



REPUBLIC OF KENYA

High Court at Nyeri

Criminal Appeal 240 of 2009

NELSON WAMBUGU KARIUKI.....APPELLANT

Versus

REPUBLIC .....RESPONDENT

*(arising from the judgment of Hon. F. Kombo, Senior Resident*

*Magistrate Mukurweini in Criminal Case No. 526 of 2009)*

**JUDGMENT**

The appellant was charged with the offence defilement of a girl contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on 28th November 2008 at [PARTICULARS WITHHELD] within Central Province committed an act which caused penetration with a child namely CWG aged 11 years.

He pleaded not guilty and was tried convicted and sentenced to imprisonment for life and being aggrieved of the conviction and sentence filed this appeal and raised the following grounds in his petition of appeal.

- 1. That the learned trial magistrate erred in fact in convicting the appellant on uncorroborated evidence of the complainant thereby occasioning the appellant a miscarriage of justice.***
- 2. That the learned trial magistrate findings are against the evidence on record, he therefore erred in law and fact in convicting the appellant on grounds the basis of such findings unsupported by the evidence on record.***
- 3. That the learned trial magistrate erred in law and in fact in allowing the medical report to be produced by a witness other than the maker without meeting the requisite criteria for such production.***
- 4. That the learned trial magistrate erred in law and in fact in failing to find that proof of the age of the complainant was crucial ingredient of the charge before the court.***
- 5. That the learned trial magistrate erred in law and in fact in failing to find that since the age of the complainant was not established, charge against the appellant could not hold.***
- 6. That the learned trial magistrate erred in law and in fact that by failing to appreciate the***

***fact that the complainant reported the alleged commission of the offence ten (10) clear days and the medical report was not explicit that such offence as defilement could have been proved in the circumstances more so in the absence of the primary and initial medical and treatment notes (if any)***

***7. That the learned trial magistrate erred in law and in fact in failing to recognize and take caution in evaluation of the evidence of the defence and the accused on the one hand viz a viz the evidence of the prosecution witness on the other hand.***

***8. That the conviction was baseless, unmerited and totally unsafe and is against the principles of law and justice.***

At the hearing hereof Mr. Wambugu appeared for the appellant and submitted no evidence was tendered to prove the age of the victim and therefore failure to tender the said evidence completely destroyed the charge against the appellant.

That the alleged offence occurred on 28th November 2008 and was not reported until 9th December 2008 yet she was going to school and living with her mother and in all that time neither her mother or someone at school noticed anything.

That no treatment notes were produced and some vital witnesses were never called and no reason given for the said failure.

Miss Maundu for the state opposed the appeal and submitted that the evidence of Teresa was not vital and that the court should take judicial notice that not all Kenyans hold a birth certificate. That age can be proved through other means noting that the complainant was in class six and the mother who was present at the time of her birth testified.

The delay in reporting was explained in that the appellant had threatened to kill the complainant if she told anybody and that P3 form was sufficient to prove that defilement had taken place.

This being a first appeal the court is required to reevaluate the evidence tendered before the trial court and to come to its own conclusion.

P.W.1 testified that on 28th November 2008 the appellant who had been employed by her uncle at about 4.30 pm found her at the well irrigating vegetable grabbed her by hand into a coffee plantation and threatened to kill her if she screamed and ordered her to lie down and remove her panties which she did. He therefore defiled her for 30 minutes. On 7th December 2008 the complainant mother overheard her telling friend Teresa Wanjiru what had happened.

P.W. 2 testified that the complainant was aged 11 years old and that on 7th December 2008 she was in her kitchen when she overheard her telling her friend Teresa how the appellant had defiled her and that she confirmed that the appellant who was known to her had defiled the complainant on 28th November 2008.

hP.W.3 Paul Gachoya Waweru the chief testified that he received the report and interrogated the minor who confirmed that the appellant had defiled her. He therefore arrested the appellant and escorted him to Mukurweini police station.

P.W.4 Dr. Muchuga testified on behalf of Dr. Kimathi that he estimated age of the complainant was 11 years old and on examination the hymen was not intact and had whitish discharge.

When put on his defence the appellant gave sworn evidence that he had been employed by the complainant mother and that the assistant chief came and arrested him and that the day the complainant said that she had been defiled she had been beaten by her mother.

From the submission by the advocate herein and the evidence tendered before the trial court the

following issues have been identified by the court for determination:

- a. Was the age of the complainant proved?*
- b. Was the prosecution case against the appellant proved beyond reasonable doubt?*
- c. Was the appellant defence taken into consideration?*

I have noted that the age of the complainant was stated by the mother and confirmed by the evidence of P.W.4 who is a medical doctor whereas the age is a vital ingredient in the offence of this nature I am of the considered opinion that the age of the appellant was satisfactorily proved.

I have looked at the evidence tendered before the trial court and agree with the trial court findings that the prosecution case against the appellant was proved beyond reasonable doubt. P.W.2 stated that she overheard the complainant tell her friend Teresa what had happened to her the P3 form confirmed that her hymen was broken and confirmed to the assistant chief that the appellant had defiled her.

As regards the appellant defence I have noted that whereas the complainant and her mother P.W.2 both testified that the appellant was employed by her uncle and brother in law respectively the appellant testified that he was employed by P.W.2 this can not be true having taken into account the evidence of P.W.3 the area assistant chief who arrested the appellant.

I therefore find no merit on the appellant's appeal herein and dismiss the same.

Dated and delivered at Nyeri this 7th day of February 2013.

**J. WAKIAGA**

**JUDGE**

Judgment read in open court in the presence of Miss Maundu for the State, Nelson Wambugu Kariuki - appellant.

**J. WAKIAGA**

**JUDGE**