



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 45 of 2011

ISAAC MURIITHI WAMBUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from original conviction and sentence in Naivasha SNR. P.. M..CR.C.NO2046 of 2010 by
Hon P. M. Mulwa, Principal Magistrate dated 7th

February, 2011]

JUDGMENT

The appellant was aggrieved by the conviction and sentence of twenty (20) years for the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offence Act, No.3 of 2006**.

He has challenged the conviction on the grounds that are clearly mitigating factors. He is concerned more with the sentence which he has urged the court to substitute with a non-custodial sentence for the reasons that:

- i) he is the sole bread winner;
- ii) he is remorseful;
- iii) he was misled by the bad company he kept and the influence of alcohol.

Learned counsel for the respondent supported the conviction and sentence arguing that the conviction was in respect of a child aged seven (7) years and the only sentence was life imprisonment.

The complainant, a girl aged seven years and her siblings were playing together outside their house on the 15th August, 2010 when the appellant who had just been employed by a neighbour as a *shamba* boy lured the complainant and another child, D. to his house where he offered them tea. He kept the two in separate rooms. The appellant went to the room where the complainant was and after undressing her, defiled her.

The complainant's screams as a result of the pains she felt attracted her 17 year old brother, P.W.3, K. who rushed to the room but found it locked from inside. He called out the complainant's name and the appellant opened the door. The complainant did not tell him what had happened to her. But when two female neighbours talked to her she explained to them how the appellant had defiled her. One such neighbour, P.W.4 had seen the appellant go to the complainant's parent's house four times. The fourth time, he took the complainant and Dismas away.

This aroused P.W.4's curiosity and as a result she called another neighbour with whom they monitored the events. They directed Kevin to the appellant's house where he found the complainant. The complainant's mother was called and informed of these events. When she got to the hospital where the complainant had been taken, the latter explained to her what the appellant had done to her and upon herself checking on her, she found blood on her private parts.

The appellant was arrested and together with the complainant, they were taken to the hospital where they were both examined. Dr. Terer Eric found one day old scratch marks on the complainant's nose and mouth. He also noted further bruises on the genitalia and a broken hymen. He concluded that there was penetration.

In his defence the appellant explained that on the day in question, he met the complainant's mother who sought to borrow some money from him. He rejected the request. It was his view that as a result of this, he was arrested. He also realized that his arrest was designed to create an opportunity for a certain young man, presumably Kevin, to take his job.

The learned trial magistrate found that the evidence, in its totality proved the charge of defilement and upon convicting the appellant sentenced him to twenty (20) years imprisonment as explained earlier.

Being the first appeal, the evidence on record must be subjected to fresh scrutiny in order for this court to come to its own independent finding. See **Okeno V. Republic** (1972) EA 32.

Although, according to the complainant, the appellant was not known to her, it is not in doubt that the two were neighbours. Secondly, from the record, the trial court was satisfied that the complainant was possessed of sufficient intelligent to warrant her testify on oath. Her evidence itself confirms that finding as she gave a clear graphic account of the events leading to her defilement. For instance, she stated that the appellant went to their (complainant's) house three times asking if Kevin was still cooking as if to confirm that Kevin was engaged in order to create an opportunity to execute his objective.

The three times the appellant went to the complainant's parent's home gave the appellant chance to be able to identify the appellant. The appellant eventually took the complainant and D. to his house and served them tea in different rooms. The complainant explained:

“I took tea there. I was wearing a shirt/blouse, a sweater and a long trouser. The person removed my trouser and under wear. I was lying on the bed. The accused removed his clothes and he did bad things to me. He did it here.

COURT: The child points at her vagina.

I felt a lot of pain and cried. K. knocked on the door which was locked. The accused dressed me up quickly. He also put on his clothes. The door was opened and I went out. K. was there. I had stopped crying but was very angry.”

P.W.4, M. N. J. (M.) also saw the appellant going and returning to the complainant's parent's house several times before he finally took the two children away. After K. discovered that the complainant was in the appellant's house, the complainant told M. that the appellant had done “*bad things*” to her. The complainant's mother on her part noticed blood on the complainant's private part. Finally, the doctor confirmed that there was penetration.

From this evidence, I am persuaded that the appellant committed the offence charged in the main count. There are no grounds to warrant interference with the finding of the learned trial magistrate regarding the commission of the offence.

However, the learned trial magistrate having made a specific finding that the complainant was seven (7) years at the time the offence was committed and as indicated in the charge sheet, he ought to have proceeded under **Section 8(2)** of the **Sexual Offences Act** by sentencing the appellant to life

imprisonment. That was the lawful sentence.

In the result, the sentence of twenty (20) years is substituted with life sentence. The appeal therefore fails and is dismissed accordingly.

Dated and Signed at Nakuru this 18th day of January, 2013.

**W. OUKO
JUDGE**

Dated, Signed and Delivered at Nakuru this 31st day of January, 2013 by Hon. Justice M. J. Anyara Emukule.

JUDGE