REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 92 OF 2009

JOHN KURIA KARANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru, Hon.

H. O. Baraza -Resident Magistrate delivered on the 19th of March, 2009

in A/CR Case No. 127 of 2007)

RULING

The appellant herein **JOHN KURIA KARANJA** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at Nakuru Law Courts. The appellant had been arraigned before the trial court on 28/5/2007 facing a charge of **DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"On the 19th day of May 2007 in Nakuru District of the Rift Valley Province, unlawfully had carnal knowledge of T W M a child aged 8 years"***

The appellant entered a plea of **'Not Guilty'** to the charge. His trial commenced on 14/6/2007 before **HON. H. M. NYAGA** Senior Resident Magistrate who only heard one witness. Following the transfer of this magistrate the matter began *'de novo'* on 31/12/2008 before **HON. H. O. BARAZA**, Resident Magistrate. The prosecution called a total of four (4) witnesses in support of their case.

The complainant **T W M** told the court that at the material time she was aged 8 years. On 15/5/2007 at about 2.30pm she was outside their house sweeping. The appellant who was their worker came with a stick and pulled her into a corridor. He forced the child to lie down and removed her panty.

The appellant then put some sand into the complainant's vagina and proceeded to poke her vagina with the stick. When the appellant heard somebody coming he released the child warning her not to reveal what he had done or he would kill her. The complainant went home but did not reveal the incident to her mother.

PW1 A N M was the complainant's mother. She told the court that on the material day her child who was

then 8 years did come home limping. **PW1** did not suspect much and the following day she released the child to go to school as usual. That day the child was brought back home by one of her teachers called **'N'**. The said **'teacher N'** told **PW1** that the complainant revealed to her that she had been defiled the previous day. The teacher gave **PW1** the treatment card from Kabazi Health Centre **P. Exb 1**. **PW1** then questioned the complainant who told her that their worker (the appellant) had pulled her into the corridor the previous day and had sex with her. The child said she feared to tell her mother initially as she had been threatened. **PW1** reported the matter to police. The complainant was taken for a medical examination. Upon completion of police investigations the appellant was arrested and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He opted to make an unsworn statement in which he denied having defiled the complainant. On 19/3/2009 the learned trial magistrate delivered his judgment in which he convicted the appellant of the offence of **'Sexual Assault'** and thereafter sentenced the appellant to serve thirty-five (35) years imprisonment. Being aggrieved the appellant filed this appeal.

Although in his written submissions the appellant took issue with his conviction on the date of hearing of his appeal he stated as follows

> ***"…….. I will be relying on my written submissions. I am not appealing against my conviction. I only wish to challenge my sentence"***

The appellant thereby withdrew his appeal against conviction and opted to challenge **only** his sentence. For completeness however and this being a first appeal I will consider and analyze the evidence on record in order to determine whether the conviction itself was merited.

The complainant in her evidence narrated how the appellant accosted her whilst she was outside their house, sweeping, pulled her into a corridor and defiled here. In her own words the child stated at page 20 line 14

> ***"….. I recall 15/5/2007 at about 2.30pm. I was sweeping outside our house ….. That man (points to the accused) came with a stick and pulled me to the corridor. He also picked sand. The corridor was a veranda. He closed the corridor door and told me to lie down. He removed my pant and put the sand here. He lay on me. He put the sand inside here minor touches the area between her legs ie the vagina area. He then put the stick in the place I use to urinate……."***

The child here has given a very clear and graphic description of what the appellant did to her. The account was so detailed that it is highly unlikely to have been a fabricated story. The complainant remained unshaken under cross – examination by the appellant. She stated at page 21 line 13

> ***"You put sand into my private parts. The parts used to urinate. I was injured here. Witness lifts up her dress and shows the court the part next to her vagina. You touched me on that part as you put the stick…"***

The complainant though a young child gave clear and consistent evidence she did not waver in her account.

The complainant's testimony is corroborated by the evidence of **PW2 GLADYS ONDIEKI** a clinical officer based at Bahati Clinic. She examined the complainant on 25/5/2007 six days after the incident. She noted that the child had **"bruises on both thighs and swelling of right thigh and the right hip joint. On the vagina the internal mucous was inflamed together with the labia minora….."**

PW3 explained that the patient developed an abscess (wound) on the bruises. **PW3** produced the complainant's initial treatment notes from Nakuru Provincial General Hospital **P. Exb 1** as well as the duly filled P3 form **P. Exb 2.** The evidence of **PW3** staves that there was clear interference with the vagina of the child. There had been penetration by some object. Indeed **PW3** confirms in cross-examination at page 23 line 11 that

"The vagina was swelling and there was a sign that the internal vagina was interfered with. Something had penetrated right inside"

From the evidence available I do find as a fact that there had been penetration of the complainant's vagina on the material day.

The appellant had been charged with **'Defilement'**. In order to prove defilement it must be shown that the appellant penetrated the child. The term **'Penetration'** is define in the Sexual offences Act 2006 as

"The partial or complete insertion of the genital organs of a person into the genital organs of another person"

Therefore in order to prove defilement the evidence must show that the appellant used his **'genital organ'** to penetrate the genital organ of the complainant. This did not happen in this case. The complainant states that the appellant used a **'stick'** to penetrate her vagina. This does not amount to defilement. However as the learned trial magistrate properly found the facts of the case do prove the offence of '**Sexual Assault'** under Section 5(a) of the Act.

Section 5(a) provides that

"5(1) Any person who unlawfully

a. ***Penetrates the genital organs of another person; with***

i. ***any part of the body of another or that person or;***

ii. ***an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes….***

b. **……..**

Is guilty of an offence termed sexual assault" (my own emphasis)

Clearly the use of a stick (object) to penetrate the vagina (sexual Organs) of the complainant amounted to a sexual assault under Section 5(a) (ii).

The final question would be that of identification. The incident occurred at 2.30 pm. It was broad daylight meaning that visibility was good. The appellant was a worker employed by the complainant's mother. The child knew him well as he was not a stranger to her. She identified him by his name John Kuria and pointed him out severally in court during the trial. The complainant later told her mother that it was appellant who had sexually assaulted her. There is clear evidence of recognition of the perpetrator with no possibility of mistaken identity.

In his defence the appellant claimed that the charge had been fabricated at the instant of **PW1** the child's mother because she was unhappy at appellant's demanding his wages from her. However this defence was clearly an afterthought. The appellant never raised the issue of unpaid wages whilst he was cross-examining the witness. I do agree with the learned trial magistrate's decision to dismiss this defence.

Finally I am satisfied from my own analysis that the evidence on record proved that the appellant unlawfully assaulted the complainant child. His conviction for that offence was sound and I do confirm that conviction.

After conviction the appellant was allowed an opportunity to mitigate. The magistrate did consider his mitigation and sentenced him to serve thirty five (35) years imprisonment. The appellant has appealed against that sentence terming it harsh and excessive. Section 5(2) of the Sexual Offences Act 2006 provides for a sentence of **'not less than ten years'** upon conviction for Sexual Assault. The law thereby

provides for a minimum sentence of ten (10) years. The maximum sentence would be life imprisonment. I do agree that the 35 year term was somewhat excessive. I note the young age of the child and I note that she did not suffer any permanent **physical** injury. Undoubtedly the psychological harm done to her will last forever. In the circumstances I am inclined to allow this appeal against sentence only. I set aside the 35 year term imposed by the trial court in its place I substitute a term of twenty (20) years imprisonment. This sentence will run from the date of conviction by the trial court. It is so ordered.

Dated in Nakuru this 22nd day of July 2016.

Appellant in person

Maureen Odero

Judge

22/7/2016