REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO 158 OF 2008

PATRICK KATHURIMA NGEERA.................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

INTRODUCTION

The Charge

[1] The Appellant was charged with defiling D K, a child aged 13 years contrary to Section 8(1) and (3) of the Sexual Offences Act. The offence was committed on 4th day of April, 2008. The case was heard, he was convicted and sentenced to 20 years imprisonment. Being aggrieved by the conviction and sentence, he filed this appeal.

THE APPEAL

Grounds of Appeal and Submissions

[2] The appeal proposed two significant grounds; 1) that the trial magistrate did not observe that section 72(1) of the Constitution had been contravened thus rendering the trial null and void; and 2) that the trial magistrate did not sufficiently consider the defence offered.

[3] The Appellant urged that he had been charged with abduction and not rape. It is the police who framed him for rape in collusion with the mother of the complainant. The mother of the complainant had a settlement of a grudge with him because he terminated her contract to till their family land. He submitted that he also refused to sell that land to her after the death of the Appellant's father. To him, there was no evidence of rape whatsoever.

[4] The Appellant was adamant that he had asked for an OB extract to prove his claims but it was never provided despite the order of the court for it to be produced in court. He was given just a photocopy.

Respondent Opposed the Appeal

[5] M/S Muriithi for the State opposed the appeal. She submitted that the allegation of a grudge was misplaced as the six witnesses who testified gave credible evidence that the Appellant committed the offence. He was afforded ample opportunity to defend himself and so the trial was fair. He was also admitted to bail as a way of safeguarding his rights. Therefore, his rights were

not violated as he claims. Ground 1 should fail.

[6] M/S Muriithi argued that the OB extract was not an issue in the trial and should be discarded. The whole appeal lacks merit and should be dismissed.

COURT'S RENDITION

[7] Preliminary issue; that of the OB extract. It is not true that the court or the Appellant were not provided with the OB extract for 7th April, 2008. On 7.5.2013, the court and the Appellant were provided with a copy of the OB extract in question. The OB was a usual recording of occurrences in and reports made to a police station as required by law. The fact that the OB talked of abduction does not mean the person must be charged with that particular offence. The police receive information after the recording in the OB and make the decision on the appropriate charges to prefer against the suspect. That ground is not helping the appeal and I dismiss it. The preliminary issue has been settled. This being the first appeal, the court will now do what the law requires of it; re-evaluate the evidence and come to its own findings and conclusions. See OKENO V R. In evaluating the evidence herein, I will consider the three inextricable elements in sexual offences against a child which are:

> *1) Whether the victim was a child;*
>
> *2) Whether there was penetration with the child; and*
>
> *3) Whether the penetration was by the Appellant.*

Whether the Victim was a Child

[8] The age of the victim occupies a special place in sexual offences against a child, for it determines the amount of penalty to be meted out once the offence is proved. In the present case, the victim is said to be of thirteen years of age and so Section 8(3) of the Sexual Offences Act will apply. The section provides:

> *8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.*

The offence of defilement is established in Section 8(1) of the Sexual Offences Act that:

> *8(1) A person who commits an act which causes penetration with a child is guilty of an offence defilement*

[9] PW1 testified that she was born in May, 1994. She was 13 years old at the time of the offence, that is 4th of April, 2008. The doctor also confirmed she was 13 years in his evidence contained in the P3 Form. I have stated in other cases that assessment of age does not mean certificate, it could be ascertained from other evidence. On this see the case of **MACHAKOS HC CR APPEAL NO 296 OF 2010 FAPPYTON MUTUKU NGUI V REPUBLIC:**

> *"…that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases".*

[10] The court finds that PW1 was a child aged 13 years at the time of the offence to whom Section 8(3) of the Sexual Offences Act applies.

Whether there was Penetration

[11] Section 2 of the sexual offences act defines penetration as:-

> *"....the partial or complete insertion of the genital organs of a person into the genital organs of another person"*

PW1 told the court that the Appellant *''placed his penis into my vagina''*. PW1 was examined by PW6 Dr Isaac Macharia. The doctor filled in a P3 Form detailing his findings of the examination on PW1 that her hymen had been broken which was a sign of sexual intercourse. That was sufficient proof of penetration in the sense of the Sexual Offences Act. The fact that there were no spermatozoa noted during the examination he conducted on PW1 does not change the fact of penetration. The absence of spermatozoa was also sufficiently explained in scientific terms that the examination was on the 4th day and spermatozoa survive for only 48 hours.

