



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 56 OF 2013

JOSEPHAT GITHAIGA KIMANI..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from the Conviction and Sentence by W. K. Chepseba, Ag. Chief Magistrate's Court at Nyahururu in S.R.M.CR.C.NO.874 of 2012 dated 12th April, 20130)

JUDGMENT

1. The Appellant, **Josphat Githaiga Kimani**, was charged with the offence Defilement contrary to **Section 8(41)** as read with **Section 8(4)** of the **Sexual Offences Act No.3 of 2006**.
2. The particulars of the charge were that on the 13th May, 2012 at 1.30pm in [Particulars withheld] village in Nyandarua County, unlawfully and intentionally caused his genital organ namely penis to penetrate the vagina of **JWD, P.W.1** a child of 17 years old.
3. The alternative count was of **Indecent Act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act No.3 of 2006**.
4. The particulars are that on date hereinbefore mentioned and at the same place, the Appellant unlawfully and intentionally did an indecent act to JWN by causing his genital organ namely penis to come into with the child's private parts.
5. The Appellant was convicted and sentenced to serve a term of fifteen (15) years. Being aggrieved by both conviction and sentence, the Appellant preferred this appeal and listed nine (9) grounds of Appeal in his Petition of Appeal.
6. The grounds of Appeal are as set out as follows:
 - i. **That he pleaded not guilty to the charge;**
 - ii. **That the Learned trial Magistrate erred in law in and in fact for relying upon circumstantial evidence adduced from P.W.2 who is the mother of the plaintiff;**
 - iii. **That the Learned trial Magistrate failed to consider the fact that the circumstances surrounding the appellant's arrest were totally displaced by his defence.**
 - iv. **That the trial magistrate did not consider the fact that the complainant colluded with her mother with interior motive to fix the appellant for both families had long standing grudges for they lived in the same village.**

- v. **That the trial magistrate erred in law and fact for not being eager to know the motive of the complainant being in the Appellant's homestead**
- vi. **That the trial magistrate erred in law and fact for replying on evidence adduced by P.W.4 who was the arresting officer yet they did not find the appellant in the house they were claiming.**
- vii. **That the trial magistrate erred in law for just concluding that the complainant had been seen in the Appellant's house and failing to investigate further and establish her presence there and the motive.**
- viii. **That the trial magistrate erred in law for not considering that the complainant after receiving a heavy beating confessed falsely to her mother that she had been defiled.**
- ix. **That the Honourable court reviews the case, the sentence and conviction be set aside or otherwise be heard afresh.**

7. At the hearing hereof, the Appellant opted to rely on his written submissions in support of the appeal and Mr. Chebii, Learned Prosecuting Counsel for the State made oral submission in response.

APPELLANT'S SUBMISSIONS:

8. The Appellant submitted that the trial magistrate erred in relying on the complainant's evidence that she had been defiled.
9. That no proper investigations had been carried out by the arresting officer (P.W.4) to establish the presence of the complainant in his house, whilst he himself was absent.
10. That the complainant colluded with her mother (P.W.2) and both had an ulterior motive to frame him due to a long outstanding grudge.
11. The Appellant prayed that his appeal be allowed and his conviction quashed and sentence set aside.

RESPONDENT'S SUBMISSIONS:

12. The complainant went missing from her home on Sunday, the 13th May, 2012.
13. P.W.2, the mother of the complainant suspected the Appellant and she made a report to the police who provided her with an escort. They went to Appellant's house and upon breaking down the door, they found the complainant.
14. The appellant was arrested by P.W.4 and charged with the offence of defilement.
15. The complainant was examined by P.W.6 a Medical Officer who formed an opinion that the complainant had been defiled as her hymen was torn.
16. P.W.6 Produced a Birth Certificate "**P Exh.1**" that established the age of the complainant as 17 years.
17. Counsel for the State urged the court to uphold the conviction and sentence as the evidence of the complainant had been corroborated by P.W.2, P.W.3, P.W.4 and P.W.6.
18. The appellant had also given no explanation as to why minor had been found in his house with the door locked, his absence notwithstanding.

