



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 206 OF 2011

JACKSON WAMBUA KASIVA APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. A.W Mwangi Senior Resident Magistrate delivered on 21/4/2011 in Kithimani Principal Magistrate Sexual Offence Case No. 10 of 2010)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Jackson Wambua Kasiva** was charged with the offence of defilement contrary to **section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.**

The particulars of the offence were that on 9th day of May 2010 at **Ikombe Sub-location, Ikombe Location** in **Yatta District** within **Eastern Province** intentionally and unlawfully did an act which caused penetration of his genital organ (penis) into the genital organ (vagina) of **F M W** a girl aged 10 years.

2. In the alternative, the Appellant was charged with the offence of indecent act on a child contrary to **section 11(1) of the Sexual Offences Act No. 3 of 2006.**

The particulars of the offence were that on the 9th day of May 2010 at **Ikombe Sub-location, Ikombe Location** in **Yatta District** within **Eastern Province** committed an indecent act on **F M W** by touching her private parts namely vagina.

3. The facts that emerge from the prosecution case were that on 9/2/2010, PW2 **V K M** went to attend a meeting. She left her standard 3 daughter, PW1 **F W** (the complainant) aged about ten years and her five year old son at home. When PW2 returned to her house, she only found her five year old son at their house. The mother called out for her daughter but there was no response. The mother started looking around for her daughter and making inquiries. The Appellant who lived in a house in the same compound and worked for a relative of the complainant's family was among the people the complainant's mother made inquiries from but received a negative response. The Appellant locked his house and left but returned soon thereafter and kept locking and unlocking his house and pacing up and down anxiously.
4. When the Appellant entered his house, the now suspicious mother followed him in and searched

- the house using torchlight. The mother found the complainant under the Appellant's bed. The mother took the complainant out of the house and beat her up for having not responded when she called her. They went home, ate supper and went to bed.
5. The following day, the complainant went to school as usual. When she returned home at about 1.00 p.m, the mother asked her what she had gone to do in the Appellant's house the previous day. It was then that the complainant explained how the previous day at about 6.30 p.m, the Appellant called her to his house, removed her pants and placed her on her back on the bed and removed his trousers and lay on her. The Appellant then did what the complainant described as **"bad things"** to her vagina using **"his thing"** which was between his legs, causing her a lot of pain. That after the Appellant finished doing the bad things, he told her to hide under the bed where her mother eventually found her.
 6. After the narrative from the complainant, the mother proceeded to examine the complainant. She noted that the complainant's vagina was inflamed. The complainant's mother went to the Appellant and asked him about it but the Appellant threatened to beat her. The complainant's mother then reported the matter to the Appellant's employer then reported to the Assistant Chief who advised her to take the child to the hospital.
 7. The complainant was taken to **Matuu District Hospital** where she was examined, and it was confirmed that she had been defiled. The matter was reported to the police and investigations commenced. The Appellant was later arrested and charged with the offence herein.
 8. In his defence, the Appellant elected to give unsworn evidence and to call one witness. The Appellant later decided against calling the witness.

The Appellant in his defence case stated that he was herding goats when he was arrested by administration police officers who inquired if he knew what offence he had committed. That the police officers asked him for Kshs.500/= if he wanted to find out. The Appellant did not have any money and was arrested. That further demands for Kshs.500/= and Kshs.1,000/= were made by the police officers to buy his way out. That the complainant's mother arrived at the police station with her two children. That when the Appellant was taken to hospital for examination, the doctor also talked to the complainant's mother. The Appellant was examined by the doctor and found to have no abnormalities. The Appellant was later transferred to **Kithimani Police Station** and subsequently arraigned in court.

9. At the conclusion of the trial, the Appellant was convicted in the main count of defilement and sentenced to serve a life sentence. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-
 - v. **That the Appellant's fundamental rights provided by the Constitution were violated.**
 - v. **That the prosecution evidence was inconsistent and contradictory.**
 - v. **That the conduct of PW1 and PW2 rendered their evidence unbelievable.**
 - v. **That the trial court erred in relying on evidence adduced by an incompetent witness contrary to section 48 of the Evidence Act.**
 - vi. **That the defence case was dismissed without the question of grudge raised being considered and that the court failed to comply with section 169 (1) of the Criminal Procedure Code.**
10. During the hearing of the appeal, the Appellant relied on his written submissions which essentially expounded the grounds of appeal.
11. The learned State Counsel opposed the appeal. It was submitted that the complainant knew the Appellant and that the offence took place during the day, that the complainant was later found by her mother under the Appellant's bed. That the medical evidence confirmed that the complainant was defiled. That the complainant's Birth Certificate was produced and proved her age. The court was urged to uphold the evidence and the life sentence.
12. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – **See Okeno –vs- Republic (1972) EA 32.**
13. The complainant (PW1) gave sworn evidence. The trial court carried out a *voire dire* and was satisfied that the complainant was intelligent and understood the meaning of oath and the duty to tell the truth. The complainant narrated to the court what transpired between her and the Appellant. There was no doubt that the acts visited on the complainant amounted to defilement.

The complainant knew the Appellant as they lived in the same compound. The offence took place at about 6.00 p.m. in broad daylight. The complainant was fished out by the mother from under the bed of the Appellant. The Clinical Officer, PW3 **Benjamin Mwangi** examined the complainant and confirmed that she had been defiled.

14. The complainant's mother (PW2) testified that when she entered the house of the Appellant, she found the Appellant on his bed and that on further searching the house using torchlight as it was by then about 7.00 p.m., she found the complainant under the bed. The circumstances under which the mother found the complainant corroborated the evidence of the complainant that she had been in the house of the Appellant at the material time.
15. The investigations carried out by PW4 PC **Abdalla Kong'ani** confirm that the Appellant was arrested for the offence of defilement. The complainant's Birth Certificate (Exh.3) confirmed the date of birth as 22/12/2000. The Birth Certificate was issued on 26/3/2001, long before the material date in the year 2010. The complainant was about 9½ years at the material time.
16. In his defence, the Appellant talked about his arrest and the attempts by the police officers to extract a bribe from him. Like the trial magistrate, I do not find the defence case convincing in view of the strong prosecution evidence. No reasons emerge from the record why the complainant's mother would frame him up.
17. After re-evaluating the evidence, I am satisfied that the conviction is based on sound evidence. The sentence is within the law and uphold the same. The appeal has no merits and the same is dismissed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 18th day of February 2014.

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B. THURANIRA JADEN

JUDGE