



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO.229 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. M. W. Mutuku - PM

delivered on 29th August 2012 in Thika CM. CR. Case No.1388 of 2011)

HENRY GITA WAITHAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Henry Gitau Waithaka was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act**. The particulars of the offence were that on the 16th day of March, 2011 at *[particulars withheld]* Village in Kiambu County, the Appellant intentionally caused his penis to penetrate the vagina of C W M a child aged sixteen (16) years. In the alternative, he was charged with the offence of committing an **indecent act with a child** contrary to **Section 11(1) of the Sexual Offences Act**. The particulars were that on the 16th of March 2011 at *[particulars withheld]* Village in Kiambu County, the Appellant intentionally touched the buttocks, breasts and vagina of C W M a girl aged 16 years. When arraigned in court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main count of defilement. He was sentenced to fifteen (15) years imprisonment. Aggrieved by the conviction and sentence, the Appellant filed an appeal to this court.

In his petition, the Appellant raised six (6) grounds of appeal challenging his conviction and sentence. The Appellant was aggrieved that the charge sheet was altered at the judgment stage. He faulted the trial magistrate for convicting him under **Sections 8(1) and 8(3) of the Sexual Offences Act** yet no evidence had been adduced by the prosecution to support the charge. The evidence linking him to the commission of the offence was not properly evaluated. He complained that the trial court overlooked the complainant's sexual activities that could have caused her hymen to break. He urged court to quash the conviction and set aside the sentence.

During the hearing, the Appellant presented his written submissions to court in support of his appeal. Ms. Njuguna for the State opposed the appeal. She submitted that the ingredients of defilement had been proved. She argued that the prosecution had established its case to the required standard of proof. She urged court to uphold the conviction and sentence.

What are the facts of the case? On 15th of March 2011, PW3 was informed by her husband that the complainant, PW1 was expelled from school. On 16th of March 2011, the complainant commuted from her Aunt W's house. W contacted PW3 H W M, mother to the complainant. She informed PW3 that the complainant was on her way to Nairobi. The complainant went to Thika stage to board a matatu to Nairobi. At the stage, the complainant inquired from the Appellant where she could buy potato chips. The Appellant offered to take her to a shop. The Appellant dragged her in a matatu and drove off. The matatu dropped them off at Makongeni Estate. The Appellant led the complainant to his house. He locked her in his house. At around 10 p.m., the Appellant returned to his house while drunk. The complainant tricked the Appellant into surrendering his phone. The complainant called PW2, P M C using the Appellant's phone. The complainant informed PW2 that she was somewhere in Makongeni Estate. The Appellant then defiled the complainant twice that night. PW2 contacted PW3 to convey the information from the complainant. PW3 told PW2 to inform the complainant to meet them in town.

The following day, the Appellant gave Ksh.100/= to the complainant to facilitate her travel to town. Meanwhile PW3 alerted the Police to arrest the complainant at first sight. When the complainant met with PW2 at the bus stage, she was arrested by the police. At Makongeni Police Station, the complainant recorded a statement narrating the whole incident. PW5 CPL Diana Mbura, the investigating officer arrested the Appellant with the help of the complainant and PW2. The Police took him to Makongeni Police Station.

The complainant was taken to Thika District Hospital. Dr. J. Kinyua examined her. A medical report and the P3 form were produced in court as exhibits on his behalf by PW4 Dr. Namarome Nekesa. The examination discovered a broken hymen. There was a foul smelling discharge but no visible physical injuries. There were bruises on the inner thighs. The P3 form together with the birth certificate of the complainant was handed over to PW5.

This court being the first appellate court, it has a duty to re-evaluate and re-consider the evidence on record by making its own independent findings. (**See Njoroge V Republic (1987) KLR 19**). The court has to re-evaluate whether the prosecution proved its case beyond reasonable doubt.

The ingredients of defilement were highlighted by Hon. Justice L. Ndolo in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** that;

“The critical ingredients forming the offence of defilement are; age of the Complainant, proof of penetration and positive identification of the assailant.”

Regarding proof of penetration, the complainant testified that she was going home from school on 16th of March, 2011. She went to Thika bus stage to board a matatu to Nairobi. At the stage, the complainant inquired from the Appellant where she could buy the potatoes chips. The Appellant offered to take her to shop. The Appellant dragged her in a matatu. It drove off. The matatu dropped them off at Makongeni Estate. The Appellant led the complainant to his house. He locked her in his house. At around 10.00 p.m., the Appellant returned to his house while drunk. He defiled her twice that night. The complainant was taken to the Thika District Hospital. She was examined by Dr. J. Kinyua. The examination revealed a broken hymen. There was a foul smelling discharge but no visible physical injuries. There were bruises on the complainant's inner thighs. PW4 Dr. Namarome Nekesa produced the medical report and the P3 form in court as exhibits on his behalf of Dr. J. Kinyua. A broken hymen was proof that there was penetration. The medical evidence therefore corroborated the evidence of the complainant.

As regards the age of the complainant, a birth certificate was produced in court as evidence. The certificate indicated that the complainant was born on 7th of March 1995. This was proof that the complaint was 15 years when she was defiled by the Appellant in accordance with the charge sheet.

The Appellant was identified by the complainant on the material day of the incident. The complainant was at the bus stage in Thika at around 5.00 p.m. This was in broad day light. She inquired from the Appellant where she could locate a potato chips shop. The Appellant offered to take her. He instead dragged her in a matatu and took her to Makongeni Estate. The Appellant's house was dark. He lit a

candle to provide some light in the house. The complainant identified the Appellant as the person who defiled her that night. The conditions of a proper identification existed.

The Appellant was charged under **Section 8(4) of the Sexual Offences Act**. The minimum sentence is 15 years. The Appellant understood the charge when it was read to him. The offence under **Section 8(3)** carries a minimum sentence of twenty (20) years imprisonment and not fifteen (15) years imprisonment. This was a typographical error that did not occasion into any miscarriage of justice.

From the analysis of the evidence, it was clear evident that the prosecution proved its case to the required standard. The ingredient of the offence of defilement was established. The Appellant was linked to the offence by evidence of identification of the complainant. This court therefore dismisses the appeal. The conviction and sentence are hereby upheld.

DATED AT NAIROBI THIS 17TH DAY OF JUNE 2015.

L. KIMARU

JUDGE