Whether the Penetration was by the Appellant

[12] This is the mega question. PW1 was the only person who identified the Appellant as the person who committed penetration to her genital organs. She told the trial court that she met the Appellant on 4th day of April, 2008 when she was looking for employment. She decided to look for employment because she was not doing well in school. She was becoming last in class and so she opted to drop out. According to her, the Appellant bought her tea and mandazi and then he promised to take her to his aunt in Nairobi who needed a girl to employ. After taking tea the Appellant took her to his home. They arrived in the compound of the Appellant's home at around 11pm. But while outside his house, the Appellant pull off her dress and pant, lay her down and put his penis into her vagina. She felt pain and screamed but the Appellant threatened to kill her if she raised alarm again or tell his wife about the sexual intercourse. She obliged and kept quiet.

[13] The following day, that was Saturday 5th April, 2008, the Appellant woke up and proceeded to his place of work leaving PW1 at his home with his wife. On Sunday afternoon, she and the Appellant's wife went to the market for shopping as the Appellant had changed his earlier promise to take her to Nairobi. He promised to take her to Nairobi on Monday, 7th April, 2008. The Appellant did not take her to Nairobi as he had promised, instead his wife send her to the posho mill at Kiirua. That is when her grandmother (PW2) saw her and enquired from her where she had been. She told PW2 that she had been at the Appellant's home. PW2 called PW3. PW3 went with PW1 to where the Appellant worked and identified him. The Appellant admitted to PW3 that he knew PW1. He was later taken to the police station and booked.

[14] I reckon that this is a case of identification by a single witness. Where conviction is based on the evidence of identification by a single witness, the law is that the court, before convicting on that evidence, should warn itself of the possibility that the witness could have been mistaken on the identity of the Appellant. The trial court should carefully evaluate such evidence with utmost thoroughness in order for it to be satisfied that it is safe to convict. It should, therefore, consider any other independent evidence on the matter. See **ABDALA BIN WENDO V R [1989] KLR 424,** and **R V TURNBULL (1976) 3 All ER 549.** There are a great many decisions of the Court of Appeal on this issue which I need not multiply. But, the proviso to Section 124 of the Evidence Act allows the court to convict on the evidence of only the victim as long as the court records the reasons for believing that the minor victim was telling the truth. The trial court believed PW1was telling the truth. It also noted that PW1 had made up her mind to drop from school and she was determined, therefore, to get a job. This made her easily fall for the trap by the Appellant that he would take her to Nairobi to his aunt who needed a girl to employ. The Appellant admitted that he knew PW1 and that she was at his home except he said that he found her there and he denied he defiled her. There are other witnesses, particularly PW2, PW3 and PW4 who confirmed that the Appellant knew PW1. PW6 confirmed that PW1 had been penetrated through sexual intercourse. All these evidences put together reinforces the evidence of PW1. There is nothing which suggests a possibility of mistaken identity as to the person who penetrated PW1. In the circumstances, I find that the penetration into the genital organs of PW1 was committed by the Appellant.

[15] The trial magistrate considered the defence evidence and I agree that there was no grudge between the Appellant and PW2 as alleged by the Appellant. The contract to till land between PW2 and the father of the Appellant was in the 1990's and could not be active at the time. The wife of the Appellant was also not aware of the transaction which cast doubt about the grudge alleged. I find the defence was merely an afterthought aimed at portraying the case as a fabrication. The evidence of the Appellant and DW1 also sharply differed in some material respects. For instance, when the trial court sought clarification from the Appellant, the Appellant told the trial court that he was told by his wife that PW1 arrived at 9pm and said to his wife that she had visited a friend whom she found was not there and so she looked for a place to sleep. On the same matter, DW1 told the court that PW1 came at 8pm and told her that she had gotten late on the way and asked DW1 to give her a place to sleep. Even the morning conversation between PW1 and DW1 was about how PW1 was looking for a job as a maid. Nowhere in the evidence by DW1 did she say that PW1 told her that she had visited friend and got late. The trial court rightly rejected the evidence of DW1 as an attempt to shield the husband from any adverse consequences of a conviction.

[16] I find that the prosecution proved beyond any reasonable doubt that:

1) *The complainant was a minor aged 13 years;*

2) *There was penetration into the genital organs of the complainant; and*

3) *The penetration of the complainant was by the Appellant.*

[17] Accordingly, I hold that the Appellant was properly convicted for defilement contrary to Section 8(1) and appropriately sentenced to 20 years imprisonment under Section 8(3) of the Sexual Offences Act. I dismiss the appeal, uphold the conviction and sentence herein.

Dated, signed and delivered in open court at Meru on 22nd October, 2013

F. GIKONYO

JUDGE