



IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO 211 OF 2013

KENNEDY MWANGI WARUGURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against original conviction and sentence dated 13th September, 2012 in Kangema PM Criminal Case No 78 of 2012 - J Magori, PM)

J U D G M E N T

1. The Appellant was convicted after trial of **defilement** contrary to **section 8(1) & (3)** of the **Sexual Offences Act, No 3 of 2006**. The particulars of offence were that on the 9th day of February 2012 in Kangema District within Murang'a County, he intentionally caused his penis to penetrate the vagina of the complainant, a girl aged 13 years. He was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence upon the following grounds (appropriately paraphrased) -

- i. That the charge was defective.
- ii. That the Appellant was not medically examined to prove that he committed the offence charged.
- iii. That the complainant's evidence was not corroborated.

2. I will first dispose of the legal challenge that the charge was defective. The Appellant has not attempted to demonstrate how this is so. but I have carefully looked at the charge. The statement of the offence clearly discloses an offence known in law. The particulars of the offence disclose the offence charged clearly and without any ambiguity. The charge was not defective at all.

3. This being a first appeal, it is my duty as the first appellate court, to evaluate on my own the evidence placed before the trial court and come to my own conclusion regarding the same. I must however give due regard to the fact that I did not myself see and hear the witnesses as they testified. See **Okeno v Republic [1972] EA 32**.

4. The complainant in this appeal was a minor and testified on affirmation after a **voire dire** examination by the court. See **section 19 (1)** of the **Oaths and Statutory Declarations Ac, Cap 16**. See also **Mohammed - v- R 2 KLR (2005)** where it was stated -

“In conducting a voire dire, section 9(1) requires of the court to establish two matters, firstly, whether the child understands the nature of an oath. If the court comes to that conclusion, then it proceeds straight away to swear or affirm the child and record the evidence. Secondly, if the court is not satisfied on the first test, it should express its opinion not only

that the child is possessed of sufficient intelligence to justify reception of the evidence, but also understands the duty of telling the truth, before proceeding to record the child's evidence.”

5. The testimony of the complainant (PW1) was that she was 13 years old and that she was in class 6 primary school. On 9th February 2012 at 2.00 p.m. she was alone at her home. She went outside to collect her clothes (apparently from a drying line). The Appellant, who was her father's cousin (and therefore her uncle) and who lived nearby came and held her hand and took her to his house where he placed her on his bed. He then removed her clothes and started having sex with her. She felt pain and cried.

6. They then heard her father outside upon which the Appellant took her to another room in the house and placed her on a bed in an attempt to hide her. Her father then came into the room and found her and asked her what had happened. She told him, upon which he started assaulting the Appellant. Other people then came, including her mother and grandmother. She told her mother what had happened. The complainant and the appellant were then escorted to an administration police post nearby and subsequently to **Kangema Police Station**. Later she was treated at Kangema sub-district hospital where her medical report (P3) was filled.

7. The complainant's father, **JIM**, testified as PW2. His testimony was that the complainant was his 1st born daughter while the Appellant was his cousin. On 9th February 2012 at about 6.30 p.m. he returned home and found the complainant missing. First he looked for her in a neighbour's home but did not find her. He then went to the Appellant's home and found the door locked. But the Appellant was in the house and he asked him whether he had seen the complainant. The Appellant then opened the door. He was dressed in a t-shirt and shorts.

8. PW2 then entered the house and found the complainant in a dark room inside. As he had a torch he used it and saw the complainant sitting on a bed. The Appellant tried to run away but he held him and screamed. People came, including his mother. The complainant then told him that the Appellant had held her and taken her to his house where he had forcefully had sex with her. In cross-examination PW2 stated that the Appellant had at first refused to open his house and that he (PW2) used a ruse to make him open. He also stated that he had found the complainant sitting on the bed naked.

9. PW3, **Paul Mwangi Macharia**, was one of the persons who went to the scene attracted by PW2's screams. He saw PW2 holding the Appellant. He and others escorted the complainant and the Appellant to the police station.

