



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 65 OF 2013

JACKSON MUGO NGINYE APPELLANT

VERSUS

REPUBLICRESPONDENT

**(APPEAL ARISING FROM THE JUDGMENT OF THE SENIOR PRINCIPAL MAGISTRATE'S
COURT AT KERUGOYA (P.T. NDIKA – S.R.M) IN CRIMINAL CASE NO. 1214 OF 2009
DELIVERED ON 6TH JULY 2010)**

JUDGMENT

JACKSON MUGO NGINYE the appellant herein was tried before the Senior Resident Magistrate Kerugoya Court (P.T. NDIKA) for two offences being defilement of a girl contrary to **Section 8(1) (3) of the Sexual Offences Act** the particulars being that on 30th October 2009 in Kirinyaga District he caused his penis to penetrate the vagina of MN a girl aged 5 years. The appellant also faced an alternative charge of indecent act with a child contrary to **Section 11 (a) of the same Act** the particulars being that on the same day and place, he did an indecent act with the same complainant by touching her private parts namely vagina.

After hearing the prosecution and defence cases, the trial magistrate delivered a judgment on 6th July 2010 convicting the appellant on the alternative charge and sentencing him to serve 10 years imprisonment.

It is against that conviction and sentence that he has now appealed raising the following grounds:-

1. ***That he pleaded not guilty***
2. ***That the trial magistrate erred in law and in fact by not considering that he was not taken for medical examination***
3. ***That the trial magistrate erred in law and in fact by convicting him when the prosecution had not produced the exhibits***
4. ***That the trial magistrate erred in law and in fact in failing to consider that he had a hearing problem***
5. ***That the trial magistrate erred in law and in fact by failing to consider that the evidence against him was from a single witness***
6. ***That the trial magistrate erred in law and in fact by failing to consider that the evidence of the medical doctor could not warrant a conviction***
7. ***That the trial magistrate erred in law and in fact by not considering that there was a land dispute between him and complainant's father***

8. *That the trial magistrate erred in law and in fact by failing to consider his defence which was not shaken by the prosecution*
9. *That the trial magistrate erred in law and in fact by failing to consider that he was not given a fair chance to cross-examine the witnesses.*

Mr. Omayo State Counsel on behalf of the State urged me to confirm both the conviction and sentence.

I have re-examined the evidence so as to draw my own conclusions on whether the conviction can be allowed to stand. I am also aware that un-like the trial magistrate, I did not have the advantage of hearing or seeing the witnesses.

The complainant MNM testified after a brief voire dire examination in which the magistrate ruled that she knew the meaning of an oath. She then narrated how the appellant who is her grandfather took her to the bathroom on the material day and removed her pants. However, her mother arrived soon thereafter and the appellant ran away. She told her mother what had happened adding that she was not injured in her private parts.

LN (PW1) testified that on the material day, she found the appellant and complainant in the bathroom putting their clothes back. The appellant disappeared and complainant told her he had “**put something**”. The witness said she checked the complainant’s private parts and found they had “**been touched**”. So she called complainant’s father who took her to hospital and reported to the police.

The complainant’s father KM (PW3) testified that on the material day, his wife told him that the complainant had been raped so he told her to take complainant to hospital. He then later found the appellant in Kiawakara village and took him to the Police station.

P.C. VICTOR CHERMIYO (PW4) of Kerugoya Police Station told the Court that he received this complaint at 4 p.m. on the same day and issued a P3 Form and also obtained a birth certificate showing that complainant was aged 5 years – Exhibit 1.

ESTHER GACOKI (PW5) who is a Clinical officer produced the P3 Form and said there was no infection or injuries nor spermatozoa seen although a vagina swab showed pus cells.

The appellant’s defence was that when he went to the bathroom on the material day, the complainant followed him and the mother found him buttoning his trousers and started beating her. Later, the complainant’s father arrested him. The appellant called as a witness SOPHIA NGINYI (DW2). She said she saw the appellant urinating and the child talking. Then the complainant took a stick and the child started crying saying nothing had happened. Later, she heard the complainant say appellant wanted to have sex with her.

Having considered the evidence on both sides, I am un-able to support this conviction.

Firstly, the complainant was born on 5th September 2004 as per the birth certificate and therefore when she was testifying on 30th November 2009, she was 5 years and two months old. She was therefore a child of tender years as defined under the **Children’s Act**. The Court could still convict on her evidence alone if satisfied that the complainant was “**telling the truth**” – see **Section 124 Evidence Act**. And before relying on the evidence of the victim, the Court must also record in the proceedings the reasons why it is satisfied that the complainant is telling the truth. No attempt was made by the trial magistrate to give any reason that the complainant was telling the truth. Indeed no such finding was made as required by law yet the Court proceeded to convict on her evidence.

The evidence of the complainant’s mother was really of no consequences. She testified that when she checked the complainant, she found that her “**private parts had been touched**” Bearing in mind that the Clinical officer (PW5) saw no injuries, it is difficult to understand exactly what made

complainant's mother conclude that her "***private parts had been touched***".

Secondly, there is evidence from both the appellant and his defence witness that when the complainant's mother found complainant at the bathroom, she took a stick and started beating complainant. I do not think that that is the natural reaction of a mother who has just caught a man committing an indecent act with her daughter. It seems to be that indeed the complainant followed the appellant to the bathroom, as he admits, and the mother disapproved of that and therefore took a stick to reprimand her daughter. Otherwise, if indeed the complainant's mother had reason to suspect that appellant was upto no good, her natural reaction would have been to confront the appellant and even raise an alarm.

The conduct of this trial also left a lot to be desired. From the judgment it shows that the complainant is PW2. She first testified on 30th November 2009. It appears that she was stepped down and recalled on 25th January 2010 (some two months later) yet the record reads:

" PW2 re-called still on oath states"

Surely the complainant could not have remembered on oath for two months. What was so difficult about swearing her afresh?

Considering all the above, I am un-able to support the appellant's conviction. I accordingly allow his appeal on both the conviction and sentence which I hereby quash and order that he be released unless otherwise lawfully held.

B.N. OLAO

JUDGE

28TH OCTOBER, 2013

28/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel – present

Language – English/Kiswahili

COURT: Judgment delivered this 28th day of October 2013 in open Court.

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk present

Appellant present

Right of appeal explained.

B.N. OLAO

JUDGE

28TH OCTOBER, 2013