



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.81 OF 2013**

*(An Appeal arising out of the conviction and sentence of MS. NYANGENA – AG.PM delivered on 20<sup>th</sup> March 2013 in Gatundu SRMC. CR. Case No.623 of 2007)*

**PETER KARIUKI KAMAU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Peter Kariuki Kamau was charged with **defilement of a girl** contrary to **Section 8(1)** as read **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 11<sup>th</sup> August 2007 at [*particulars withheld*] village, Gatundu within Kiambu County, the Appellant intentionally and unlawfully committed an act which caused penetration on J W K (the complainant), a girl aged 6?2 years. He was alternatively charged with the offence of **committing an indecent act with a female** contrary to **Section 11(1)** of the same **Act**. The particulars of the offence were that on the same day and in the same place, the Appellant committed an indecent act on the complainant by touching her genital organs. The Appellant pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced on the main count of defilement. He was sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence which was not sufficient to sustain his conviction. He faulted the trial magistrate for convicting him yet the prosecution had not established its case to the required standard of proof beyond any reasonable doubt. He complained that he had been detained for a period of 55 days before he was brought to court contrary to the constitutional requirement that mandates that he be brought to court within 24 hours of his arrest. He faulted the trial court for failing to observe the requirement of **Section 200(3)** of the **Criminal Procedure Code**. He was aggrieved that his defence had not been considered before the trial court reached the decision to convict him. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant submitted to the court written submission. He further made oral submission urging the court to allow his appeal. He attributed his tribulation to the fact that the mother of the complainant had made a request to him to purchase his parcel of land. When he refused to accede to this request, she made the complaint with a view to framing him with the offence. He denied committing the offence. He narrated the circumstances of his arrest. He stated that the father of the complainant demanded that he pays a sum of Kshs.200,000/- to secure his release or else he was going to be charged. Since he did not have the money, he refused to pay the same hence the charge. Ms. Aluda for the State opposed the appeal. She submitted that the Appellant took advantage of the complainant's generosity to defile her. She emphasized that there was no doubt that the complainant had been defiled because semen was found on the complainant's private parts. After the Appellant had defiled the complainant, he threatened her with dire consequences if she reported the incident. To secure her silence, she gave the complainant two pieces of sugarcane. The complainant reported the incident to her mother after which the incident was reported to the area chief. The complainant was taken to hospital where it

was established that indeed she had been defiled. She had injuries on her private parts. Her hymen was broken. There was bloody discharge. As regard the complaint by the Appellant that it had taken too long before he was charged with the offence, Ms. Aluda submitted that the delay was caused by the fact that the police were investigating the case. She urged the court to dismiss the appeal as it lacked merit.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to a fresh scrutiny and evaluation before reaching its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to bear in mind the fact it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any comment regarding the demeanour of witnesses (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution established, to the required standard of proof the charge of defilement beyond any reasonable doubt.

This court has re-evaluated the facts of this case. According to the complainant, the Appellant went to her home on the material day of 11<sup>th</sup> August 2007. He found her alone at home. Her brother had gone to fetch fodder for their animals. The Appellant was known to the complainant prior to the material day of the incident. She testified that the Appellant asked her for drinking water. She obliged and gave him a cup of water. After drinking the water, the Appellant asked her to accompany him to his place so that he could give her pieces of sugarcane. The complainant followed the Appellant. On the way, the Appellant removed the complainant's underpants and sexually assaulted her. The complainant was vivid in her testimony that she saw a whitish mucus like substance produced from the Appellant's penis. When he was through, he instructed the complainant to go home and take a shower. He also threatened her with death if she told anyone. He gave her two pieces of sugarcane. On the afternoon of the same day, the complainant reported the incident to her mother when she came home. The mother, M W K (PW2) testified that upon receiving the report, she gave information to the village headman. She was advised to report to Gatundu Police Station. She made the report the following day. The complainant was taken to Gatundu District Hospital where she was examined by Dr. Kagia. It was confirmed that she had indeed been defiled. Dr. Kagia's medical report was produced by PW3 Dr. Jacob Andrew Toro. The medical report was produced as exhibit No.1. On examination of the complainant's genitalia, Dr. Kagia noted that the complainant had sustained laceration. Her hymen was broken. There was bloody discharge. He was of the opinion that the complainant had indeed been forcefully penetrated.

