



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 386 of 2010**

**RICHARD NJOGU KAMAU.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrates Court at Kibera in Criminal Case No. 2042 of 2008, delivered by Hon. Kasera (Mrs), SRM on 29<sup>th</sup> June, 2010).*

**JUDGMENT**

**BACKGROUND**

*Richard Njogu Kamau herein the Appellant, was charged of committing the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars were that on diverse dates between 1<sup>st</sup> May and 31<sup>st</sup> May, 2008 at **[particulars withheld]** within Nairobi Area province, unlawfully committed an act by inserting a male genital organ (Penis) which caused penetration into the female genital organ(vagina) of TWW a child aged 13 years old.*

*In the alternative he was charged with committing an indecent act contrary to Section 11(1) of the Sexual Offences Act. The particulars were that on diverse dates between 1<sup>st</sup> May and 31<sup>st</sup> May, 2008, at **[particulars withheld]** within Nairobi Area province, committed an indecent act by touching the female genital organ (vagina) of TWW, a girl aged 13 years.*

*He was convicted and sentenced to 20 years imprisonment. However, being dissatisfied by that court's finding he has decided to lodge the present appeal in this court. His grounds of appeal are that; the evidence adduced was not sufficient to warrant a conviction, that the prosecution did not call crucial witnesses, that the appellant's constitutional rights to a fair trial was violated having been kept in police custody for more than 24 hours and that his defence was not considered.*

**SUBMISSIONS**

*The Appellant canvassed the appeal by way of written submissions. He submitted that there was contradiction in the prosecution witnesses' testimony which shattered the entire prosecution's case. He was particular with the evidence of both PW2 and 3 which was that PW1 at the time of examination was found to be pregnant. In contrast, on her examination by PW5, the police doctor, no evidence of pregnancy was noted in the P3 Form produced in evidence. The said witness did not also in his testimony allude to noting that PW1 was pregnant yet he conducted the examination 3 months after the*

incident. In that case, although PW1 may have been pregnant, the only evidence that could have confirmed that the Appellant was responsible for the pregnancy was through a DNA test. Unfortunately none was conducted giving doubt that the Appellant had any sexual intercourse with PW1.

The Appellant also queried the prosecution evidence on the dates that the offence is said to have occurred. The charge sheet was drafted to indicate that the offence was committed on diverse dates between 1<sup>st</sup> and 31<sup>st</sup> of May, 2008. In contradicting this fact, PW1 herself was categorical that she had a sexual intercourse with the Appellant on 14<sup>th</sup> May, 2008. Having denied that he committed the offence, the contradiction should only have been resolved through a DNA test so as to confirm that he was responsible for the pregnancy of PW1. In the same spirit, he was of the view that the learned trial magistrate ought to have held PW1 as an untrustworthy witness. This was more particularly because she testified that 14<sup>th</sup> May, 2008 was on a Sunday which day was confirmed to be on a Wednesday on the calendar. Therefore, the person who might have had sexual intercourse with her on a Sunday was not the Appellant.

The Appellant went on to submit that the age of PW1 was not proved. According to him, PW1 testified that she was born in 1994 whilst her mother testified that she was born on 3<sup>rd</sup> March, 1993. He submitted therefore that the contradiction ought to have been resolved in his favour. Finally, he submitted that his defence was not considered which if it had been, the trial court would have acquitted him.

Learned State Counsel, Ms. Sigei for the Respondent gave oral submissions. She submitted that the three ingredients of the offence; age, identification and penetration were proved. She submitted that the charge reflected that the offence was committed on diverse dates since it took too long for the offence to be reported to the police. She urged that the appeal be dismissed.

## **EVIDENCE**

As a first Appellate court, this court is mandated and duty bound to re-evaluate and reanalyze the evidence on record afresh while taking into consideration that it has not had the chance to observe the witnesses' demeanor. See: **Okeno v. Republic[1972] EA 32.**

The prosecution's case was that the Appellant lured the complainant to his house where he proceeded to have sexual intercourse with her before sending her home. She went home and did not inform anyone of the incident until a month later or so when the mother, who was suspicious, found her vomiting and thereafter on being submitted to a test, was found pregnant. She informed her mother that the Appellant was which led to his arrest.