ISSUES FOR DETERMINATION:

19. After taking into consideration, the submission of both parties, this court finds the following issues for determination:

- i) whether the trial magistrate conducted a *voire dire* test to test the credibility of the Complainant;
- ii) whether the trial magistrate erred in law and in fact in disregarding the defence of the Appellant?

ANALYSIS

20. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno V. Republic, (1972) EA 32.**

21. This court has perused the court record and notes that the trial magistrate failed to conduct a “*voire dire*” examination. The complainant was aged 17 years and was therefore a minor. She was sworn and then proceeded to give her evidence on oath.

22. A *voire* test has to be conducted beforehand to establish whether the child understands the meaning of an oath and if not to ascertain and establish the intelligence of the minor and her understanding of the need **P.W.5** to tell the truth. Refer to the Court of Appeal decision **Mwalewa Libaya Kalu V. Republic, CR.A.NO.267/2008 (MSA) unreported.**

23. In most cases of defilement, there is usually no eye witness to the commission of the offence and at all times, the evidence of the complainant will be relied upon to support the conviction of the perpetrator.

24. The trial court failed to properly guide itself in the following manner:

- i) failed to conduct a *voire dire* test which then lessened the probative value of the Complainant's evidence.
- ii) failed to make any comments as to the Complainant's competency as a witness, her intelligence and/or her truthfulness
- iii) further the trial court did not invoke the proviso to **Section 124** of the **Evidence Act**
- iv) nor did it caution itself on the dangers of convicting on such evidence

25. This court has had the occasion to re-assess the evidence of **P.W.2** and that of **P.W.5**.

26. The evidence of **P.W.2** is that upon being told by **P.W.3**, her neighbour, that the Appellant was looking for her, she immediately knew where her daughter the complainant would be.

27. She then went straight to the police to report the matter and with their assistance, went to the Appellant's house, whereupon after breaking the door, found the complainant.

28. It is interesting to note the testimony of **P.W.5** to this situation and his exact words are and this court quotes:

“..... I went to the scene. They are neighbours about 500 metres apart. It was not the 1st time.....”

29. The latter part of the evidence of **P.W.5** needs interrogating as it raises questions in this court's mind with respect to grudges and motives. The questions that arise are:

- i) the number of visits made by the police
- ii) what was the nature of these issues that required the police intervention, prior to this instant incident

iii) action taken by police

iv) was the Appellant indeed framed due to these outstanding issues?

30. There was no elaboration or answers and where doubt is raised in the mind of the court, the benefit of the doubt is always given in favour of the Appellant/Accused.

31. In the light of P.W.5's evidence, the court ought not to have disregarded the Appellant's defence

32. The evidence of P.W.6, the Medical Officer was that there were no injuries on the complainant and having performed a High Vaginal Swab there was no blood or presence of spermatozoa found and the hymen is not said to be freshly torn.

33. This court opines that there is therefore no medical evidence to support or corroborate the evidence of the Complainant and that this evidence exonerates the Appellant on the issue of defilement.

FINDINGS

34. After re-evaluating and re-assessing the evidence on record, this court makes the following findings:

i) That failure by the trial court to conduct the “*voire dire*” test rendered the evidence of the Complainant unreliable and not credit worthy.

ii) In the light of the evidence of P.W.5, the trial magistrate ought not to have disregarded the defence of the Appellant.

iii) The conviction based on the evidence of the Complainant and **P.W.2** is found to be unsafe as there could have existed a grudge and ulterior motive.

CONCLUSION

35. For the reasons stated above, this court finds that the appeal has merit and it is hereby allowed.

36. The conviction is hereby quashed and sentence set aside. The Appellant to be set at liberty unless otherwise lawfully held.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 31st day of July, 2014

A. MSHILA

JUDGE