



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL CASE NO. 337 OF 2013

SIMON MWANGANGIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Sexual Offence case No. 36 of 2013 by S.O. Ogot , RM on 20/12/2013)

JUDGMENT

1. **Simon Mwangangi Kameta**, the Appellant, was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **18th** day of **October**, 2013 at [**Particulars Withheld**] Sub-location of **Mutha** Location in **Mutomo** District within **Kitui** County intentionally and unlawfully caused his penis to penetrate the vagina of **N M** a child aged 12 years.
2. In the alternative he was charged with **Indecent Act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **18th** day of **October**, 2013 at [**Particulars Withheld**]Sub-location of **Mutha** Location in **Mutomo** District within **Kitui** County committed an act of **indecentcy** with **N M** a child aged 12 years by touching her private parts namely breasts, vagina and thighs.
3. Facts of the case were that on the **17th** October, 2013, **PW1, N M** left home going to her grandfather's funeral when she encountered the appellant at Mwingi Market. He introduced himself as her uncle. He requested her to accompany him to where he could keep his bicycle prior to travelling to Nairobi. In the process he grabbed her and slapped her at the back of her head. As a result she fell down. He took her to a nearby thicket/bush whereby he lifted her dress which got torn at the side. He opened his zip and penetrated her. She was in pain. She screamed and attracted the attention of people who went to answer her call of distress. On hearing people talking he ran away. People chased after him. He was subdued and taken to the Police station.
4. The complainant was presented to the Clinical Officer, **PW2, Benjamin Mwanzia** some twelve (12) hours later. On examination of her genitalia she had whitish discharge that was confirmed to be spermatozoa. Both Labia minora and majora were injured and the hymen was broken. The dress that she wore was torn with spots of blood and whitish discharge. The abdomen had tenderness secondary to the sexual act.
5. In his defence the appellant stated that he encountered the complainant's mother on the **10th** October, 2013. She told him stories about prostitution; tales he did not want to hear about. On the **18th** October,

2013 he was arrested following allegations that he had defiled the complainant. Denying having done it, he said that the allegations came up because of a grudge they had at home.

6. The learned trial magistrate evaluated evidence adduced and reached a finding that the appellant was properly identified; and the prosecution's case was credible. She convicted the appellant of the main count and sentenced him to twenty (20) years imprisonment.

7. Being dissatisfied with the conviction and sentence thereof the appellant appealed on grounds that the learned trial magistrate erred in law and fact:-

- By relying on evidence of a single witness which was not corroborated;
- Evidence adduced was riddled by inconsistencies and contradictions;
- The Clinical Officer failed to examine the appellant;
- The duration the appellant was held in custody was not considered; and
- The Investigating Officer did not visit the scene of crime and/or accompany the minor to hospital.

8. The appellant canvassed the appeal by way of written submissions. The State in response thereto opposed the appeal. **Mr. Maina** learned State Counsel submitted orally that the complainant positively identified the appellant; medical evidence adduced by the Clinical Officer proved the fact of defilement and the age of the complainant was proved. He called upon the court to uphold the conviction and sentence.

9. This being the first appellate court, I am guided by the principles set out in the case of **Okeno -versus- Republic [1972] E.A. 32** where it was stated that:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted afresh and exhaustive examination (Pandya –versus- Republic [1957] E.A. 336) and the appellate court’s own decision on evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -versus- Republic [1957] E.A. 570) . It is not a function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. (see Peter -versus -Sunday Post [1958] E.A. 424).”

10. Looking at the first ground of appeal, it raises the issue whether or not corroboration is a legal requirement for a conviction to be entered in a case of defilement. It has been held now and again that in order for a court to convict in sexual offences; corroboration of the victim's evidence is not a requirement. What the trial magistrate ought to do is to evaluate evidence adduced by the victim, observe her demeanor and form an opinion if she is truthful... Having believed that she is honest and would not be lying, in the circumstances the court proceeds to convict on such evidence. (see **Mukungu -versus- Republic (2003) AHRLR 175(Ke CA 2003); Section 124 of the Sexual Offences Act, 2006**).

