



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 443 OF 2010

J K K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case Number 1601 of 2009 by Mrs. Kabucho (SRM) in the Chief Magistrate's Court at Kiambu on 20th July 2010)

JUDGMENT

1. **J K K** the appellant herein, was tried by the Chief Magistrate's Court Kiambu on a charge of defilement of a child contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars contained in the charge sheet were that on 25th September 2009 at *[particulars withheld]* Village in Kiambu District within Central Province, he intentionally committed an act which caused penetration with his genital organ into the genital organ of J.N.V a girl aged 8 years at the time.
2. In the alternative the appellant was charged with indecent assault of a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**. It was alleged that he unlawfully and indecently assaulted J.N.V a girl aged 8 years by touching her private parts.
3. At the end of the trial the appellant was convicted under **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**, and sentenced to life imprisonment. The appellant appealed to the superior court against both conviction and sentence on five grounds.
4. A summary of the case was that on 25th September 2009 at 4 pm **PW1** and **PW3** her aunt both being minors, were at the home of **PW3** with the appellant who is the father to **PW3** and grandfather to **PW1** when they retired to be bed the appellant got into bed with them. He started by touching **PW1**'s private parts and then he removed her panties. **PW1** left the room and moved to another bedroom but the appellant followed her and continued the ignoble activity. He inserted his private part in hers and cautioned her not to tell anyone. He promised her some niceties.
5. **PW3** became aware of what was taking place and asked the appellant what he was doing to **PW1**. At that juncture **PW1** called **PW3** to remove her from where she was and **PW3** came into the room. The following day the appellant told **PW1** not to go home and later in the evening he

attempted, yet again, to defile her but this time **PW1** resisted. When they returned to **PW1**'s home, **PW3** told her sister who is **PW1**'s mother what had happened. Her mother reported the incident at Muchatha Police Post and took her to hospital for treatment. The appellant was arrested and charged.

6. Put on his defence, the appellant denied the charge and said he did not know **PW1** who was his granddaughter. He referred to **PW1** as "a strange girl". I note that his cross examination of **PW1**, **PW2** and **PW3** curiously does not raise issue with this alleged consanguine relationship. He gave details of how **PW1** and **PW3** attended church with him on Sunday and attended school the following Monday and Tuesday. He said he was confronted by **PW2** and two other women on a Wednesday in the evening demanding Kshs. 1,500 from him, for **PW1**'s treatment and accusing him of defiling her. He was later arrested by Administration Police who took him to the police post.
7. It is the case for the prosecution that **PW1** was defiled and the culprit was the appellant. There were testimonies of various witnesses on record to support their case. There was the evidence of **PW2**, mother to **PW1** who left her at home on the 25th September 2009, and when she returned in the evening she learnt that **PW3** her sister had fetched her and taken her to the appellant's home. When they returned a few days later **PW3** reported that the appellant had defiled **PW1**, and **PW1** herself narrated what had transpired. **PW2** checked her genitals and found a yellowish discharge. She reported the matter to the police and also took **PW1** to hospital where she was treated and issued with a P3 form.
8. I assessed the evidence on record afresh in light of the grounds of appeal and submissions on record. In the first ground the appellant urged that he was convicted on a defective charge sheet. He submitted that he was wrongfully charged for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**, instead of the offence of incest by a male person, contrary to **Section 20 (1)** of the same **Act**, being the grandfather to **PW1**. Miss Maina responded that the charge sheet was not defective as the proper sections were cited and the particulars were very clear.
9. The Sections referred to above provide as follows:

Section 20(1)

"Any person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years".

However, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which caused penetration or the indecent act was obtained with the consent of the female person.

Section 8(1) on the other hand provides that:

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".

Section 8(2), a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

- 10.A properly framed charge contains three basic parts: the commencement, the statement of the offence and the particulars of the offence. The particulars must be clear enough to enable the accused person to know the offence he is charged with. It is fundamental that the charge should allege all the essential constituents of an offence in my view this has been achieved in the instant

case.

