrested due to a grudge between him and the complainant because he chased the complainant from his grazing field. The appellant's

- explanation over as to the reasons for his arrest is incredible and amounts to an afterthought.
- 19.The truth of the matter, as I discern it and as is evident from the testimonies of the prosecution witnesses is that the appellant was caught in the act of committing an indecent act with a child
- 20.The appellant's theory that the complainant had a grudge with him cannot hold any water because there were other independent eye witnesses to the offence whom the appellant has not stated also had a bone to pick with him.
- 21.From the above foregoing, I find and hold that the trial magistrate was right to convict the appellant with the offence of committing an indecent act with a child.
- 22.On sentence, **Section 11 (1) of the Sexual Offences Act No. 3 of 2006** states as follows:

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

- 23.In view of the above section, I find that the sentence of 15 years meted on the appellant was lawful and was indeed within the limits of the sentence provided for by the law for the offence that the appellant was charged and convicted with. I therefore find no reason to interfere with the sentence passed by the trial court.
- 24.The upshot of my judgment is that the appeal lacks merit and is hereby dismissed.

Dated, signed and delivered in open court this 26th day of May 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

Otieno for the State

N/A for appellant

Omwoyo court clerk