



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 319 OF 2013

MICHEAL GITHUKU NGIGI.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Sentence of the Senior Principal Magistrate's Court at Nyahururu, Hon. D. K. Mikoyan - Ag. Senior Principal Magistrate delivered on the 22nd October, 2013 in CMCR Case No. 392 of 2013)

JUDGEMENT

The appellant **MICHAEL GATHUKU NGIGI** has filed this appeal challenging his conviction and sentence by the learned Ag. Senior Principal Magistrate sitting at the Nyahururu Law Courts.

The appellant was arraigned before the trial court on 13/3/2013 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

“On 11th day of March 2015 in Subukia District within Nakuru County, intentionally and unlawfully caused his penis to penetrate the anus of S N K a child aged 13 years”.

The appellant faced an alternative charge of **COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT 2006**.

The appellant pleaded ‘**Not Guilty**’ to both counts. His trial commenced on 24/4/2013 at which trial the prosecution led by **INSPECTOR OMWERI** called a total of seven (7) witnesses in support of their case.

The complainant who testified as **PW1** was a 13 year old school boy. He told the court that on 11/3/2013 at 2.00pm he was helping his mother at her timber yard in Subukia. The appellant whom the child refers to as ‘**Michael**’ and who worked for the child’s mother, called the child ostensibly to accompany him to collect grass for the goats. The two left together.

They went to the appellant’s house where the appellant changed his clothes. As they walked away the appellant claimed he had forgotten to take a bag and so he sent the child back to collect a bag to carry the grass. The child obliged and returned to the appellant’s house. As he was there looking for the bag the appellant also returned and held the boy by the neck. The boy struggled. A lady **PW5** came in briefly, saw the two together and left.

The appellant then removed the child's belt and used it to tie the child's hands. He then removed the boy's trouser and carried him to the bed. The appellant moved to another room and removed his own trouser. The then returned and lay on top of the child pinning him to the bed and sodomized him. After the act the appellant wiped the boy and let him leave warning him not to reveal the incident to anyone. The complainant returned to his mother's business.

PW5 ANGELICA WANJIKU told the court that on the material day at around 2.15pm she went to her rental house and heard a child cry out. She found the appellant's door ajar and entered. She saw appellant seated with the child by his feet and the child's hands had been tied. The boy's trouser had been removed and appellant's trousers were around his feet. **PW5** backed out of the house and went and informed one Mwangi what she had seen.

PW6 SAMUEL MWANGI WANGARI stated that he was alerted by **PW5** that the appellant was holed up inside his house with a young boy. Later **PW6** saw the complainant whom he knew back at his mother's timber yard. He attempted to question the complainant who initially was fearful and declined to talk.

Later **PW6** took the complainant to his house where he and one 'Muhoro' questioned him. The child revealed to them that the appellant had sodomized him. **PW6** relayed this information to **PW2 L W** the child's mother. **PW2** took the boy to a clinic for medical attention. The matter was reported to police who came and arrested the appellant. Upon the conclusion of police investigations the appellant was taken to court 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. The opted to make an unsworn statement in which he denied having defiled the child.

This being a first appeal the court is obliged to re evaluate the evidence adduced during the trial and to draw its own conclusions on the same. In the case of **MWANGI Vs REPUBLIC [2004] KLR 28** the Court of Appeal held

"1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate courts own decision on the evidence.

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions"

The first question which requires determination in this case is that of the age of the complainant. In any case of defilement the age of the victim is a critical fact in issue. It is a fact which requires conclusive proof as age will ultimately determine the sentence to be imposed if the accused is convicted.

In his evidence the complainant told the court that he was aged 13 years and was a Form One Student at [particulars withheld] Highway School. **PW2** the child's mother told the court that her son was 13 years old having been born on 7/5/1999. **PW2** produced as an exhibit the original copy of the child's birth certificate **P. Exb 2**. A birth certificate is an official government document which provides *prima facie* proof of age. This document clearly gives his date of birth as 7th May 1999. Therefore as at March 2013 when this incident allegedly occurred the complainant was aged 13 years. I find that the age of the complainant has been proved beyond reasonable doubt.

The next question that needs to be answered is whether this act of defilement did in fact occur as alleged. The complainant narrated to the court how on the material day he was helping his mother at her timber yard. The appellant who had been their worker called the boy to accompany him (the appellant) to collect grass for their goats.

The appellant then lured the complainant to his house on the pretext that he had forgotten a sack to carry the grass. Once inside the house the appellant turned on the child. He held him and tied him up. The

appellant removed the child's trouser and his own trouser. He then pinned the boy onto the bed, covered his mouth and sodomized him.