11. From the evidence on record, it is not in doubt that the appellant is the grandfather of the complainant. His defence that she was a stranger to him does not hold water in light of the evidence of **PW1**, **PW2** and **PW3**. From the reading of the two sections above it is evident that whereas the appellant could have been charged under **Section 20 (1)** of the **Sexual Offences Act**, which specifically deals with sexual assault by male persons, in incestuous relationships, there was nothing to preclude him from being charged under **Section 8(1)** and **(2)** of the **Sexual Offences Act** as he was. The ingredients of both offences are similar save that in the offence of incest, the victim is a relative of the suspect. Therefore, the fact that the appellant was charged with defilement and not incest did not render the trial defective, neither did it prejudice him or occasion any failure of justice. Additionally, both offences carry a mandatory sentence of imprisonment for life. Upon conviction.
12. In the second ground, the appellant submitted that the medical evidence was unsatisfactory as it was adduced by a clinical officer on behalf of Dr. Marion Muhia who was said to be abroad, and that the medical evidence itself was inconclusive. Miss Maina contended that it was a well settled position by the Court of Appeal, that a clinical officer was qualified to produce a medical report.
13. The evidence of Dr. Muhia corroborated that of **PW1**. Her report showed that **PW1** was sexually assaulted based on clinical findings, which confirmed that penetration had taken place, that **PW1** had bruises on the vulva, had a perforated hymen, and a foul smelling discharge. The report was therefore conclusive. **PW5** the Government analyst analyzed the blood sample of **PW1** and the appellant as well as the appellant's under pant. He found no blood stain or seminal stain on the under pants, but found that both **PW1** and the appellant belonged to the blood group B+.
14. On the competence of the clinical officer, **PW4**, to produce the medical report the matter was put to rest by the Court of Appeal in the case of **Raphael Kavoi Kiilu vs Republic (2010) unreported** where their lordships stated that:

“Under section 2 of the Clinical Officers Act (Training, Registration and Licensing Act Cap 260 (LOK) a clinical officer means:-

“a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act.....”

Section 7(4) of the Act States:-

“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”

From the foregoing, **PW4** who testified in this case on behalf of Dr. Marion Muhia was competent to do so.

15. In the third ground the appellant submitted that his rights to fair trial were violated. He argued that the admission of the evidence of **PW5** and **PW6** by the trial court violated **Article 25(c)** of the **Constitution**. Miss Maina argued that the appellant's right to fair trial was not violated as he got the chance to cross examine the witnesses and understood the proceedings in court.
16. It is clear from the proceedings that indeed the appellant cross examined both **PW5** and **PW6**. I also note that both **PW1** and **PW3** who were minors were subjected to voire dire examination before they testified and that he cross examined them too. From his participation in the proceedings it is evident that he understood the language used in court.

17. In the last ground the appellant contended that the Judgment of the trial court was invalid as it was unsigned. Miss Maina's reply was that the proceedings were signed and it was therefore safe to find that the trial magistrate signed the Judgment too. However, she urged that should the court find that the judgment was not signed the court has the power to send the file back to the trial magistrate to sign it, since the evidence on record was credible and sufficient to sustain a conviction.

18. Faced with a similar question the Court of Appeal in the case **Willy John vs Regina M, Cr. App. No. 536 of 1995 EACA pg 509.**

“The failure to date and sign the judgment is a mere irregularity which can be cured by the application of Section 304 of the Criminal Procedure Code since the whole of the record of the proceedings is in the hand of the trial Judge and there was no prejudice to the appellant.”

Today the applicable section is **382.**

19. **PW3** testified that on 25th September 2009 she fetched **PW1** and brought her to her home to play. In the evening, they both went to bed with the appellant. She was woken up at night by **PW1** who complained that the appellant was doing bad things to her. The following Monday she took **PW1** home even though the appellant tried to prevent her from leaving, and reported what the appellant had done to her.

20. After carefully analysing and re-evaluating the evidence on record to draw my own conclusion as is required of me as the first appellate court, and being mindful of the fact that I did not have the advantage of seeing or hearing the witnesses as they testified. I find that the appellant was properly convicted. This appeal therefore lacks merit and is dismissed accordingly.

SIGNED DATED and DELIVERED in open court this 25th day of June 2014.

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L. A. ACHODE

JUDGE