



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 149 OF 2011

ALEXANDER KARIUKI APPELLANT

VERSUS

REPUBLIC RESPONDENT

From original Conviction and Sentence in Criminal Case number 1222 of 2010 of the Principal Magistrate's Court at Maseno – Hon. S. Ongeri-RM

JUDGMENT

1. The Appellant was charged with Defilement Contrary to **Section 8 (1) (3)** of the Sexual Offences Act in that on 15/10/2010 in **[particulars withheld]** village within the County of Vihiga he intentionally caused his penis to penetrate the vagina of **D N** a child of 12 years.
2. He faced an alternative charge of committing an indecent Act with a child Contrary to **Section 11 (i) of the Sexual Offences Act** the particulars being that on 15/10/2010 in **[particulars withheld]** village within the County of Vihiga he intentionally touched the buttocks, vagina and breasts of **D N** a child aged 12 years.
3. He pleaded not guilty to both charges and a trial wherein the prosecution called **5 witnesses** and the appellant gave sworn evidence and called two witnesses ensued. At the end of the trial, the Trial Magistrate found the Appellant guilty on the charge of Defilement, convicted him and sentenced him to 20 years imprisonment. Being aggrieved he filed this appeal.
4. The same is premised on the substituted Petition of Appeal filed on 25th March, 2013 and which contains grounds as follows:

(I) THAT the learned Trial Magistrate erred in law and facts since the whole charge sheet was defective.

(ii) THAT the Trial Magistrate erred in law and in facts when the age assessment was not carried out.

(iii) THAT the Trial Magistrate erred in law and in facts when Plaintiff was not sworn as required by the law.

(iv) THAT the Trial Magistrate erred in law and in facts as there was no identification parade.

(v) THAT the Trial Magistrate erred in law and in facts as the grudge was established in the case.

(vi) THAT the Trial Magistrate erred in law and in facts since the medical report produced was not of the required standards.

(vii) THAT the Trial Magistrate erred in law and facts as the investigation was not done to expected standards.

(viii) THAT the Trial Magistrate erred in law and in facts when the whole Defence witnesses were collaboration with the appellant (Defense Witness 1)

(xi) THAT the Trial Magistrate erred in law and in facts in that the Prosecution Witness were dishonest, full of contradiction and doubt.

(x) THAT the Judgment delivered on the Appellant was full of error and doubt.

5. Briefly the facts of the case were that on the material day at about 6 a.m the complainant a class 5 pupil aged 12 years, boarded a “**boda boda**” (bicycle) to go to school. The same happened to belong to the Appellant, instead of following the road to the school the Appellant allegedly followed the route to Ebusachi. The Complainant screamed for him to stop and jumped off the bicycle. It was then that he drew a knife from his pocket and threatened to stab her. He then pulled her to a nearby maize farm, removed his trouser and then tore her skirt and underpant with the knife. He then pushed her into a ditch and inserted his penis into her vagina. Once he was done with her went away. In the meantime Salome (PW2) had heard her screams and as she was going to see what was happening, she met the Appellant pulling up his trouser. She went and found the complainant crying in the ditch. When the complainant told her what had happened she escorted her to her home.

PW2 testified that she saw the complainant`s soiled and blood stained clothes and that she also witnessed the Appellant riding away on the bicycle. At home they found the Complainant`s grandfather who advised her to go to bed. When her grandmother (PW3) returned home that evening she narrated the ordeal to her and it was her grandmother who took her to Emuhaya District Hospital the next day. Joshua Imbachi (PW4) the Clinical Officer who examined her testified that she wore a grey skirt that was torn and stained with mud. She appeared sickly and her hymen was broken. The external genitalia was swollen and the cervix was tender on touch. She had an offensive white discharge which indicated a venereal disease. He testified that the urine had blood which indicated injury to the urinary system. He filled her P3 form on 21/10/2010. He told the court that he had seen her on 17th October, 2010 two days after the incident and that he relied on treatment notes made earlier.

6. In his Defence the Appellant testified that he was a farmer and a pastor. Denying that he committed the offenses he testified that he had visitors who had gone to his house to see his new born daughter at 6.am on that day. That the visitors left at 8.50 a,m and that after that he went to the shamba and then left to supply vegetables to his customers. In the evening he went to Luanda market. The next day he woke up at 8 a.m and supplied vegetables before going for a Pastors` Meeting. Later in the evening he was approached by people who were accompanied by the Complainant. He was asked to identify her before six men apprehended him and took him to the Police Station but come Monday he was released for lack of evidence. He was however, arrested after one week and was surprised to be charged with these offenses. His two witnesses DW2 and DW3 testified that he was an Assistant Pastor at their Church-Upendo Pentecostal Church-Kima. They stated that on 15/10/2010 they went to his house at 6 a.m and 10 a.m respectively to celebrate the birth of his daughter. DW2 testified she left at 10 a.m whereas PW3 testified that he left at 12p.m after feasting and praying. He produced the baby`s dedication certificate (EXDI). DWI denied that the Appellant operated a “**boda boda**”. She also stated that she found him in his house that morning and that it seemed that he had just woken up. They both could not tell whether the

appellant had defiled the complainant. After the close of the Defence case the Court heard submissions from the Appellant.

7. This Appeal was canvassed through written submissions which were highlighted before mention on 6/10/2014. Judgment was to be delivered on 14/12/2014 but the court took leave suddenly. It was deferred to 5/2/2015 but it was not ready. The delay is regretted.

8. As I am enjoined to do as the first Appellate Court, I have reconsidered and evaluated the evidence in this matter while at the same time bearing in mind that I did not see the witnesses as did the trial Magistrate. **Section 124** of the Evidence Act provides that the evidence of a victim of a Sexual Offence need not be corroborated; that it is sufficient that the Court believes her. The Section does however also provide that the Trial Magistrate must record the reasons for believing the victim. Having perused the proceedings taken at the trial and the judgment, I noted that nowhere does the Trial Magistrate state that he believed the complainant and if he did he does not give reasons for believing her. He seems to have based his decision to convict the Appellant on a finding that the evidence of the Complainant was corroborated by **PW2**. On my part I find that there was so much inconsistency and contradiction in their evidence so much so that it was even difficult to tell which of them was telling the truth. For instance whereas the complainant was emphatic that she did not know the Appellant well and that she had seen him for the first time on that day, PW2 testified that she did. Whereas PW2 testified that from the scene she escorted the girl to her home but did not find anybody the Complainant testified that they found her grandfather who advised her to go to bed. She also said that PW2 talked to her grandmother. Things become even more confounding even with the testimony of Christine Inyere the Investigating officer. This witness testified that **PW2** at first took the complainant to her own home but was prevailed upon by her mother to take her home. She also testified that the Complainant told her that PW2 assisted her to take a bath and then escorted her to school and that it was a teacher who advised her to go to Maseno Hospital for treatment. This witness was emphatic that the two first went to the home of **PW2**. The contradictions in the evidence of the Defence Witness pales in the face of these contradictions and this complied with the fact that the age of the Complainant was not proved at all leads me to the inevitable conclusion that the charge against the Appellant was not proved beyond reasonable doubt.

9. Accordingly the Appeal is allowed, the Conviction is quashed and the sentence is set aside.

10. The Appellant be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kisumu this 12th day of February 2015

E.N. MAINA

JUDGE

In the presence of:

..... for State Council

..... for Appellant

Moses Okumu- Court Interpreter