



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 274 OF 2008

DAVID WARUI MWANIKI.....APPELLANT

versus

REPUBLICRESPONDENT

(arising from the judgment of Hon. L. Onyina Senior Resident

Magistrate Nyeri in Criminal Case No.141 of 2007)

JUDGMENT

1. The Appellant **DAVID WARUI MWANIKI** was charged with the offence of defilement of a girl contrary to section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on the 7th day of January 2007 in Nyeri District within Central Province had carnal knowledge of CWN a girl under the edge of 11 years.
2. He faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on the 7th day of January 2007 in Nyeri District within Central Province intentionally and unlawfully did an act of indecent by inserting a finger into CW vagina.
3. He pleaded not guilty, was tried convicted and sentenced on the main charge to serve life imprisonment. Being dissatisfied with the said conviction and sentence he filed the present appeal and in his home made grounds of appeal raised the following grounds.

a. The complainant did not make an initial report to anybody.

b. Prosecution case was not proved beyond reasonable doubt.

c. His defence was not considered.

4. When the appeal came up for hearing before me the appellant who was unrepresented filed an amended petition and written submissions in support of the appeal while Mr. Njue appeared for the state and opposed the appeal.

SUBMISSIONS

5. It was submitted by the appellant that his rights under Article 49(1) (f) to be brought to court was violated in that he was arrested on 8th January 2007 and taken to court on 15th January 2007. It was further submitted that the medical evidence adduced was not genuine and contrary to section 77 of Evidence Act and that the charge sheet indicated that the complainant was 11 years whereas she told the court that she was 8 years and therefore the age of the complainant was not proved.

6. It was submitted by Mr. Njue for the state that though the date of his arrest is not clear from the charge sheet the alleged infringement of his constitutional rights does not vitiate the trial and convictions. He further submitted that the medical evidence challenged by the appellant would have been important if he was convicted of the offence of defilement and that the offence under section 8(2) covers the age of one (1) to (11) Eleven years and therefore whether or not the complainant was eight (8) years and not eleven he was still within the section.
7. It was further submitted that the P3 form though not produced by the maker was properly produced.
8. This being a first appeal the court has to look at the evidence tendered afresh before the trial court and to come to his own conclusion though taking into account the fact that I did not have the advantage of seeing and hearing the witnesses.
9. P.W.1 Dr. Jane Gitau produced a P3 form filled by Dr. Gichangi wherein the age of the complainant was indicated as eight (8) years and that on examination of genitalia she was found to have a torn hymen which was evidence of penetration. P.W.2 C.W. testified that on the material day she did not go to school and was at her grandmothers when the appellant came by and told her that he would give her something which he did not name. He proceeded to remove her pants and put his finger in her private part and placed his penis inside her causing her to feel pain. Later on she reported to her mother the following day.
- 10.P.W.6 LUCY WAIRURI MAINA the area assistant chief's evidence was that the complainant mother reported to her that she had been defiled by a person known to her. She referred them to Nyeri General Hospital and that the complainant reported to her that the appellant inserted his hands in her vagina then later inserted his penis. She thereafter arrested the appellant and took him to Nyeri police station.
- 11.P.W.5 NWM's evidence was that she had left her husband and returned to her home and on 6th January 2007 her husband took the complainant so she wanted assistance to enable her get the child back. On the way he told the child to walk faster when they arrived home she decided to wash the complainant when she noticed white substance on her thighs and she had an odour and she thereafter informed her what happened to her on 7th January 2007.
- 12.P.W.6 p.c REGINA KANARI's evidence was that she was at the report office desk when she got information of the defilement of the complainant. She interrogated the appellant who denied the commission of the offence and on cross examination she stated that she learnt that there was a grudge between the appellant and the complainant's mother.
- 13.When put on his defence the appellant gave sworn evidence and stated that he owns a kiosk at Kangaita. On 8th January 2007 the complainant mother told him she wanted the things she had left with her husband and when he told her that her husband had said she would not take anything she warned him that he will see. He was subsequently arrested at 5.00 pm by the sub chief and that the last time he saw the child was about one week before that date. When he was arrested he heard the sub chief say that the child was at her home. Under cross examination he stated that the complainant's father had left him with the wardrobe, bed and other things when he found that his house had been broken into and items stolen.
- 14.Based upon this evidence the appellant was convicted and sentenced to life imprisonment on the main charge.

ISSUES FOR DETERMINATION.

15.From the submissions herein and the evidence tendered I have identified the following issues for determination.

- 1. Whether the appellant's constitutional rights were violated and if so what is the effort thereof.***
- 2. Was the age of the complainant proved.***
- 4. Whether the prosecution case against the appellant was proved beyond reasonable doubt.***

16. On the issue of the appellants constitutional right I have noted that the same was arrested on 8th January 2007 and taken to court on 15th January 2007 which was a delay of seven (7) days. This delay was not explained by the prosecution. I am however of the considered opinion that the appellant can be adequately compensated for the said violation by way of damages should he file an appropriate petition before the constitutional court. I therefore find that the said delay did not vitiate the trial.
17. On the issue of the age of the complainant, the testimony of the complainant's mother and as confirmed by P3 form was that the same was eight years old. The charge sheet however stated that the appellant had carnal knowledge of CWN a girl under the age of 11 years. The same did not give the age of the complainant which age was confirmed during trial to be eight (8) years. I therefore find no defect on the charge sheet herein.
18. On the issue of proof of the prosecution's case against the appellant, it is not in dispute that the medical examination confirmed that the complainant had been defiled. What is in dispute was whether it was the appellant who had defiled the complainant.
19. I have noted the evidence of P.W.5 NWM the complainant's mother that her husband took the complainant from her on 6th January 2007 and that on 8th January 2007 she went to report to the chief 's office that she was not at her matrimonial home and wanted assistance to take back her child and that when she went to the chief's office she found the child thereat lying on the grass. The complainant in her evidence in chief did not mention being at the chief's place on 8th January 2007.
20. I have also noted that two very vital witnesses were never called to testify in this matter these being the complainant's grandmother and father who would have confirmed whether the complainant was at home on 7th January 2007 at the time when it is alleged that she was defiled and whether her grandmother had left her at home alone on the material day.
21. I have further noted that the trial court did not give any consideration to the evidence of P.W.4 who testified under cross examination that there was a grudge between the appellant and the complainant's mother. This was further confirmed by P.W.6 Regina Kanari who confirmed that she learnt of the grudge between the appellant and the complainant's mother.
22. It is clear from the aforesaid that the appellant defence was never taken into account by the trial court as the court dismissed the same as mere denial and held that though there was a disagreement the appellant was not wrongly accused by the complaint's mother. The court should have taken note that the complainant's mother wanted to take her from the father and there was possibility of using the charge herein to enable her get custody of the complainant.
23. There was also inconsistency between the prosecution witnesses which raised a doubt as to whether the complainant was defiled on 7th January 2007 as alleged which benefit of doubt should have been given to the appellant.
24. I therefore find that the conviction of the appellant was not safe. I allow the appeal herein, quash the conviction and set aside the sentence. The appellant should be set free forthwith unless otherwise lawfully held.
25. Dated, signed and delivered at Nyeri this 28th day of March 2014.

J. WAKIAGA

JUDGE

Appellant in person

No appearance by the state.

Court: Judgment read in open court in the presence of the appellant and in the absence of the state.

J. WAKIAGA

JUDGE