



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 59 OF 2013

SAITOTI GABANYANAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(BEING AN APPEAL FROM THE CONVICTION AND SENTENCE OF HON. S.O. TEMU
(SRM) DELIVERED ON 28/07/2011 IN KAJIADO PRINCIPAL MAGISTRATE'S COURT
CRIMINAL CASE NO. 27 OF 2011)**

(BEFORE HON. B. THURANIRA JADEN J)

J U D G M E N T

1. The Appellant, **Saitoti Gabanyan**, was charged with the offence of “defilement in violation of **section 8 (1)** as read with **section 8 (2)** of **Sexual Offence Act No. 3 of 2006**.”

The particulars of the offence were that “on 7th day of January 2011 at around 12.00 p.m. at **Meto Location, Bissil Trading Centre in Kajiado District** within the **Rift Valley Province** did cause his penis to penetrate the vagina of **R N** a girl aged 14 years.”

2. In the alternative the Appellant was charged with the offence of “indecent act with a child contrary to **section (1) (1)** of the **Sexual Offence Act No. 3 of 2006**”.

The particulars of the offence were that “on the 7th day of January 2011 at around 12.00 p.m. at **Meto Location, Bissil Trading Centre, in Kajiado District** within the Rift Valley Province did intentionally and unlawfully caused his penis to come into contact with the vagina of **R N** a girl aged 14 years.”

3. The Appellant pleaded not guilty. The case proceeded to a full trial.

4. The prosecution case was that on the material time at about 12.00 noon, the complainant, **R N**, a fourteen (14) year old form one student was grazing her father’s goats. The Appellant was also grazing cows nearby. The Appellant then went to where the complainant was and pushed her to the ground then held her by the neck and attempted to strangle her. The complainant then asked the Appellant what he wanted. The Appellant told her to remove her clothes. The complainant removed her shoes then tried to escape. The Appellant however held the complainant and removed her panties. The Appellant then lay on the complainant and inserted his penis into her vagina then released her. The complainant started running

away to where the goats were. The Appellant however held and pushed the complainant. The complainant's clothes got torn. The complainant fell down and the Appellant hit her with a club on the head. The complainant screamed but nobody went to her rescue. The Appellant then had sex with the complainant two times then let her go.

5. The complainant went home and reported the matter to her grandmother. The complainant's father and other family members were informed what had transpired. The complainant's uncle, PW2 **J L** organized a search team that went out to look for the Appellant in the bushes where the Appellant was herding the cows. They found the Appellant who tried to run away but they gave chase and arrested him. The Appellant was escorted to **Bissil Police Station**. The complainant was issued with a P3 form and escorted to hospital for treatment. The Appellant was subsequently charged with the offence herein.

6. When put on his defence, the Appellant gave unsworn evidence. No witnesses were called. The Appellant described himself as a **Tanzanian** resident who was staying in **Meto area of Kenya** taking care of some cattle. He denied the charges and stated that on the material day he was herding cows. That the cows strayed into somebody's *shamba* and the owner of the cows arrested him and assaulted him. The Appellant stated that he did not see the complainant until the time of his arrest when the complainant identified him as the one who was taking care of the cows. The Appellant further stated that this case was a frame up by the complainant's father who had asked him if he had a work permit then blamed him for working in **Kenya** illegally.

7. The trial magistrate found the prosecution case proved beyond reasonable doubts. The Appellant was convicted for the offence of defilement and sentenced to serve twenty (20) years imprisonment.

8. The Appellant was aggrieved by both the conviction and sentence. He appealed to this court on the following grounds:-

- **That the charge sheet was defective.**
- **That the case was not proved by way of DNA evidence.**
- **That the nurse who produced the P3 form was an incompetent witness.**
- **That the defence case was dismissed although the same was plausible.**

9. During the hearing of the appeal, the Appellant relied on the grounds of appeal and written submissions.

10. The appeal was opposed by the State. The learned counsel for the State submitted on the sufficiency of the prosecution evidence.

