



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.34 OF 2013

(Being an appeal against conviction and sentence in criminal case No. 52 of 2011 by Hon. Nthuku SRM, Nakuru Law Courts delivered on 11th March, 2013)

JOSEPH KAMAU GITTHU APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged and convicted of the offence of defilement of a child aged 9 years contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act, No. 2006**. He was also convicted on an alternative charge of committing an indecent act with a 5 years old child contrary to **section 11(1)** of the **Sexual Offences Act No.3 of 2006**.

The particulars of the main charges were that on 5th day of March 2011 at J f in Subukia District of the Rift Valley province, he intentionally and unlawfully inserted his male genital organ (penis) into the vagina of KMN a child aged nine (9) years contrary to **section 8 (1)** as read with **section 8 (2)** of the **Sexual Offences Act, No.3 of 2006**.

The particulars of the alternative charge in count two were that the appellant at the place named in the main charge intentionally and unlawfully committed an indecent act by touching the genital organ (vagina) and breasts of EWN a child aged nine (5) years.

Upon trial the appellant was found guilty of the main charge in respect of count 1. He was also found guilty of the alternative charge in count two. Consequently, he was sentenced to life imprisonment on account of the main charge in count one and twenty-five (25) years on account of the alternative charge in count two.

Aggrieved by both the conviction and sentence the appellant has filed an appeal to this court on twelve (12) grounds that can be reduced to four (4) as follows:-

1. That the charges were not proved;
2. That his defence was not considered;
3. That he was not accorded a fair trial; and
4. That he was denied an opportunity to give a statement in mitigation before the passing of the sentences herein.

In support of the appeal the appellant has filed written submissions in which he contends that no investigations were carried out to warrant the charges and the conviction herein; that the trial court failed to take into account the fact that P.W.1 admitted she had had sexual intercourse before the incident hereto, which fact may explain why her hymen was broken. Regarding the broken hymen he wondered how the complainant's hymen could have healed within two days from the date of the alleged defilement. He has also submitted that the prosecution evidence, especially that of P.W.1 and P.W.2, is contradictory.

Counsel for the appellant, Mr. Wachira reiterated the foregoing submissions and urged the court to allow the appeal.

The respondent conceded the appeal. Its counsel, Mr. Chirchir submitted that evidence reveals that P.W.1 had been defiled on several occasions and that she destroyed evidence of who could have defiled her when she admitted that she had had sex previously with a classmate, and by admitting that she had been coached to frame the appellant. P.W.2, who is also a victim of the alleged crime, confirmed that their mother had coached them to fix the appellant.

Further that the clinical officer who examined P.W.1 confirmed that she had been defiled several times and noted that the hymen had healed. He opined that the hymen could not have healed within two days. (he had examined the complainant two days after the offence allegedly occurred).

Finally, he submitted that there was inordinate delay in reporting the offence and arresting and charging the appellant. There being no evidence that the appellant had gone underground, counsel submitted that the arresting and charging of the appellant was an afterthought.

This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence adduced in the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses. See **Okeno v. Republic** (1972) E.A 32.

A total of five (5) prosecution witnesses testified in the case before the lower court. P.W.1, who was at the time a girl aged 10 years told the court that on the material day her sister, EW (P.W.2) and herself were at their home playing, when the appellant called them and sent them to go and fetch water. Later on, he invited them into his house and while sitting on a long seat in his sitting room, he started putting his fingers inside their genital organs. He partially removed her panty and after opening the zip of his trousers he did bad manners to her. After he finished he gave them avocados.

On cross-examination P.W.1 stated that the appellant did bad manners to her in the presence of her sister P.W.2. She alleged that he had removed her skirt and his trouser half way. Thereafter he took P.W.2 into his bed room but did not do tabia mbaya to her. Later that night, P.W.2 told their mother about the incident.

P.W.2, EW who did not understand the meaning of an oath gave unsworn statement. She stated that on the material day and time she was with P.W.1 and Njoki when the appellant called them into his house and started putting his fingers into their private parts. According to her he started with P.W.1 before he did the same to her in his bedroom.

On cross-examination she stated that P.W.1 did not see the appellant put his fingers in her private parts. She alleged that when the appellant put his fingers in P.W.1's genital organ P.W.1 cried. Unlike P.W.1, she stated that the appellant had not removed his trousers. Like P.W.2 she stated that it was her mother who had told her what to say in this case.

