REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 565 of 2009

JOSEPH GITAU GATHONI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 1600 of 2009 in the Chief Magistrate's Court at Nairobi – Mrs. A. Ongeri (SPM)

JUDGMENT

1. **Joseph Gitau Gathoni,** the appellant herein was tried and convicted for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**.

2. The brief particulars were that, on the 2nd day of October 2009 at ***[particulars withheld]*** in Kiambu District of the Central Province, he committed an act which caused penetration with J.M.G. a girl aged 13 years.

3. Upon conclusion of the trial the learned trial magistrate sentenced the appellant to 20 years imprisonment. The appellant appealed against conviction and sentence citing various grounds of appeal.

4. This being the first appeal I have scrutinized and re-assessed the evidence on record to draw my own conclusion and make my own findings.

5. The **1st ground** in the amended grounds of appeal was that the charge sheet was fatally defective. On this the appellant first contended that the complainant was his cousin and that therefore, he should have been charged with the offence of incest contrary to **Section 20** of the **Sexual Offences Act** and not defilement contrary to **Section 8(1)** and **(3)** of the said Act.

6. Secondly that the charge sheet was defective for failure to include the word **"unlawfully"** which in his opinion is the one word that makes the sexual act to be illegal and not consented to.

7. Miss Kuruga, the learned State Counsel responded that the relationship between the complainant and the appellant is not included in those relationships upon which a charge of incest may be based under **Section 20** of the **Sexual Offences Act**, and that the complainant being a minor had no capacity to consent, whether or not the charge included the word "**unlawfully**."

8. **Section 20(1)** of the **Sexual Offences Act No. 3** of **2006** provides as follows:

"**Any male person who commits an indecent act or an act which causes penetration with a female**

person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years."

From a reading of the said provision therefore, it would appear that the relationship between the complainant and appellant as cousins is not one of the kinship envisaged by **Section 20(1)** of the **Sexual Offences Act**.

9. Further the omission of the word **"unlawfully"** in describing the **actus reus** in the charge sheet does not sanitise nor render the offending act lawful. The offence of defilement is committed if it is proved that a person committed an act which caused penetration with a child. In this case the evidence shows that the complainant was a 13 year old child and the act, once proven to have occurred, would be unlawful per se as she lacked capacity to consent.

10. On **grounds no. 2, 3, 4,** and **5** the appellant questioned the evidence on record which, he argued, was contradictory, incredible and did not prove the prosecution's case beyond reasonable doubt. In his written submissions, he took issue with the fact that the minor's mother did not testify, and stated that the four prosecution witnesses did not corroborate each other.

11. In her response Miss Kuruga submitted that the absence of the testimony of the minor's mother was not fatal since there was sufficient evidence tendered to show that the complaint was a minor and that she was defiled by the appellant. Further, that the learned trial magistrate was not in error when she invoked **Section 124** of the **Evidence Act** and convicted the appellant in reliance of the evidence of the minor alone, with regard to the actual defilement.

12. The facts of the prosecution case were that the appellant took the minor from her aunt's house after convincing her that her mother had sent him to fetch her. This evidence was corroborated by **PW2**, the aunt who released the minor into the custody of the appellant and **PW3** the appellant's friend who was with him when he took the minor from **PW2**.

13. **PW3** last saw the appellant and the minor walking along the road, behind him as he walked towards his home, which is next to the appellant's home, at 7 p.m. on 2nd October 2009. The appellant told him that he was taking the minor to her home.

14. The next day the appellant told **PW3** that he had taken the minor to her home. That same evening however, **PW3** was present when the minor was found in the appellant's house by the police. It transpired that the appellant had locked her in the house when he left for work in the morning.

15. **PW5** was a police officer attached to Karuri Police Station. He received the report of the missing girl on 3rd October 2009 and in his investigations learnt that a man called Gitau, who is the appellant herein, had taken her from her aunt's place. He traced the appellant's house through **PW3** and found the minor in the appellant's bed. The appellant was present in the house and was wrapped only in a towel.

16. After a careful analysis of the evidence, I find that it was not necessary for the minor's mother to testify, since the prosecution was able to prove their case through other witnesses. **PW2** a sister to the minor's mother testified that the minor's mother was mentally challenged. The appellant did not challenge this assertion on cross-examination.

17. The evidence of the prosecution flowed smoothly from one witness to the next and interlocked properly to convince me that the minor was telling the truth. Parts of the evidence of the minor was corroborated by **PW2** and **PW3** who saw the appellant leaving with the minor in the evening claiming that he was escorting her to her home. Further corroboration came from the evidence of **PW5** who removed the minor from the appellant's bed the next evening in the presence of **PW2** and **PW3**.

18. I have perused the learned magistrate's judgment and I am satisfied that she complied with the provisions of **Section 169(1)** of the **Criminal Procedure Code,** and that she was also minded of the

proviso to **Section 124** of the **Evidence Act.**

19. In her judgment the learned trial magistrate rendered herself thus:

"Under Section 124 of the evidence Act Cap 80 Laws of Kenya the court can rely on the testimony of a child in a criminal case involving sexual offence even if the evidence is not corroborated if the court believes that the child is speaking the truth.

In this particular case, the victim is a big bodied girl who is coherent in herself explanation and she told the court that the accused person raped her once that night.

I do not believe the defence by the appellant that it was the mother of the complainant who reported the matter because he damaged her house and also owed her money for a television he bought from her."

PW6, the Dr. who examined the minor was not able to note physical injuries to her genitals because the minor was in her menses.

20. The learned trial magistrate did consider the appellant's defence and found that she could not believe it. I have subjected the entire record including the statement of the defence to fresh scrutiny and I am in agreement that the defence did not manage to dislodge the otherwise overwhelming prosecution evidence.

For the foregoing reasons the appeal fails, and I uphold the conviction and sentence.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **17th day** of **April 2013.**

L. A. ACHODE

JUDGE