11. 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**.

12. The complainant (PW1) gave a detailed and candid account of evidence on how the Appellant had sex with her on the material day. The complainant gave her age as 14 years. The complainant's evidence is that she did not know the Appellant before but that they had spent the day in the grazing fields from about 11.00 a.m. to 4.00 p.m. The complainant therefore had sufficient opportunity to observe the Appellant in broad day light. The evidence of identification was therefore free of any possibility of error. The complainant described what the Appellant wore at the material time. That was a pair of shorts and a blanket.

13. The evidence by the complainant that the appellant was arrested from the same grazing field the same day at about 4.30 p.m. was corroborated by that of her uncle (PW2). According to the uncle, (PW2) he was amongst the group of people who arrested the Appellant following the report by the complainant. It is the evidence of PW2 that the accused attempted to run away but he fell down and he was arrested and escorted to the police station after the complainant (PW1) identified him as the culprit.

14. The evidence of the assistant chief, PW4 **John Koisikiri** and that of the investigating officer PW5

Cpl. Magdalene Wangare (PW5) confirmed that a report of the defilement was made to the authorities and investigations carried out. The investigating officer produced the complainant's Birth Certificate as an exhibit. The same confirms that the complainant was born on 26/6/1997 and was therefore 14 years old at the material time.

15. PW3 **Rebecca Mura Karinga** who described herself as a "nurse officer" produced a P3 form which she filled in after examining the complainant. Is a nurse a competent witness to give medical evidence? I have perused the **Nurses Act Cap 257 Laws of Kenya** but I have not seen any entry that empowers a nurse as a "medical practitioner" as is the case for example, with persons registered under the **Medical Practitioners and Dentists Act Cap 253 Laws of Kenya** or a person registered to render medical and dental services under the **Clinical Officers (Training, Registration and Licensing) Act Cap 260 Laws of Kenya**.

The evidence of the nurse fails to disclose whether she is qualified to render medical services and fill in P3 forms. I hold that the nurse was not competent to produce the P3 form and therefore her evidence was inadmissible.

16. The Appellant's defence was that this case was a frame up by the complainant's father. No reasons emerge from the record why the complainant's father would frame up the Appellant. Although the Appellant in his evidence stated that the cows he was grazing strayed in somebody's *shamba*, the *shamba* was not said to belong to the Appellant's father. The defence case is not convincing in view of the strong prosecution evidence. The trial magistrate who had the advantage of seeing the witnesses testify and observed their demeanour believed the complainant. I have no reasons to differ with the finding of the trial magistrate.

17. As stated in the proviso to **section 124** of the **Evidence Act Cap 80 Laws of Kenya**:-

"Provided that where in a Criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

18. One of the issues raised by the Appellant is that the charge sheet is defective. The Appellant was charged under **section 8 (1)** as read with **section 8 (2)** of the **Sexual Offences Act**. However, the complainant was 14 years old. The Appellant ought to have been charged under **section 8 (1)** as read with **section 8 (3)** of the **Sexual Offences Act**. However, the irregularity did not occasion any miscarriage of justice and is curable under **section 382** of the **Criminal Procedure Code**.

19. Although the Appellant stated that the words "intentionally" and "unlawfully" were missing from the charge, **section 8 (1)** of the **Sexual Offences Act** which defines the offence of defilement states as follows:-

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

20. There is no requirement for the use of the terms "intentionally" and "unlawful" in cases of defilement. The overriding factor is that the victim of the offence is a child. A child is defined in section 2 of the **Children Act Cap 141 Laws of Kenya** as any human being below 18 years.

21. Having considered the evidence on record in its entirety, I am satisfied that the prosecution case was proved beyond reasonable doubts. The sentence is within the law. The appeal has no merits and I dismiss the same. I uphold the conviction and sentence.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 31st day of July 2014.

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B. THURANIRA JADEN

JUDGE