P.W.3 P.C Stanley Mwenda got the report of the crimes herein on 10th March, 2011 from EW (P.W.5), the complainants' mother. He recorded her statement and issued her with P3 forms which were filled on 17th March, 2011. On 18th March, 2011, accompanied by P.C Druma and P.C Chepkwony, he visited the appellant's home arrested the appellant and later charged him with the offences herein. He alleged that they carried investigations which revealed that on 5th March, 2013 at about mid-day, the appellant took the complainants to his house and defiled them in turns. He obtained and produced the complainants'

immunization cards which showed that P.W.1 was born on 2nd May, 2002 and that her sister, P.W.2, was born on 28th August, 2005.

Two days after the alleged offence, P.W.4, Isack Gitonga, a clinical officer at Kabazi Health Centre examined the complainants after they were taken there by P.W.5. The 1st complainant, P.W.1, had a foul smelling discharge and her hymen was broken. She also had healed bruises on her labia majora. Because of the broken hymen and the healed injuries on the labia he opined that she might have been penetrated (defiled) but doubted whether the hymen was broken during the offences under investigation.

Concerning the 2nd complainant's examination he neither noted any bruises nor discharge on her genital organ. He also found her hymen intact.

On her part, the children's mother (P.W.5) led evidence to the effect that on the material day at about 9.00a.m, she left P.W.1, P.W.2 and another child R N in her house. When she returned at about 2 pm, she found P.W.2 sleeping. The child said she had head ache. She also complained of stomach ache. At about 10.00 p.m, she the child (P.W.2)complained that she was feeling pain when urinating. While crying, she informed her that the appellant had, earlier on, put fingers in her genital organs).

On the following day she informed Pastor Kamau and later on informed church elders.

On cross-examination, she stated that P.W.1 told her that the appellant had defiled her twice. She maintained that her children were defiled.

Put on his defence, the appellant gave a sworn statement and stated that on the day in question he was in his shamba waiting for building blocks to be brought to his home. The first delivery was effected at 1.30 p.m and the second at about 5.00 p.m. He denied having seen the complainants or their mother on that day. On the following day he went to church and came back at about 10.30 a.m. He alleged that he got to know about the complaint on 17th March, 2011 when his wife told him that P.W.5 wanted Kshs. 20,000/= because it was alleged that he had defiled her children. He said he could not pay such money because the allegations were strange. The following day, at about 6.00a.m he was arrested and taken to the police station and later on charged with the offences herein. He complained that he was neither taken to a doctor nor told the reason for his arrest.

On cross-examination, he confirmed that no grudge existed between him and P.W.5.

D.W.2, Nathan Bufea, got information about the alleged defilement on 6th March, 2011. On 7th March, 2011. She met P.W.5 who told him that the children were defied on 5th March, 2011 but she had not taken them to hospital. She stated that he had known the accused for a long period of time and that he had never received any bad report about him. He alleged that P.W.5 told her that if he had been given Kshs. 20,000/= to wipe her tears she would have withdrawn the charges.

The foregoing constitutes the evidence upon which the trial court found the offences the appellant faced proved beyond reasonable doubt and convicted the appellant.

Upon evaluation of the evidence presented before the trial court I have no doubt that the 1st complainant was defiled. It is also not in dispute that the said complainant was 9 years at the time of offence. It is equally common ground that the appellant and the complainant knew each other prior to the day in question. The only issue for determination is whether there was sufficient evidence to prove that the appellant was indeed the person who committed the offence.

The only direct evidence against the appellant was given by the complainants. The 1st complainant described the events leading to the incident in detail and stated *inter alia*:-

“We sat next to him. Then he started putting fingers here (points to her private parts). I had my clothes on. He had removed my panty till the knees. He opened the zip of his penis. It was big. All this time we were in the seat. He then lay on top of me. I was

sleeping on the seat looking up. It was a long seat. He then started doing manners here (points to private parts). I felt pain in the sides of my private parts.”

On cross-examination she stated that E was present. and saw everything. She didn't tell her mother because appellant said he would kill her. He had gagged her mouth with a shirt and removed her skirt.

She further stated as follows:-

“I knew tabia mbaya from M and G. I saw M and G doing it.”

I had done tabia mbaya before with M. He is as old as G. He removed my panty and put his thing inside. I didn't feel pain. M is my school mate. We were doing it in our house. . . .Only M did to me once. He didn't put his fingers using his “thing”. Baba didn't put his thing inside E but they were in the bedroom. . . .Baba Migwi told me to say baba Murea is bad. Even my mother said so. But he is not a bad person because of that incident is what mum said he is bad. My mother told me to come and say that Baba Murea did to me bad manners. Baba Migwi just said I say what I have said.

