



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 178 of 2011

KAGAI KANG'ETHEAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1212 of 2010 in the Principal Magistrate's Court at Githunguri – B. M Nzakyo (RM) on 10th June 2011)

JUDGMENT

1. **Kagai Kang'ethe** the appellant herein was convicted for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**, and sentenced to twenty years imprisonment.
2. The brief particulars were that on the 24th day of September 2010 at {*particulars withheld*} within Central Province, he unlawfully committed an act which caused penetration with his genital organ (penis) into the genital organ (vagina) of R. W. (identity concealed on account of her being a minor) a child aged 13 years.
3. In the alternative he had also faced a charge of indecent act to a female child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.
4. Upon conviction the appellant filed an appeal against both conviction and sentence and argued firstly, that the prosecution case was not proved beyond reasonable doubt since the learned trial magistrate made no specific finding in relation to the burden of proof, secondly, that the prosecution did not summon essential witnesses and lastly, that the medical evidence did not support the testimony of **PW1** that she was defiled.
5. In response Miss. Maina, the learned state counsel opposed the appeal, stating that there was sufficient evidence to support both conviction and sentence. She submitted that there was no pre-existing grudge between the two families and there was therefore no reason for the minor or her family to frame the appellant.
6. I have scrutinized and re-assessed the evidence on record afresh as is my duty as the first appellate court so as to make my own findings bearing in mind that I did not have the opportunity to observe the witnesses as they testified.

7. Briefly stated the case for the prosecution was that **PW1** the complainant was a 13 years girl old who knew the appellant before this incident. On 24th September 2010 she went to the appellant's house in the daytime, to borrow a machete. The appellant told her to fetch the machete from inside the house. The appellant followed her in, shut the door, and undressed her. He also undressed herself and defiled her.
8. **PW3**, the minor's aunt went to the appellant's house and called out his name from the outside. The appellant ran into his bedroom, while the minor opened the door and came out. The minor later reported to her brother **PW2** that she had been defiled. **PW3** took the minor to hospital that evening.
9. **PW5**, a Clinical Officer at Githiga found a broken hymen, a whitish discharge and presence of puss cells on the 13 year old when she examined her on the same day. Her finding was that the minor had been defiled and she produced a P3 form to that effect.
10. In his unsworn testimony the appellant confirmed that indeed PW1 visited his home to borrow a file. He testified however, that all he did was to offer the child some food which she ate and left. He also closed his house and went to the shopping Centre. Upon his return home he was arrested by members of the public and handed over to the police.
11. The issues for determination are whether the complainant was defiled and if she was, whether the identity of the person who defiled her was proved. This court has considered the evidence on record and found that the medical evidence adduced by **PW5** conclusively proved that the complainant herein who was 13 years old had been defiled. There was no evidence from the defence in rebuttal.
12. On identification, parts of the evidence by **PW1** was corroborated by that of **PW3** Esther Wanjiru who confirmed that she saw **PW1** emerging from the appellant's house when **PW3** went there to collect Napier grass. The corroboration was to the extent that the minor was alone with the appellant in his house at the material time, that the door was shut and she emerged when **PW3** called out the appellant's name from the outside. The minor was subjected to medical examination the same day and was found to have been defiled.
13. In his submissions the appellant stated that he was not given a chance to cross-examine **PW2**. The handwritten record however, shows that the appellant was given the opportunity to cross-examine **PW2** and his response was that he had no questions for that witness. In any case from the evidence on record **PW2** was not at the scene of the crime and only directed **PW3** to take the minor to hospital upon receiving the report.
14. I am therefore satisfied that the prosecution proved their case against the appellant to the required standard. The learned trial magistrate therefore directed himself properly on both the facts before him and the law applicable in entering the conviction against the appellant. The sentence of 20 years imposed by the learned trial magistrate is what is provided by law under **Section 8(3)** of the **Sexual Offences Act**.

For the foregoing reasons I find that the appeal is lacking in merit and I dismiss it.

SIGNED DATED and DELIVERED in open court this **21st** day of **February 2013**

L. A. ACHODE

JUDGE