



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 296 OF 2013

JOSEPH KAKEI KISWILI APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. B.M Kimemia Principal Magistrate delivered on 4/4/2012 in Kitui Chief Magistrate Sexual offence No. 42 of 2010)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Joseph Kakei Kiswili**, was charged with the offence of defilement contrary to section 8 (1) (3) of the sexual offences Act No. 3 of 2006.

The particulars of the charge were that “on diverse dates between **19th and 31st July 2010** at **[particulars withheld]**, **Sub-location**, in **Kitui District** of the Eastern province, intentionally penetrated his penis to the vagina of **M K** a child **aged 13 years**”.

2. In the alternative, the appellant was charged with indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars of the charge were that “on diverse dates **19th and 31st July 2010** at **[particulars withheld]**, **Sub-location**, in **Kitui District** of the Eastern province, committed an act of indecency with **M K** a child aged 13 years by touching her private parts namely vagina, breasts and buttocks by using his hands”.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.
4. The case for the prosecution was that on 19/7/2010 the complainant, **M K**, a thirteen (13) year old primary school girl was on her way to school that the Appellant who worked in the neighbourhood approached her and asked her to go to his home with him. The Appellant then took her to his bedroom, removed her **clothes**, then removed his clothes and had sex with her. That the Appellant thereafter cooked for her and made her stay in the house upto 4.00 p.m when he released her to go home after threatening to kill her if she told anybody what had transpired.
5. On 21/7/10, the complainant left home at 6.00a.m met the Appellant at the road. Then they proceeded to Appellant’s house. The Appellant gave her tea and bread. They then had sex. The

- Appellant told her not to scream or people would beat him. The Appellant left the complainant in the house. He later gave her roasted maize and released her to go home at 5.00 p.m.
6. On the third day the complainant found the Appellant waiting for her at the road. The Appellant went with the complainant to his house and gave her 'githeri' and tea then had sex with her. That the Appellant locked her in the house. That the Appellant went out until about 4.00 p.m when he returned. He gave the complainant some pawpaw to eat then told her to go home.
 7. When the complainant went back to school, she was sent home and asked to go with her parents to school. When the parents went to the school, it turned out that the complainant had been absenting herself from school. After being questioned the complainant explained to a teacher what had transpired. The matter was reported to the police. After investigations the Appellant was arrested and charged with the offence herein.
 8. In his defence, the Appellant gave sworn evidence. The appellant stated he worked in a farm near the complainant's home. The Appellant denied the charge and blamed the same on a grudge with the complainant's family. That the grudge arose after he refused to allow anybody into his employer's compound. The Appellant further stated that the complainant used to go to his home when the teacher had beaten her.
 9. At the conclusion of the trial, the Appellant was convicted for the offence of defilement and sentenced to 21 years imprisonment.
 10. The Appellant was dissatisfied with both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

- a. ***That the prosecution case was not proved beyond reasonable doubts.***
- b. ***That the trial court relied on uncorroborated evidence.***
- c. ***That the medical evidence failed to ascertain who the culprit was.***
- d. ***That this case was a frame up due to a grudge.***

11. During the hearing of the appeal, the Appellant relied on written submissions. I have duly considered the same.
12. The appeal was opposed by the State. The learned counsel for the State submitted on the sufficiency of the prosecution evidence.
13. This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences— ***See Okeno –vs- Republic (1972) EA 32.***
14. The **complainant (pw1)** gave evidence that on three days she failed to go to school she stayed with the Appellant in his house. That on all the three days the Appellant gave her food, had sex with her then released her to go home after 4.00 p.m.
15. The complainant's evidence is that of recognition. It is clear from the complainant's evidence that she knew the Appellant as a neighbour. The offence took place during the day. The complainant stayed almost the whole day with the Appellant on each of the three days in question. There is no possibility of mistaken identity.
16. The complainant's evidence is consistent with what she told her parents at the material time. The mother, Pw2 **J L** and the father **Pw3 F K M** testified.

It is clear from the parents' evidence that the Appellant was employed in a farm in their neighbourhood and was well known to the family. The complainant's parents denied any suggestions of the existence of any grudge with the Appellant.

17. **Pw5 Dr. Patrick Mutua** gave evidence that confirmed that penetration had occurred and the complainant's hymen was missing. The doctor gave the complainant's age as thirteen (13) years and produced the P3 form and age assessment form.
18. **Pw4 PC Monica Aoko** gave evidence that confirmed the report and the investigations carried out.
19. From the defence given by the Appellant, it is clear that the complainant knew him. According to the Appellant, the complainant's grandmother used to send her and other children to the home where he worked. The defence of a frame up is not convincing in view of the overwhelming prosecution evidence.
20. The trial magistrate who had the benefit of seeing the witnesses testify and observed their demeanor believed the complainant. The trial magistrate believed the complainant. I have no

reasons to differ with the findings of the trial magistrate.
21. On whether the complainant's evidence lacked corroboration and whether the medical evidence failed to nail the culprit, the proviso to section 124 of **the Evidence Act** stipulates as follows:-

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

22. After evaluating the evidence on record, I am satisfied that the conviction is based on sound evidence. The sentence is within law. The appeal has no merits and is dismissed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 29th day of January 2015.

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B. THURANIRA JADEN

JUDGE