Upon re-examination, the 1st complainant maintained that it is the appellant who did “*tabia mbaya*”, although she had also done it with M.

On her part, P.W.2, described the events of the day as follow-

“He put his fingers here (points to her anus). He started with K. I saw him put his fingers in her then he put in me. PW1 was in the seat. He put fingers inside me in his bed in the bedroom. I was there seeing him put his fingers inside K. I used it to urinate where he put fingers. He didn't do anything else. I told my mother i feel pain when i urinated. It is my mum who told me to come and say this. Mum said I tell the court the way I said at Kerengero (the police station).”

Upon evaluating the foregoing evidence, I find as a fact that the minors (complainants') contradicted themselves on only one issue the issue as to whether the appellant had sexual intercourse with P.W.1. But as regards the allegations that the appellant indecently assaulted the minors, I find the evidence of the minors, who were eyewitnesses to the offence consistent and credible.

Did the complainants' mother and/or any other person frame the appellant?

My answer is in the negative. The evidence on record shows that both the appellant, the complainants and their mother were in good terms before the incidences herein. The evidence on record shows clearly that it's P.W.2 who broke the bad news to the P.W.5, after she felt pain while urinating. Although there is nothing in the prosecution's evidence to connect the pain P.W.2 complained about to what the appellant did to her, upon evaluation of the totality of the evidence adduced in this case, I have no doubt that the minors were assaulted by the appellant.

I also observe that the appellant lied by stating that he only got to know of the alleged crime on 17th March, 2011. His own witness, D.W.2 led evidence to the effect that she was aware of the alleged crime as early as 6th March, 2011. It is apparent his wife was also aware of the alleged incidences. In his own words he stated as follows:-

“I didn't see the complainant or the children/ I heard about this case on 17/3/2011. I was called by my wife and she told me that there was a lady calling me i.e mama K (E). I told my wife that I don't go out at night let her come the following day. I slept and my wife was saying I had spoilt (kuharibu) “nimewashika” my wife told me that E Wanted Kshs.20,000/= because of the allegation”.

From the foregoing, and P.W.5's allegation that church elders had tried to stop her from reporting the crime to police, the only reasonable conclusion that this court can draw is that the parties herein

unlawfully wanted to settle this matter out of court. Unfortunately, that scheme did not materialize.

The two minors painted a graphic picture of what happened to them, they were very honest in answering the questions put to them by the defence counsel.

Regarding the contention that the minors conceded that they were coached, having considered and evaluated their testimony in totality, I find that both children qualified the alleged concession. For instance, P.W.1 stated as follows-

“ Baba Migwi told me to say baba Murea is bad. Even my mother said so. But he is not a bad person because of that incident is what mum said he is bad. My mother told me to come and say that Baba Murea did to me bad manners.”

Clearly the child alluded to an incident that made her mother urged her to come and tell the court whatever she said. In re-exam, she confirmed that the appellant did bad manners to her.

On her part, P.W.2, after stating that its her mother who told her to come and say what she said in court. She clarified what she meant said by stating as follow-

“Mum said I tell the Court the way I said at Kerengero”.

From the record it is clear that Kerengero is the police station. In my view the child did not mean that she was coached to say what she said. She confirmed as much in re-exam when she stated-

“the accused put his fingers inside me. I am not lying.”

For the foregoing reasons, i find and hold that the prosecution evidence was sufficient to prove the charges in both counts.

Concerning the sentence, meted on the appellant, it is not in dispute that he was not accorded an opportunity to give a statement in mitigation.

There are instances when mitigation affects the nature of sentence imposed in criminal cases, especially where there is, no minimum sentence provided. In this case the offence in count I attracts a life sentence and does not give the court discretion for an alternative sentence.

The provision under the **Sexual Offences Act** with regard to an offence under **section 11(1)** attracts a sentence of not less than 10 years imprisonment. Given the circumstances under which the offence was committed and the age of the victim, I am persuaded that the sentence were appropriate. Consequently I confirm the sentence, - with a variation that since the appellant is already sentenced to life, the sentence of alternative count shall be held in abeyance. The appeal is dismissed.

Delivered and dated this 21st day of March, 2014 at Nakuru.

H.A. OMONDI

JUDGE