



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 86 OF 2014

JOHN GITAU NDIRANGU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 19 of 2014 (Hon. P. Mutua, Principal Magistrate) delivered on 3rd October, 2014)

JUDGMENT

The appellant was tried and convicted in the subordinate court of the offence of defilement contrary to **section 8 (1) and (3) of the Sexual Offences Act No.3 of 2006**; he had also been charged with alternative count of indecent act with a child contrary to section 11 of the same woman Act. Having been convicted of the principal count, this alternative count is of little relevance in this appeal.

The particulars in the main count were that on the 11th day of May, 2014 in Nyeri county within the Republic of Kenya, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of A N G a girl aged 13.

The trial court was satisfied with the prosecution evidence that this offence had been proved beyond reasonable doubt and so it convicted the appellant and sentenced him to 20 years' imprisonment. The appellant has now appealed to this court against both the conviction and sentence. According to his amended grounds of appeal which are contained in the submissions in support of his appeal and which he filed in this court on 14th January, 2015, the appellant faulted the learned magistrate's decision on the following grounds:

1. The learned magistrate erred in law and in fact when he based his decision on the evidence of the first and second prosecution witnesses without the corroborative evidence of the complainant's father and grandmother;
2. The learned magistrate erred in law and in fact in convicting the appellant yet the act of penetration was not proved beyond reasonable doubt;
3. The learned magistrate erred in law and in fact in basing his conviction on the manner by which the appellant was arrested yet those who were alleged to have arrested the appellant were not called as witnesses;

4. The learned magistrate erred in law in rejecting the appellant's defence yet the same was not challenged or displaced by the prosecution; he thereby contravened section **212** of the Criminal Procedure Code.

The state opposed the appeal and the learned counsel for the state urged that the appellant was properly convicted and sentenced; he, however conceded that there was no documentary proof of the complainant's age. This omission, according to the learned counsel, was not fatal to the prosecution case because in his submissions this honourable court can invoke **section 358** of the criminal procedure code and remit the case back to the magistrates' court for purposes of assessment of the age of the complainant; he urged the court to do so.

Apart from the question of age, the other points of contention in the trial against the appellant were whether the complainant was defiled and therefore whether an offence was committed as contemplated under **section 8 (1) and (3)** of the **Sexual Offences Act** and whether the appellant perpetrated this crime.

In order to ascertain the answers to these questions, it is necessary to examine and assess the evidence that was proffered at the trial. At the end of this exercise, this honourable Court has to come to its own conclusions which may not necessarily be consistent with the conclusions of fact arrived at by the magistrates' court. I am, however, minded that the trial court was in a better position to appreciate the evidence at trial because it had the advantage of seeing and hearing the witnesses.

The complainant herself testified that she was aged 13 and that on 11th May, 2014 at about 3 PM she went to the appellant's house for his cell phone. The appellant grabbed her and removed her clothes; he also removed his own trousers and proceeded to defile her threatening to kill her if she raised alarm.

The appellant was an employee of the complainant's parents and he shared the same compound with them.

According to the complainant, nobody else was at home when this incident happened; she, however informed her **grandmother** who in turn reported it to her parents. The latter reported the incident to the police who came and arrested the appellant.

The complainant's mother, **DG (PW2)** told the court that her daughter was born on 28th November, 2011 but that she did not have any document to prove her age. According to her, the day on which the complainant is alleged to have been defiled was a Sunday and so she had left for church. She left the complainant behind together with her father and the appellant who is said to have been milking the cows on the farm.

When she returned, she met the complainant. She noticed that the complainant was somehow shying away from her and when she enquired what could have happened, she told her that she could only tell her teacher or her grandmother. The said grandmother later called her to say that the complainant had told her that she had been raped by the appellant. She reported the incident to her husband, the complainant's father, who reported to the headman. The latter called the police who arrested the appellant. The complainant was taken to hospital for treatment.

Joseph Maina Mungai(PW3), the area assistant chief testified that he got a call at around 9 PM on 11th May, 2014 from the complainant's father who reported that the appellant and molested his 14 year-old child. He went to the complainant's home together with his security team. They arrested the appellant and took him to Nyeri police station. Administration Police **Constable Cyrus Amia (PW4)** of Tetu Sub-county testified that indeed he arrested the appellant on 11th May, 2014 and took him to the police station together with the complainant.

Police Constable Barago of Nyeri police station investigated the complainant's complaint; however, he did nothing more than issue the complainant with the P3 form and record the prosecution witnesses' statements.