When he was put on his defence, the Appellant denied committing the offence. He testified that the charge was motivated by a grudge that existed between him and the mother of the complainant that was caused by his refusal to sell land. He took issue with the timelines from the time the incident is alleged to have occurred to the time the incident was reported to the police. In his view, the gap between the period the incident is alleged to have occurred and the reporting of the same to the police is sufficient proof that the charge was contrived against him.

Having re-evaluated the evidence, the grounds of appeal, the submission made during the hearing of the appeal, it was clear to the court that indeed the prosecution established its case on the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The prosecution was required to prove three elements in order to secure the conviction of the Appellant on the charge of **defilement**. The first element is penetration. Penetration is defined under **Section 2(1)(d)** of the **Sexual Offences Act** as ***“the partial or complete insertion of the genital organs of one person into the genital organs of another person”***. In the present appeal, the complainant testified that the Appellant lured her into a bush then removed her underpants before inserting his penis into her vagina. On being examined by her mother, she noted that there was semen in the underpants of the complainant. Forceful penetration was established by the doctor when he examined the complainant. Considering the age of the complainant at the time, it cannot reasonably be expected that she had engaged in sexual intercourse before the fateful day. The doctor noted that the complainant had laceration in her genitalia. Her hymen was broken. She had a bloody discharge. This court holds that the prosecution did prove penetration to the required standard of proof beyond any reasonable doubt.

The second element that the prosecution was required to establish is the identity of the perpetrator. The complainant and PW2 testified that the Appellant was known to them prior to the incident. The Appellant

was a neighbour. In her testimony, the complainant referred to the Appellant by his name “**Kariuki**”. It was clear to the court that the complainant knew the Appellant before the incident. The identity of the Appellant as the perpetrator of the penetration was therefore established to the required standard of proof beyond any reasonable doubt. The defence by the Appellant that he was a victim of an alleged grudge that existed between him and the complainant’s mother is not credible taking into account the fact that there was no evidence to support the Appellant’s assertion that he indeed owned a parcel of land that he was in a position to sell. This court formed the view the defence put forward by the Appellant to be an afterthought meant to exonerate him from culpability.

The third element that the prosecution was supposed to establish is the age of the complainant. According to the medical report it was alleged that the complainant was 6?2 years at the time she was examined. When she testified before court, the complainant testified that she was ten (10) years old. The complainant testified on 19<sup>th</sup> October 2010. The sexual assault took place on 11<sup>th</sup> August 2007. The mother of the complainant testified that the complainant was 11 years old at the time of her testimony. Since the age of the victim of a sexual assault has a bearing in the sentence that the Appellant is supposed to serve, it is imperative that the prosecution produces documentary evidence to establish the age of the victim. In the present appeal, the prosecution made no effort to produce any documentary evidence to conclusively establish the age of the complainant. This failure meant that this court is certain as to the age of the complainant. The complainant may well have been aged more than 12 years. The failure by the prosecution to establish the age of the complainant means that the sentence meted on the Appellant cannot be sustained.

The upshot of the above reasons is that the appeal lodged by the Appellant challenging his conviction on the charge of defilement lacks merit and is hereby dismissed. The prosecution established the charge of defilement to the required standard of proof beyond any reasonable doubt. As regard sentence, the prosecution failed to establish to the required standard of proof the age of the complainant. The sentence of life imprisonment cannot therefore be sustained. The sentence of life imprisonment is therefore set aside and substituted by an appropriate sentence of this court. The Appellant is sentenced to serve twenty (20) years imprisonment. The sentence shall take effect from 20<sup>th</sup> March 2013 when he was convicted by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 14<sup>TH</sup> DAY OF MAY 2014**

**L. KIMARU**

**JUDGE**