The child gave a very clear and graphic account of what happened to him. I have no doubt that he was telling the truth – a child so young would not have made up such an elaborate tale.

PW5 'Angelica Wanjiku' a neighbour corroborates the complainant's evidence as she literally caught the appellant '**pants down**' **PW5** stated that she was headed to her house when she heard a child cry. Since the appellant's door was ajar **PW5** went to check. In her own words

"I found the door ajar. I found Michael seated on a seat and there was a child who was at Michael's legs and the minor hands tied. The minor's trouser was out and Michael did not have a trouser also Micheal's trouser was on his feet. I got shocked and went away told Mama Mande so as I went I heard the door close from inside....."

The evidence of **PW5** precisely corroborates what the complainant told the court. The child stated that initially the appellant had

'held me by the hands then took me to a seat behind his door. He held me by the neck. I was struggling and a lady entered then left (my own emphasis).

It was after **PW5** left that the appellant pulled the child to the bed pinned him down and sodomized him. **PW5** also mentioned having noted that the child's hands were tied which is exactly what the child told the court. Why would an adult man tie up a child, remove both their trousers unless he intended to sexually molest that child.

PW4 SAMUEL MUROR a medical officer attached to the Subukia Health Centre testified that he examined the complainant. He filled and signed his P3 form which was produced as an exhibit **P. Exb 1**. **PW4** stated that although he noted no physical injuries to the child's rectum he formed the opinion that the child had been sodomized and placed him on post rape prophylactic treatment.

The absence of bruises or wounds on the child's anus does not in my view negate the fact of defilement. The Charge of Defilement is defined by 'an act which causes penetration of a child's sexual organ' Section 2(1) of the Sexual Offences Act defines penetration. **"Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person"**.

The appellant had removed the boy's trouser, tied his hands, pinned him onto a bed face down and placed his penis in or about the child's buttocks. The fact that the appellant may not have fully penetrated the child's anus is neither here nor there. The complainant told the court that after the act the appellant **"wiped me with a piece of cloth"**. The act of wiping off the child indicates that the appellant reached sexual conclusion. Any mere penetration of the child's buttocks even if not fully into the anus completed the act of defilement. Based on the testimony of the child, that of **PW5** and the doctor's evidence I find that the act of defilement is proved to have occurred.

The final question is that of the identity of the perpetrator. The child identified the appellant as the man who defiled him. This incident occurred at 2.00pm. It was broad daylight and the complainant was able to see the appellant well. The appellant was a man very well known to the child as he had been their worker for 8 years. Indeed the complainant in his evidence referred to the appellant by name – '**Michael**'. Thus this was more than mere visual identification. There was evidence of recognition which was held by the Court of Appeal in the case of '**Anjononi & Others Vs Republic [1980] KLR 59**' to be **"more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"**

The evidence of the complainant regarding identification was corroborated by **PW5** who caught the appellant in the act. She identified the appellants as the man she saw without his trouser holding the child in his house.

PW6 was an elder in the area to whom the report was made. He told the court that he called the minor to his house and questioned him. Thought fearful at first the child revealed that he had been molested by the appellant. The complainant maintained consistency in his story and in his identification of the appellant as the man who defiled him.

PW2 the complainant's mother confirmed that the appellant did odd jobs for her and was well known to them. **PW2** confirms that on the material day it was the appellant who called the child away from her timber yard.

I have considered the defence of the appellant. I note that it amounts to a mere denial. The appellant makes no attempt to address the charge at all. I find there is no reason advanced to show why the complainant **PW2**, **PW5** and **PW6** would gang up to allege the appellant was the perpetrator. They hold no grudge against the appellant. They had no reason or motive to lie to the court. I therefore dismiss the appellant's defence.

I am therefore satisfied that there has been a clear, positive and reliable identification of the appellant by more than one witness. I find there exists no possibility of mistaken identity.

The evidence as a whole was clear cogent and reliable. I am satisfied that the charge of defilement was proved beyond reasonable doubt. The appellant's conviction was sound and I do uphold the same.

The appellant was allowed an opportunity to mitigate after which he was sentenced to serve twenty (20) years imprisonment. This is the lawful and mandatory sentence in accordance with Section 8(3) of the Sexual Offences Act, 2006. I therefore confirm that sentence. The upshot is that this appeal fails and is hereby dismissed in its entirety.

Dated in Nakuru this 9th day of December, 2016

Read in open court.

Maureen A. Odero

Judge

9/12/2016