**PW1, T.W.W**, who was the complainant then aged 14 years gave sworn evidence. At the time of her testimony, she was in class 7. She testified that on 14<sup>th</sup> May, 2008, a Sunday, she was on the way from church when she met the Appellant who was a family friend walking. The Appellant asked her to escort him home to pick something. When they got to the house he cooked some rice and gave her some but she refused to eat. He then asked her to have sex with her. He informed her that she did not risk getting pregnant 10 days after her menstruation. She informed him that her mother would not approve of this but he undressed her and had sex with her. She cried and he let her go and she went back to the mother's kiosk (Kibanda). She did not immediately inform her mother what had happened. A month later, she started getting sick. Her mother took her to hospital where she was diagnosed to be pregnant. She then revealed that the Appellant was responsible. She was further treated at the Nairobi Women's Hospital. A government doctor also examined her. Medical reports were adduced in court as evidence.

**PW2, R N W**, PW1's mother testified that she noticed PW1 vomiting on 14<sup>th</sup> July, 2008 after giving her some food. She also appeared pregnant. A laboratory examination confirmed that she was pregnant. PW2 made a report at the Chief's Camp at Kangware and later at Muthangari Police Station. PW1 disclosed to her mother that the Appellant was responsible for the pregnancy.

**PW3, Dr. Ketra Muhombe** of Nairobi Women's Hospital examined PW1 on 5<sup>th</sup> July, 2008. A pregnancy

test was positive. The pregnancy was 14 weeks old. She also found that there was an old tear on the hymen but no abnormal discharge. She concluded that it was a case of defilement. She then sent her for counseling. She then produced the report she made on 7<sup>th</sup> August, 2008.

**PW4, Juma Kipyegon** worked as a volunteer Children Officer at DC's office at Dagoretti. He recalled that on 17<sup>th</sup> July, 2008 he was at work at the Children's office at Dagoretti when a lady came and informed her that a man had defiled a child. She said she knew the defiler as the Appellant. He filed a case record sheet and sent it D.C.I. for investigations after which the Appellant was arrested.

**PW5, Dr. Z Kamau** of Police Surgery at Nairobi Area recalled that on 8<sup>th</sup> September, 2008 he examined the complainant. He found no physical injury on her and no positive history of having bled from her private parts. External and internal genitalia were normal. Vulva penireal was normal but the hymen was missing and this was an old injury. He confirmed that that PW1 had been seen at Nairobi Women's Hospital. He adduced here P3 Form as evidence.

**PW6, No. 77721 P.C Justus Moriu** of Muthangari Police Station was one of the investigating officers having taken over from a colleague. He recorded the witness statements and charged the Appellant.

The prosecution then closed its case and the court made a ruling that the prosecution had made out a prima facie case and the Appellant had a case answer. The Appellant gave a sworn statement and testified as DW1. He testified that on 22<sup>nd</sup> July, 2008 he was asleep at around 6:30 am when he was awoken by a knock on the door. He went outside where he was informed he was needed at the Chief's place. He did not know the messenger. When he arrived at the Chief's place he was informed by the officers there that he was under arrest for defiling a school girl. They informed him that the girl was the complainant. At around 4.00 p.m. the child's mother came and informed him that he had impregnated her daughter. He was taken to Muthangari Police Station where he was charged. He denied the offence and produced a diary to demonstrate that he was at work on the fateful day. He also challenged the prosecution's evidence that 14<sup>th</sup> May, 2008 was a Sunday. He concluded by testifying that he had never had sex with the complainant.

### **DETERMINATION.**

I have considered the evidence and the respective submissions and arrived at the conclusion that the issue for determination is whether the case was proved beyond reasonable doubts. The complainant gave evidence that the offence was committed on the 14<sup>th</sup> of May, 2008. She testified that this was a Sunday and she was on her way from Church. The Appellant submitted to this court and the lower court that the date in question fell on a Wednesday and not on a Sunday as adduced by the complainant. This court has looked at the calendar and it is clear that the date in question was indeed a Wednesday which calls into question the evidence as adduced. The charge sheet on the other hand indicated that the offence occurred between 1<sup>st</sup> and 31<sup>st</sup> of May. It contrasts the evidence given by the complainant which was quite detailed on when and how the offence occurred. My view is that after the complainant testified, the prosecution ought to have amended the charge sheet so as to reflect the actual date that the offence occurred.

