



No. 183/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 434 OF 2008

SAFALI KILUTU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No. 388 of 2007 by Hon. T. M. Mwangi - R.M. On 16/10/2008)*

J U D G M E N T

1. The appellant was charged with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. Particulars thereof being that on the 15th day of April 2007, at around 7.00 p.m., at [*particulars withheld*] village, Mutanda location in Kitui District of the Eastern Province, defiled **B M**, a child aged 14 years. In the alternative he was charged with the offence of committing an act of indecency with **B M**, a child aged 14 years by touching her private parts namely vagina.
2. He was tried, convicted and sentenced to 12 years imprisonment on the main count. Being aggrieved by the conviction and sentence he now appeals on grounds that: He was convicted on a defective charge sheet; his constitutional rights were violated having been detained in custody for 9 days prior to being arraigned in court; and his defence was not considered.
3. The prosecution's case was that **B M** a child aged 14 years was sent by her mother about 7.00 p.m. to take some clothes to her sister. On her way back she encountered the appellant who held her and threatened to stab her with a knife if she screamed. He took her to his house, pushed her onto a mattress and had carnal knowledge of her. In the morning he threatened to stab her with a knife if she screamed.
4. On learning about the complainant's disappearance PW1, **A K M** acting on information received, reported the matter to the village elder. PW2, **J K K** the village elder on receiving the report went to the shop where the appellant lived. They knocked the door persistently but the appellant declined to open. Many people gathered. The appellant opened the door and confronted them with a knife. People subdued him and arrested him. He was taken to the police post.
5. The complainant was taken to Kitui District hospital for examination. PW5, **Charles Mutuku Muthini** who examined her genitalia the outer part of the vagina (labia Minora) was bruised and bleeding upon touch.

Laboratory examination of the vagina swab revealed many pus cells, yeast cells, trichenoma vaginalis and the presence of spermatozoa. He formed an opinion that there was forced vaginal

penetration. The complainant had contracted a sexually transmitted disease. He also examined the appellant. He detected no abnormality. There was no presence of pus or yeast cells.

6. In his defence the appellant stated that he was in his shop from 9.00 a.m. While asleep he heard a knock on the door. He declined to open. Later due to fear he opened. People entered and robbed him of Ksh.11,000/= and arrested him.
7. At the hearing the appellant opted to rely solely on his written submissions. The learned counsel **Ms. Maingi** in her response called upon the court to uphold the conviction and sentence. She stated that the appellant was positively identified; the prosecution proved the occurrence of the act of defilement; medical evidence adduced corroborated that of the complainant as to the commission of the act and the trial court dismissed the defence as being of no value.
8. This being the first appeal, I am reminded of my duty as the first appellate court to revisit the evidence adduced before the trial court, analyze it and come up with independent conclusion bearing in mind that I did not see or hear witnesses who testified. (**See Muthoka and Another versus Republic (2008) KLR 297 297; Okeno V R (1972) EA 32**).
9. It is submitted by the appellant that his constitutional rights were violated; having been detained in custody for more than 24 hours prior to being arraigned in court. The entry on the charge sheet shows that the appellant was arrested on the 18th April 2007. He was produced in court on the 26th April 2007. This means that he was in custody for 9 days prior to being arraigned in court. It has been held that breach of right to personal liberty is a breach of a civil right. Though constitutional in nature is beyond statutory duty of a criminal court, it is expressly compensable by damages. (**See Julius Kamau Mbugua versus Republic – Criminal Appeal No. 50 of 2008**).
10. In the case of **David Karobia Kiiru versus Republic HC. Misc. Criminal Application 863 of 2007** it was stated thus:

***“the trial court conducting the trial is a tribunal of fact, and any factual matter which emerges, that might taint the regularity or propriety of the trial process is to be stated bona fide before the trial court which will then give an appropriate direction.”***

The appellant should have raised the issue before the trial court to give the prosecution a chance to render an explanation for the cause of delay in arraigning him in court. He can therefore not raise it at this stage when no explanation can be given. In the premises that is not a ground for declaring the trial a nullity.

11. It has been stated that the provision of **Section 212 of the Criminal Procedure Code** was violated. In his submissions the appellant did not expound on the issue. He only stated that his defence was disregarded by the trial magistrate without giving satisfactory evidence.

Section 212 of the Criminal Procedure Code states thus:

***“If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.”***

The prosecution could have sought to adduce evidence in reply had the appellant introduced in evidence a new matter that it could have been required to controvert. The defence having not introduced new evidence the averment is irrelevant.

12. Finally it is stated that the appellant was convicted on a defective charge sheet. A charge sheet will be fatally defective if it does not allege essential ingredients of the offence. (**See Fappyton Mutuku Ngui versus Republic (2012) eKLR 480; Sigilai versus Republic (2004) 2 KLR 480; and Yosefu versus Uganda (1969) EA 236**).

In particular in the Sigilai case the court held thus:

***“The principle of law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused person to prepare his defence.”***

13. In this case the appellant was charged with an offence that is known in law. However, the particulars of the offence state thus:

***“On the 15th day of April 2007, at around 7.00 p.m. ... defiled B M, a child aged 14 years.”***

The particulars of the offence as drawn do not disclose essential ingredients of the offence of defilement. In the premises the charge is defective. I have also looked at the sentence meted out by the trial court. It was illegal. The prescribed minimum sentence for the offence would have been 20 years imprisonment.

14. In this case, however, there was an alternative charge of committing an indecent act with a child. It has been stated that the appellant committed an indecent act with the child by touching her private part namely vagina. The trial court which had an opportunity of seeing the complainant's demeanour having cautioned itself said it believed her, it upheld what she stated to have been the truth. This was in compliance with Section 124 of the Evidence Act.

15. An analysis of the evidence adduced show that there was evidence of penetration of the complainant's genital organ. She contracted a sexually transmitted disease. The clinical officer (PW5) said on examination of the appellant some seven (7) days later (24.4.2007) no abnormality was detected. He further stated that the trichonoma a protozoa that caused the sexually transmitted disease the complainant contracted is not likely to be observed in a man's genitalia although they may be carriers.

16. On cross examination of the complainant (PW3), answers elicited were as follows:

***“...it is not true that you left me in house making tea. It is not true that you went to buy beans for my mother. You did not leave me in the house...”***

The kind of questions put to the complainant by the appellant were tantamount to an admission that indeed the complainant was at his house. The evidence strengthens that of the witnesses who rescued her amidst threats of being stabbed with a knife.

17. It was the evidence of the complainant that the appellant removed her underpants, biker and shirt. He then removed his clothes and inserted his penis into her vagina. The act of inserting/pressing his penis into her vagina was evidence of touching her vagina. At her age she was incapable of consenting to such an act. This was therefore an indecent act.

18. Having evaluated the evidence on record, it is apparent that the appellant committed an act of indecency with the complainant herein. Her age has not been challenged. She is therefore a child. In the premises I hereby alter the findings of trial magistrate by acquitting the appellant on the main charge of defilement contrary to **Section 8(1) (3) of the Sexual Offences Act**; and now convict him of the alternative charge of committing indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act, 2006**.

19. Accordingly I sentence him to ten (10) years imprisonment.

20. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 29<sup>th</sup> day of JANUARY, 2014.**

**L.N. MUTENDE**

**JUDGE**