11. The complainant was examined by PW2 twelve (12) hours later. He concluded that indeed she had been defiled. There was evidence of a torn hymen which was proof of penetration into her genital organ. A child health card adduced in evidence proved that she was born on the 22nd October, 2000. This was proof that at the time the offence was perpetrated she was thirteen (13) years old. **PW3, D M M** her mother, also proved the fact of her age. This was evidence that the complainant was a minor, therefore having been penetrated, she was defiled. Furthermore, medical evidence adduced indeed corroborated the complainant's evidence that she was defiled.

12. Therefore what had to be proved was whether it was the appellant who defiled her. PW2 found the presence of spermatozoa in the genitalia of the complainant. This per se was proof that the penetration in the circumstances was by a male organ. PW1 stated that the perpetrator of offence was the appellant. In his defence the appellant denied having been the person responsible. It was the evidence of PW1 that

when the appellant committed the act that caused penetration into her genitalia he removed her pant and lay on her having unzipped his pair of trousers. According to her it was in a bush by the roadside. She screamed and on hearing people talking he ran away. He was caught not far away from the scene of the incident.

13. PW4 who participated in the arrest of the appellant said he was attracted by the voice of the complainant. The girl was telling someone not to injure her. He moved to a nearby structure made of sticks where he found the appellant lying on the complainant with his pair of trousers lowered. The appellant purportedly told him that he lived with the child but he did not believe him therefore went to call people. PW5, one of the persons he called participated in the arrest of the appellant that night and they took both the complainant and the appellant to the police station.

14. It has been stated that the evidence adduced by the prosecution was riddled by inconsistencies and contradictions. The trial magistrate indeed remarked in her evidence that the evidence adduced by PW4 and PW5 was contradictory and opted not to rely on their evidence. She acted correctly by disregarding such evidence. (See *Ruwala versus Republic 1937 EACA 570*).

15. According to PW4, the complainant was defiled more than once. He claimed that he found the two in the act of coitus more than twice. This was not confirmed by evidence adduced by the complainant. PW5 on the other hand stated that he was with his mate, **Jackson** when they went to look for a person who was alleged to be defiling a child. They went to the place and on seeing them the suspect attempted to run away but he grabbed his shirt and arrested him.

16. The evidence adduced by PW1 was that when the appellant heard people talking he ran away but was arrested. The only reasonable conclusion one can draw is that PW5 could have been one of the members of public who arrested the appellant. What is not in dispute however, is the fact that the appellant was arrested at the wee hours of morning and taken to the police station together with the complainant.

17. In his defence the appellant stated that a grudge existed between him and the complainant's mother following some proposal to engage in a love affair with her which he declined. However, the evidence did place him at the scene of the incident where he was arrested and taken to the police station by people who had no grudge with him. In the premises, the learned magistrate did not misdirect herself by reaching a finding that he was the one who defiled the complainant. Failure to examine him was not detrimental to the prosecution's case since such evidence was not prerequisite for proving the fact of defilement.

18. It is apparent that the learned magistrate in accepting the evidence of the complainant cautioned herself of the danger of relying on such evidence. She analyzed evidence adduced and gave reasons as to why she believed the appellant was the perpetrator of the offence.

19. Finally, the magistrate is faulted for not considering the duration that the appellant was held in custody. He was arrested on 18th October, 2013 and arraigned in court on the 22nd October, 2013; if his rights were violated as suggested then he is at liberty to institute a suit claiming for compensation for the civil wrong. (see *Julius Kamau Mbugua –versus- Republic – Criminal Appeal No. 50 of 2008*.)

20. The sentence imposed was the minimum prescribed sentence stipulated by the law.

21. From the foregoing I have no reason to interfere with the decision of the Lower Court. Accordingly, I dismiss the appeal in its entirety.

DATED, SIGNED and DELIVERED at MACHAKOS this 19TH day of MARCH 2015.

L.N. MUTENDE

JUDGE