



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO.48 OF 2012

DANIEL MBUGUA MUCHIRI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

Daniel Mbugua Muchiri is the appellant herein. He 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, in Nyahururu Cr.1460 of 2011. In the alternative he faced a charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006. After a full trial, by C.K. Obara R.M. the appellant was convicted and sentenced to 20 years imprisonment.

He is aggrieved by the said conviction and sentence. The grounds of appeal are found in the petition of appeal filed in court on 17/2/2012 and further grounds are found in the submissions filed in court on 19/11/2013.

The grounds are as follows:

1. **That the appellant's constitutional rights were violated as he was held in police custody for 4 days;**
2. **The trial magistrate failed to warn himself of the danger of basing a conviction on a single identifying witness;**
3. **That the age of the complainant was not proved;**
4. **That the court failed to consider the appellant's alibi defence.**

The appellant therefore prays that the appeal be allowed, conviction quashed and sentence set aside and he be set at liberty.

The appeal was opposed. Mr. Marete Learned State Counsel submitted that the complainant was examined by a Clinical Officer who established that the hymen was perforated, had injuries to her private parts and concluded that there was penetration; that the appellant was identified as the culprit because the offence was committed in broad daylight; that the age of the complainant was 12 years and the case was therefore proved beyond any doubt. He urged the court to dismiss the appeal.

In support of their case, the prosecution called a total of 4 witnesses. PW1 DW told the court that she was 12 years old and in class 6. She was at home on 17/7/2011 at about 4.00 p.m. Her mother was unwell and the father was asleep. The appellant, Daniel came and talked to her father. By then, PW1 was playing with her 2 sisters. The appellant then came, held her by the neck and took her to a nearby maize plantation. While in the plantation, he took out her pants, removed his trouser upto the knees put her

against a tree and inserted his genitals into her genitalia. At that juncture, the father came and found the appellant still undressed and he started to run away. Her brother chased and caught him and returned him. She was taken to hospital. She noticed a white substance and some blood stains on her pant. She gave her pants to the doctor. She was then taken to the police station. PW1 identified the appellant as a neighbor whom she knew very well.

PW2 S N the mother of PW1 recalled the 17/7/2011 at about 4.00 p.m. her son G K informed her that he had found the applicant defiling PW1. PW2 was unwell and the brother, by name D took PW1 to the police station. PW2 knew the appellant and that he normally used to come to her house to talk to her husband.

PW3 PC Maurice Angat testified that on 17/7/2011, this case was given to him to investigate. Together with PC Mbuvi, they went to the scene which was in a maize plantation, about 10 metres from PW1's parent's house. They found the scene disturbed with broken maize stocks. They learnt the maize was broken as accused tried to ran away.

Peter Nginyo (PW4), a Clinical Officer at Olkalau District Hospital recalled that on 18/7/2011, when he filled the complainant's P3 form, she had not showered. He took possession of PW1's pant which was stained with a whitish substance, her labia minora was bruised and hymen freshly perforated. He opined that there was fresh penetration of PW1. He also found pus cells. He produced the P3 form, (P.Exh.2) and also the treatment notes.

When called upon to defend himself, the accused gave an unsworn statement. He said that he was at home about 3.00 p.m. when his cousin Kamau came and asked why he did what he did. He did not understand. Kamau called his cousin Imanyara and they took accused to the police station where it was alleged that he defiled D but he denied. He said that he was being framed because of a dispute over land. They want to snatch his piece of land. He denied defiling the complainant.

The offence of defilement is committed when penetration is proved. **Section 2 of the Sexual Offences Act** defines '**penetration**' as "**the partial or complete insertion of the genital organs of a person into the genital organs of another person**". PW1 graphically described what happened to her. Her evidence was corroborated by the testimony of PW4, Peter Nginyo who examined her at the hospital. He found that the complainant's labia minora was bruised, hymen freshly perforated, there were pus cells on the swab taken and he formed the opinion that there was freshy penetration of PW1. I am satisfied that the complainant was defiled.

