



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.7 OF 2016

NAHAMAN KIRIMI IKAMATI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case No.4953 of 2014 of the Chief Magistrate's Court at Maua by J.W. Wanganga– Resident Magistrate)

JUDGMENT

The appellant, **NAHAMAN KIRIMI IKAMATI**, was charged and convicted for the offence of defilement contrary to section 8(1) (2) (sic) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 16th December 2014 at **[particulars withheld]** sub location Market, in Igembe Central District of Meru County intentionally caused his penis to penetrate the vagina of **D.M.K** a child aged 5 years.

The appellant was sentenced to life imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Mutembei, learned counsel. He raised thirteen grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by convicting the appellant on a charge that was fatally defective.
2. That the learned trial magistrate erred in law and fact by failure to hold that the failure by the complainant to give out the name of the appellant at the earliest opportunity cast serious doubts as to the identification of the appellant.
3. That the learned trial magistrate erred in law and fact by convicting the appellant without sufficient evidence.
4. That the learned trial magistrate erred in law and fact by disregarding the appellant's defence.

The state opposed the appeal and was represented by Mr. Namiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

The complainant is a girl aged about 5 years. Her mother locked her in the house and went to pick the

complainant's siblings. When she returned, she found the appellant coming out of her house. He ran away on seeing her. When she entered her house, she found the complainant crying. The complainant told her that she had been beaten on her buttocks. When she checked her, she found her bleeding from the genitalia. she implicated the appellant.

On his part the appellant pleaded an alibi and denied any involvement in the offence.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32**.

The charge was wrongly drafted. It ought to have read:

"... contrary to section 8 (1) as read with section 8 (2) ..."

In the case of **FAPPYTON MUTUKU NGUI V REPUBLIC [2012] eKLR** the High court(Joel Ngugi J.) stated:

As I have previously held, the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him" In this case, the Appellant was charged under section 8(1)(2) of the Sexual Offences Act. No such section exists in the Act. Did this prejudice the Appellant and occasion a miscarriage of justice" I have previously said that the answer to that question is provided by seeking to see if the accused person can be said to have understood the charges facing him well enough to understand the ingredients of the crime charged so that he can fashion his defence. This can be tested, for example, by how much or vigorously he participated in the trial process and whether the record shows that he was able to follow the proceedings and ask questions in line with his theory of defence.

In the instant case I find that the appellant was not prejudiced for he understood the charge against him and fully participated in the trial. The defect is curable under section 382 of the Criminal Procedure Code.

In cases of identification and recognition it is very crucial for a witness who purports to identify a culprit to give such information at the earliest opportunity to the police. This is to test the power of observation, the memory and credibility of such a witness.

In the case of **R V TURNBULL AND OTHERS - [1976] 3 ALL ER 549** Lord Widgery CJ, gave the following directions:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to

recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

At the time when the complainant's mother said she met with the appellant it must have been dark. She gave the time of the incident to be between 7 PM and 8 PM. She said she found the appellant inside her house. She flashed a torch at him and recognized him. It would appear there was no other source of light in the house. If indeed she recognized him, why did she not give his name at the time she made her report? Her report to the police vide OB No.8 of 17.12.2014 is clear that the complainant's mother reported that the defiler was not known. This indeed raises an issue of the credibility of the complainant's mother.

In her initial report AK (PW1) she did not indicate that she found any man in her house. The report states that when she returned, she found the complainant crying.

This witness when testifying said that she found the appellant inside her house after she had opened her door. Towards the tail end of her examination in chief, she said she met the appellant at her door. During cross examination, she said she found the appellant inside her house defiling the complainant.

TG (PW3) testified that AK (PW1) told her that she met with the appellant at her door and when she flashed him with a torch, he ran away. If we assume this to be true, it means PW1 had very little time to identify or recognize the culprit. This again introduces confusion in the evidence attributed to the PW1. Did she find the culprit inside her house while in the act of defiling her daughter or at the door? The court of appeal in the case of NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283, (MADAN, MILLER and POTTER JJA) held:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

I am finding it difficult to accept that PW1 was able to recognize the culprit. If indeed she told TG (PW3) who the culprit was before they reported to the police, I do not see the reason she did not inform the police about the identity of the culprit. The only logical explanation for such failure is because she did not identify or recognize any person.

Though PW3 recorded in her statement that AK (pw1) gave her the appellant's name, this has very little evidential value. Her statement was recorded on 29.12.2014, two days after the arrest of the appellant.

The complainant gave a different version from that of her mother. She testified that her mother broke the door and found the appellant defiling her. Her mother started to beat him. She referred to him by name and it is not clear when she knew his name. This is because all the witnesses said she did not know the identity of her defiler.

Whereas the evidence on record indicates that the complainant was defiled, it is not clear who defiled her. The appellant raised an alibi defence and called witnesses who supported his evidence. In the case of UGANDA v. SEBYALA & OTHERS [1969] EA 204, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

In the instant case the alibi defence raised by the appellant was very plausible.

In view of the observations I have made, I find that the appellant's appeal has merit. I allow the same. The conviction is quashed and the sentence is set aside. The appellant is set at liberty unless if he is otherwise lawfully held.

DATED at Meru 19th day of December 2016

KIARIE WAWERU KIARIE

JUDGE