



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 20 OF 2010

JOSEPH KARURI KIRURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the conviction and sentence made by the learned Ag. Principal Magistrate at Karatina Law Courts (Hon. L.Mbugua) in Karatina Senior Resident Magistrate's court criminal case No.867 of 2007 delivered on 14/01/2010)*

### JUDGMENT

**JOSEPH KARURI KIRURU**, the appellant herein, was tried and convicted for the offence of attempted defilement of a girl contrary to **Section 9(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on 14th October 2007 at *[particulars withheld]* Sub-location in Nyeri North District of the Central Province, attempted to have carnal knowledge of **M N W** a girl under the age of 14 years. He was then sentenced to serve 10 years imprisonment. Being aggrieved, the appellant preferred this appeal and put forward the following grounds.

- 1. The Hon. Trial Magistrate erred in law and facts in convicting, failing to find Section 85(2) CPC violated.**
- 2. The Hon. Trial Magistrate erred in law and fact in founding a conviction, failing to find Section 211CPC violated.**
- 3. The Hon. Trial Magistrate erred in law and fact in convicting, failing to find Section 198(1) CPC violated.**
- 4. The Hon. Trial Magistrate erred in law and fact in convicting, failing to find Section 198(4)CPC violated**
- 5. The Hon. Trial Magistrate erred in law and fact in convicting failing to find Section 211 CPC and 77(1)Constitution violated.**
- 6. The Hon. Trial Magistrate erred in law and fact in convicting failing to find Section 169(1) CPC violated.**
- 7. The Hon. Trial Magistrate erred in law and fact in convicting, failing to find that Section 89 CPC, 207 CPC, 214 CPC and Section 134 CPC were all violated in that Section 11(1) of the Sexual**

### **Offences Act No.3 of 2006 was not compiled with as per charge sheet.**

Before considering the merits or otherwise of the appeal, let me set out in brief the case that was before the trial court. The Prosecution's case is supported by the evidence of four witnesses. In her evidence, the victim (P.W.1) told the trial court that on the material date she was at home with other children who included M and N when the appellant called her aside and promised to buy her a cake. It is P.W.1's evidence that she and the appellant remained inside the appellant's house while M and N were sent by the appellant to buy sweets. It is said the appellant locked the house, removed P.W.1's trouser and panty. P.W.1 further alleged that the appellant removed his trouser and underwear and proceeded to defile her by inserting his penis into P.W.1's vagina after placing her on his bed. **C N K** (P.W.3) stated that on 14/10/2007, she was told by one P W that the appellant had locked P.W.1 in his house. P.W.3 said she was prompted to interrogate P.W.1 over the issue and that she readily told her that she had been defiled by the appellant. P.W.3 decided to take P.W.1 to her mother **J N K** (P.W.2) whereupon P.W.3 said she requested P.W.2 to further interrogate her daughter (P.W.1). P.W.2 confirmed that P.W.1 was taken to her by P.W.3. P.W.2 said that P.W.1 explained to her what the appellant did to her upon locking his door. P.W.2 said she reported the incident to the police who in turn gave her a P3 form and thereafter arrested the appellant. The victim was taken to hospital by P.W.2 for treatment. **P.C Eliud Sifei Kapsanga** (P.W.4) told the trial court that on 16/10/2007 he received a report of attempted defilement from P.W.2. According to P.W.4, he was told by P.W.2 that the appellant had tried to defile P.W.1. P.W.4 arrested the appellant when he presented himself to the police that evening of 16/10/2007.

When placed on his defence, the appellant testified and also summoned the evidence of one independent witness. It is the appellant's evidence that on the material day he arrived home while he was drunk whereupon he received a report that he was being sought by police on allegation that he had defiled a child. This prompted him to surrender himself to the police and to seek for further information. The appellant further averred that the case was a frame up by P.W.2 because of a pending land dispute between them. It is the evidence of **N M** (D.W.2), the appellant's mother that the appellant passed by her home while en-route to the police station to report the allegation of defilement rumoured against him. D.W.2 accompanied the appellant to Marwa Police Post where the appellant was locked up. D.W.2 further stated that she was aware of the land dispute between the appellant and P.W.2. Honourable L. Mbugua, learned Acting Principal Magistrate considered the evidence and came to the conclusion that the prosecution had established the case against the appellant to the standard of beyond reasonable doubt thus convicting him.