The doctor who examined the complainant and filled her P3 form was Dr Meenge Kuria; he however did not testify but his report was produced in court by **Dr Njoooro Karanja (PW6)** who testified that he was familiar with his handwriting and signature. According to his findings, the complainant's undergarments were stained with blood but there were no injuries noted on physical examination. The hymen was however broken; there was a discharge, no spermatozoa but there were red blood cells noted. The report was signed on 25th May, 2014. The doctor also produced a post rape care form in respect of the complainant.

The appellant himself testified on oath and denied having committed the offence. He told the court that he was framed by his employer's so as to avoid paying him his money.

In unravelling the question whether the complainant was defiled, her own evidence was crucial in this respect. She told the court that she informed her grandmother and not her mother of the attack.

The complainant may as well have had her own reasons why she could not tell own mother that she had been assaulted by the appellant; at least it was not clear from the evidence but perhaps she was more comfortable relating this assault to her grandmother than to her own mother.

It is not clear whether the said grandmother lived with the complainant's family but it is apparent from the evidence of her mother that the complainant talked to her and told her what had happened. The grandmother was the first person to know that the complainant had been sexually assaulted and it would appear that if it were not for her, nobody else including the complainant's mother, would have known that the complainant had been assaulted.

No doubt therefore, the complainant's grandmother played a crucial role in the revelation of the offence against the complainant. However, in spite of that central role she played, she did not testify and it is not clear from the investigations officer's evidence whether he even interrogated her on the complainant's claims or took her statement. While I am aware that under **section 143** of the **Evidence Act, cap 80** the prosecution has the discretion to call any particular witness or any number of witnesses, the evidence of the complainant's grandmother would have been crucial, if not for anything else, to corroborate the evidence of the complainant that indeed she reported to her that she had been defiled by the appellant. Failure to call her, in my view, dented the prosecution case and at the very least created doubt in the complainant's testimony that she informed her grandmother of the sexual assault. It is important to remember that for some unexplained reason, the complainant could not tell her mother that she had been assaulted by the appellant, yet she was the very first person she met after the alleged sexual assault.

Coming back to the question of defilement, if the P3 form produced by the investigations officer is anything to go by then there is no doubt that the complainant was sexually assaulted in circumstances that may amount to the offence of defilement as prescribed by **section 8 (1) and (3)** of the **Sexual Offences Act**; the evidence that there could have been a sexual assault is from the doctor's findings of 'perforated hymen' and evidence of blood at the introitus and vaginal canal. This evidence, could not of itself be sufficient proof of defilement since I did not hear the doctor say that the injuries he described could only arise from penetration of one's genital organs by another person's genital organs. At the very best it was corroborative evidence which, coupled with the complainant's evidence, could provide proof that indeed she was defiled. The only question was whether the appellant defiled her.

In her evidence, the complainant's mother testified that she left the complainant in the company of two men one of whom was her husband while the other one was the appellant. It didn't come out clearly from the prosecution evidence where the complainant's father was at the time she was sexually assaulted; just like the complainant's grandmother, he did not testify. If he was left in the company of the complainant, one would ask, wasn't his evidence important at least to shed some light on whether he remained at home at the material time in which event, he could easily have noticed when his daughter was attacked or whether he left the home and it is likely that the appellant may have taken advantage of his absence to defile the complainant? The latter could as well have been the case, but in the absence of any proof, the court could not speculate and act on that assumption to convict the appellant. The burden was always on the prosecution to prove that indeed this is what happened; in my view, it is a burden that could easily

been discharged if the complainant's father testified. Without his evidence and without explanation of where he was when the complainant was assaulted, there should have been sufficient doubt whether either of the two men could possibly have committed the offence.

In the final result, my evaluation of the evidence at the trial leads me to conclude that it is possible the complainant may have been defiled but it is not certain, or to put it more clearly, it was not proved beyond reasonable doubt that it is the appellant who defiled her. The omission of the evidence of two potential witnesses who in my view were crucial left a lot of possibilities of what could have transpired and more particularly who could have perpetrated this offence.

The other issue that caught my attention was proof of the age of the complainant; I note that at some stage in the course of the appellant's trial the prosecutor applied to have the age of the complainant assessed. The court allowed the application and ordering that the appellant's age be assessed. There is no doubt that this application was made and the order was issued because of the realisation that ascertainment of age of a victim of a sexual offence is important. There is, however, no evidence that this order was complied with; it follows that the trial was concluded without ascertainment of the complainant's age.

In view of my holding that it was not proved that the appellant committed the offence, it is not necessary to consider the consequences of failure to ascertain the complainant's age save for academic purposes.

My conclusion is that based on the material presented before the trial court, and for the reasons I have given, the conviction of the appellant was not, in my humble view, safe. Accordingly, I allow the appeal quash the conviction and set aside the sentence. The appellant is set at liberty unless he is in lawfully held.

Signed, dated and delivered in open court this 18th day of November, 2016

Ngaah Jairus

JUDGE