The second inconsistency involves the evidence of the various medical experts. The Appellant submitted that the medical examiner, PW3, gave evidence that the pregnancy appeared to be 14 weeks in age as at 5<sup>th</sup> July, 2008. This implied that the conception occurred in mid March, 2008. The Appellant submitted that the evidence of the other doctor, Dr. Kamau, did not indicate a pregnancy when he examined her on 8<sup>th</sup> September, 2008. This court could not trace the P3 form filled on the day in question but from his evidence he clearly testified that when he examined her there was no physical evidence of injury on her. The contrasted evidence definitely casts doubt on the strength of the prosecution case.

Amidst the cited inconsistencies, and more so taking into account that the Appellant denied having been into contact with PW1, the only evidence that would have nailed him was a DNA test with a view to ascertaining the person responsible for the pregnancy. This is a very crucial piece of evidence which by no means the prosecution ought not to have omitted in their investigations. It begs whether the omission

was deliberate or was an oversight. Be that as it may, I am minded that under Section 124 of the Evidence Act, a court may convict on the strength of the evidence of the minor notwithstanding the absence of corroboration if it believes in such evidence. However, where the prosecution chooses to adduce evidence that they cannot prove, or the same is dislodged by the defence, no doubt the minor's evidence cannot salvage their case. This is a good example of such a scenario. The prosecution alluded that the offence was committed on diverse dates. But PW1, the victim was candid that it was committed on a specific date and day. The court has demonstrated that the date in question was not on a Sunday as alluded by PW1. This then drives me to conclude that probably the person PW1 had sex with on 14<sup>th</sup> May, 2008 was somebody else other than the Appellant. I belabor to emphasize that only a DNA test would have proved that the Appellant defiled PW1. The mere fact that he was known to both PW1 and 2 did not make him the culprit.

On prove of age, during cross-examination, PW1 stated that she was born in 1994. PW2 her mother on the other hand in cross-examination stated that PW1 was born on 3<sup>rd</sup> March, 1993. She was in court with a hospital clinic card. She was also quick to add that she could not remember whether PW1 was born in either 1993 or 1994. Interestingly, the prosecution did not have the card either marked for identification or adduced in evidence. As courts have repeatedly stated, prove of age in a sexual offence trial is paramount as penalties are determined by the age of the victim. However, age must not necessarily be proved by documentary evidence. It can be established and demonstrated by oral evidence or observation. Medical documents may also be used to demonstrate the age of a victim. In the present case, PW1 in her testimony said that she was 14 years old. She testified on 28<sup>th</sup> January, 2009 which would imply that she was born around January, 1995 but in cross examination she was categorical that she was born in 1994 which was reiterated by PW2 her mother as being the probable time of her birth. I am of the view that PW1 at the time of her testimony was mature enough to know her age as she was in Standard Seven (7). I would therefore conclude that she was born in 1994. That placed her age at fourteen (14) as at the time of her testimony. The offence having been committed in 2008, means that she was thirteen (13) years old. In that respect, the charge was properly drafted. The Appellant's submission that the age was not proved has not merit in the circumstances.

Finally, Appellant did submit that his defence was not considered in the judgment. However, at page 2 the learned trial magistrate did summarize the Appellant's defence. The only error in the judgment was that the magistrate did not give reasons why she did not believe in the Appellant's evidence. Be that as it may, I have already concluded that the prosecution did not ably discharge their burden in proving the case beyond a reasonable doubt.

In sum therefore, I find that the prosecution did not prove their case to the required standard; beyond a reasonable doubt. The appeal is allowed. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby forthwith set free. It is so ordered.

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF OCTOBER, 2016.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

Appellant in person.

Ms. Sigei for the Respondent.