Having given in brief the case that was before the trial court, let me now consider the substance of the appeal. Let me state from the outset that this being the first appellate court, I am enjoined by law to re-evaluate the case that was before the trial court. I have already enumerated the grounds of appeal relied upon by the appellant. When this appeal came up for hearing the appellant relied on written submissions. I have considered the grounds of appeal and the written submissions. I think the main ground which commends itself is whether the learned Acting Principal Magistrate considered the appellant's defence. Miss. Kitoto did not address her mind to this issue. It is the submission of the appellant that his defence displaced the prosecution's case but the trial magistrate casually rejected the same. There is no doubt that the appellant denied committing the offence. He also averred that he had a land dispute with the victim's mother which has not been resolved so far. The prosecution did not deem it fit to cross-examine the appellant and his witness over this allegation. I have critically examined the record and it is clear from the evidence of the victim that she alleged that the appellant had sexual intercourse with her on his bed. In page 5 of the typed proceedings P.W.1 stated in part as follows:

***“Accused had then removed my trouser and panty. He did a bad thing to me. He removed his clothes too. He had removed his trouser and his underwear. He put his penis in my vagina.***

***Then N came after Mama T and told me to open the door.***

***So I went and opened the door and the accused was just there in the house.***

***Accused had had intercourse with me on a bed.***

***I had dressed up by the time I went to open the door.”***

It is obvious from the above excerpt that the victim was categorical that she was defiled by the appellant. The record shows that one of the witnesses who was scheduled to testify was a doctor but unfortunately he/she did not turn up in court. The medical evidence would have established whether or not the victim was penetrated. The medical evidence was very crucial in this case. What I do not understand is why the prosecution failed to secure the attendance of the doctor who examined the victim. The other question which has troubled my mind is: If indeed there was cogent medical evidence in the possession of the police showing that the victim had been defiled, then why did the police prefer a charge of attempted defilement as opposed to defilement? From the evidence of P.W.1, I expected the appellant to have been charged with the offence of defilement, but the police preferred a charge of attempted defilement meaning, the medical evidence in their possession was negative. This conclusion brings me to the next issue relating to the manner in which the evidence of P.W.1, a child of less than six years was taken. It is apparent that P.W.1 was a child of tender age. In such a case it is the duty of the court after observing the child, to decide whether the child either understands the meaning of an oath in which case he/she may be sworn before testifying but if not, whether he/she possesses reasonable intelligence to be allowed to testify. It is also important for the trial court to establish whether the child appreciates the importance of telling the truth. In this appeal, the trial Magistrate conducted a voir dire examination and came to the conclusion that the victim is able to understand the Motion of a trial. With great respect, the learned Principal Magistrate erred. There was no proper voir dire examination conducted. It is not clear whether the child understood the meaning of telling the truth in the circumstances. The learned Principal Magistrate in her Judgment found P.W.1's evidence to be simple, direct and clear. The particulars of the charge states that the appellant unlawfully and indecently assaulted the victim by touching her private parts. This goes against the evidence of the victim who expressly stated that the appellant defiled her. The appellant on the other hand stated that he was framed up by P.W.2 because he had a land dispute with her. The learned Principal Magistrate simply took note of the appellant's defence but failed to put into serious thought and consideration *vis-a-vis* the evidence tendered. She completely ignored the appellant's defence. I have on my part re-considered the appellant's defence and I am convinced the same has raised doubts on the veracity of the prosecution's case. There is no denial that a dispute over land existed between the appellant and the victim's mother(P.W.2). It is possible that arising out of the land dispute that P.W.2 used the case to settle scores with the appellant. I have also entertained doubts as to whether the victim was actually defiled. Such doubts will always be given in favour of the appellant.

For the above reasons, I allow the appeal. The conviction is quashed and the sentence of ten (10) years is set aside. The appellant is hereby set free forthwith unless lawfully held.

**Dated, signed and delivered in open court this 20th day of February, 2014.**

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**J.K.SERGON**

**JUDGE**

**In the presence of:**

The Appellant in person

Mr. Cheboi for Director of Public Prosecution