The complainant told the court on oath that she is 12 years. PW2 confirmed the same and produced the complainant's Child Health Card issued by machinery MCH on 22/6/1999. Exh.No.3 which shows that D W was born on 25/6/1999. At the time she was defiled, she was 12 years old. The appellant's contention that the complainant's age was not proved is baseless.

PW1 and 2 told the court that the appellant is their neighbour and they they knew him very well. According to all the witnesses, the incident occurred at about 4.00 p.m., during broad daylight. There was no possibility of mistaken identity. In his defence, the appellant alleged that in fact he is related to the complaint's family and they framed him so that they can snatch his land. During cross-examination of PW1, 2 and 3 the appellant never made any such allegation of the witnesses being related to him. The complainant had no opportunity to respond to the allegation of there being a land dispute. In cross-examination of PW2, the allegation of dispute over land was raised. PW2 denied existence of any land dispute. The appellant did not explain the nature of the land dispute or what had transpired there before regarding the land. But the question is, would PW1's parents have her defiled by somebody else in order to frame the appellant? I highly doubt that anybody would expose their young daughter to such shame and embarrassment just to frame a relative over land. PW2 told court that he had information that the appellant was insane. The appellant was examined by Dr. Njau who filed a report in which he found the appellant fit to stand trial although he had a history of mental illness once there before.

I have read the judgment of the trial court. Indeed the trial magistrate never considered the appellant's

defence as required under **Section 169** of the **Criminal Procedure Code**. I have considered the said defence and found it to be unbelievable. Though the complainant was alone, there is sufficient evidence supporting her testimony. The appellant did not even escape from the scene. He was arrested on the same day. I dismiss his defence as untrue.

The appellant was arrested on 17/7/2011. He was arraigned in court on 21/7/2011 on the 4th day. He complains that his fundamental rights under Article 50 of the Constitution, that he should be produced in court within 24 hours were infringed. 17/7/2011 was a Sunday. The appellant should have been taken to court latest 19/7/2013. There was indeed a delay in producing the appellant in court. However, the appellant should have raised this complaint at the earliest time possible, in the trial court so that the police would have had the opportunity to respond. It is trite law that an allegation of infringement of fundamental rights should be raised at the earliest opportune time, see **Mwalimu –Vs- Republic (2000)KLR**.

In any event an allegation of breach of fundamental rights is a cause of action separate from what is before this court and should be addressed before the appropriate forum. The appellant cannot be acquitted of an offence just because of alleged breach of fundamental rights by the police who may have caused the delay in bringing him to court. The complainant herein whose rights were also violated had nothing to do with the delay. The allegation has no basis in this appeal.

The appellant also complained that his alibi defence was not considered. His defence was that he was arrested at home. What is an alibi? The Court of Appeal in the decision of **Karanja v Rep (1983)KLR 501** defined an alibi and when it can be deemed to be a defence. The court said:-

“1. the word ‘alibi’ is a Latin verb meaning ‘elsewhere’ or ‘at another place’. Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi....;

(2) In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought.”

The appellant’s defence did not meet the above test in that he never raised it early enough to enable the prosecution to call evidence to rebut it or test it in cross examination. The defence did not amount to an alibi.

As the first appellate court, it is required of me to analyze and evaluate the evidence afresh and draw my own conclusions and determination. I have done this. I come to the conclusion that it is the appellant who defiled the complainant in broad daylight. I confirm the conviction. The complainant was aged 12 years at the time of defilement. Under section 8(3) of the Sexual Offences Act, the minimum sentence is 20 years imprisonment. The appellant was lucky to get the minimum sentence. The sentence meted on the appellant is lawful and it is confirmed. In the end, I dismiss the appeal.

DATED and DELIVERED this 28th day of February, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant in person

Mr. Mombi for the State

Kennedy – Court Assistant