10. PW4, **IP Simon Too**, booked the report of the complainant's alleged defilement in the occurrence book at Kangema Police Station. He then escorted both the Appellant and the complainant to hospital. He commenced investigations and later charged the Appellant. He also produced in evidence the complainant's **child health card (Exhibit 3)** which showed she was **born on 6th July 1997**.

11. A clinical officer (PW5) examined the complainant and produced in evidence the complainant's medical report (P3). She stated that the complainant was born on 11th August 1999, but did not state the basis for that date. The findings of the medical examination of the complainant were that there was **minimal bleeding from the vagina**. She was negative for HIV and pregnancy. A urine analysis was normal. PW 5 formed the opinion that the complainant had been defiled.

12. In his own defence the Appellant gave an unsworn statement and called one witness. He admitted that PW2 was his cousin. The gist of his statement was that PW2 had accused him of being a **mungiki** follower and had threatened to ensure that he left the area and be forgotten, and that he (PW2) would do something that the Appellant would never forget. He subsequently confronted the Appellant while armed with a panga upon which the Appellant hid in his own house. PW2 then accused him for having defiled his child. He denied that he committed the offence.

13. DW2 was the Appellant's sister. Her testimony was that at about 7 p.m. on the material day she heard shouts and went outside where she found PW2 beating the Appellant and accusing him of having

defiled a child. DW2 screamed and other people came. The Appellant was subsequently escorted to the police station.

14. That was the totality of the evidence placed before the trial court. The alleged offence took place in the evening, but there cannot be any doubt as to the identity of the complainant's assaulter as the Appellant was well known to her, being her uncle and living next door.

15. The fact that the complainant was defiled was established by medical evidence which showed that she had bled slightly from the vagina. That slight bleeding cannot have been caused by anything else but partial or full penetration. The complainant's testimony was clear and candid. The Appellant intercepted her when she went outside to get her clothes, held her and took her to his house nearby where he placed her on the bed and undressed her. He then proceeded to have sex with her. The appearance of the complainant's father at the scene apparently interrupted the proceedings as it would appear no spermatozoa were found in the complainant's vagina. But the father found the complainant hidden in an inner dark room where she was sitting on a bed naked. The Appellant had taken her to that room upon hearing her father outside making inquiries about her. The father then raised alarm immediately and held the Appellant who was attempting to escape. Other people were attracted to the scene by the screams, including PW3. They saw the complainant in her state of undress in the Appellant's house.

16. All that evidence provided corroboration to the complainant's testimony. Even without corroboration the trial court would still have been entitled to convict the Appellant upon the evidence of the complainant only if satisfied, for reasons to be recorded, that she was telling the truth. See the **proviso** to **section 124 of the Evidence Act, Cap 80**. As it happened however, there was adequate corroboration.

17. Upon my own evaluation of the evidence placed before the trial court, I am satisfied that the Appellant was convicted upon good and sound evidence. the trial court properly rejected his defence. His conviction is safe.

18. The sentence to be imposed upon the Appellant was dependent upon the age of the complainant at the time of commission of the offence. See section 8(3) of the Sexual Offences Act. If the complainant was a child under the age of 11 years the sentence would be life imprisonment; if the child is aged between 12 and 15 years, the sentence would be imprisonment for not less than 20 years; and if the victim is between 16 and 18 years old the sentence would be imprisonment for not less than 15 years. Proof of the age of the complainant is therefore vital. See the case of **Hilary Nyongesa -vs- Republic (Eldoret Criminal Appeal No 123 of 2009)** where the court stated -

“Age is such a critical aspect in sexual offences that it has to be conclusively proved....And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”

19. The complainant herein was 12 and a half years old. This age was conclusively proved by a document (Exhibit 3) issued at her birth. The learned trial court therefore correctly sentenced the Appellant to the mandatory 20 years imprisonment.

20. In the event I find no merit in this appeal. it is dismissed in its entirety. it is so ordered.

DATED AND SIGNED AT MURANG'A THIS 17TH DAY OF FEBRUARY 2015

H P G WAWERU

JUDGE

DELIVERED THIS 20TH DAY OF FEBRUARY 2015