



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 424 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 5130 of 2010 dated 27th February 2012 in the Chief Magistrate's Court at Thika by Hon. L. Wachira - PM)

PETER KITHEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant herein Peter Kitheka was convicted by the trial Magistrate for the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act, No. 3 of 2006. He had been charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was sentenced upon conviction on the main count and sentenced to serve 21 years imprisonment. He appeals against that conviction and sentence.

The Appellant's Grounds of Appeal were as follows:

1. That the learned trial Magistrate made an error in both law and facts by failing to observe that there was no medical examination in respect of the Appellant availed in Court to link the Appellant to the commission of the offence charged hence the case for the prosecution was not proved beyond reasonable doubt as required by law.
2. That the complainant's evidence lacked corroboration and was not sufficient to have relied upon as a basis for a conviction.
3. That the trial Magistrate failed to put proper consideration as to the evidence of the Appellant's defence whereby the Appellant had raised an issue of grudge which led to the subsequent implications in the offence charged.

Upon being furnished with the record of Appeal the Appellant filed Amended Grounds of Appeal. These Amended Grounds of Appeal were:

1. That the Learned Trial Magistrate made an error in both law and facts by failing to draw an adverse inference as to the prosecution's failure that makes the report of the incident known to the authorities immediately.
2. That the case for the prosecution was not proved beyond reasonable doubt.
3. That the medical evidence was not satisfactory as the clinical officer who in legal terms cannot be

a medical officer.

4. That the age of the victim was not ascertained.

The Appellant appeared before me on 17th October 2013 and stated that the Court should look at the sentence if it could be reduced. The Appellant indicated that he had received training in carpentry and joinery as well as a cobbler. He stated the case came about as a result of a disagreement with the mother of the complainant.

Mr. Okeyo for the State opposed the Appeal. He stated that the Amended Grounds of Appeal attacked the age of the complainant and the State counsel responded by saying that PW1 who is the complainant was aged 10 years at the time of the incident. PW2 the mother of the complainant produced an immunisation card an official document as Exhibit 3 and it showed that the complainant was born on 15th July 2000. The incident took place in 2010. Regarding the attack that there was no evidence by a medical doctor he submitted that the Clinical officer from Ruiru Sub-District Hospital testified as PW4 and produced the P3 Form as Exhibit 2 and the P3 showed that the complainant's hymen was torn and that was evidence of penetration. Regarding the delay in reporting the incident, Mr. Okeyo responded that when PW1 was defiled she was given 5/- which she bought a cake and ate and secondly the Appellant had told her not to share that information with anybody. That made her keep that information to herself only for it to come out when PW3 a teacher at her school found her with 100/- and when an explanation was sought the complainant opened up that the 100/- was given to her by the Appellant. The State Counsel asserted that the prosecution proved the offence charged through the evidence tendered by witnesses it availed. As regards the allegations that the Appellant was framed, the State responded that the incident was reported by the teacher before she even informed the parents of the complainant and the teacher was not known to the Appellant. There was no grudge between the Appellant and the teacher. There was no explanation of the nature of the grudge alleged to exist by the Appellant between him and the mother of PW1. She was only informed after the complainant had been taken to hospital. Ordinarily PW1 a 10 year old child could not have a grudge with the Appellant who is old enough to be her grandfather. Concerning the sentence Mr. Okeyo submitted that the trial Court misapplied the law as the Appellant was given 21 years imprisonment. He urged that the Court disturbs the sentence and imposes the correct sentence which is life imprisonment.

The Appellant replied by saying that State Counsel had erred in saying that a 10 year old cannot have a grudge with the Appellant. He stated that a grudge existed between the mother of the complainant and the nature of the grudge was that the PW2 wanted the Appellant to live with her and when he refused is when she said the Appellant had defiled her daughter. Appellant stated that he did not give the child 100/-. He alleged that the mother and the teacher are sisters and that they fabricated the matter. He thus urged the Court to allow the Appeal. On the issue of age the Appellant relied on the case of **John Cardon Wagner v Republic [2010] eKLR** where it was held by the Hon. Justice Warsame (now Judge of Appeal) *“that in a case of defilement it was essential to prove the age of the complainant either by way of medical evidence or through other evidence”*.

The Appellant was convicted and sentenced to 21 years. In the Judgment, the Learned Trial Magistrate held that the child had no grudge against the Appellant and secondly the teacher and mother could not have conspired to frame the Appellant as PW2 was not even aware of the incident by the time the child was taken to hospital and neither had she talked to the teacher so that they could cook up a story. Regarding the delay in reporting the incident, the Learned Trial Magistrate stated that

“It is not always that children would disclose such an incident, when it happens. Infact, most of the time the incidences are discovered by the care givers during a bathe or a teacher. Thus the fact that the minor did not report the incident immediately does not mean that it had not taken place”

The Court proceeded to convict the Appellant and heard and considered the mitigation of the Appellant before sentencing the Appellant to 21 years.

Of critical importance is the age of the complainant PW1. The evidence led was that she was aged 10 years. She was emphatic that she was a minor. In her *voire dire* she testified that she was aged 10 years and was in Standard 3 and she knew that if she lied she would go to hell. In her testimony, she repeated her age as 10 years and proceeded to describe in graphic detail how the Appellant first penetrated her with a pencil before inserting his penis and defiling her further. She stated that she did not inform her mother of the incident as the Appellant told her not to. In re-examination she testified that she had told the Court the truth and her mother had not told her what to say.

The mother testified as PW2 and she stated that she found that her daughter was on medication and on enquiry was referred to the teacher who informed her of the incident and when she checked PW1 she confirmed that PW1 had been defiled. She was not aware of the matter until that point. She stated she had no grudge with the Appellant who lived nearby. In cross examination she testified that she was told the whole story and that the teacher M M was informed by the minor and she had no reason to doubt PW1. The child was taken to hospital before she even knew. The medical report was tendered by PW4 Joan Munene a Clinical Officer from Ruiru Sub-District Hospital. She testified that the evidence upon examination was that PW1 was defiled as her introitus was open and the hymen was torn. PW4 was a medical officer in terms of the law and was competent and qualified to give the medical report as evidence.

The alleged grudge was not found to exist and my perusal of the record and review of the evidence adduced does not indicate any iota of malice or ill will in the testimony of the witnesses of the State. The Appellant was charged as a result of the valiant act of the teacher M M who took action even before the mother was advised of the incidence. There was no collusion or scheme.

The immunisation card issued by the Republic of Kenya was produced as an exhibit. It shows that the PW1 was born on 15th July 2000. It shows the record of immunisations and confirmed the age of the minor. The case of **John Cardon Wagner v Republic** cited by the Appellant actually bolsters the case of the prosecution in the trial Court. The decision was to the effect that that in a case of defilement it was essential to prove the age of the complainant either by way of medical evidence or through other evidence. In this case the proof of age was via the immunisation card which is other evidence. The complainant was aged 10 years at the time of the incident.

Section 8(1) and (2) provide as follows:-

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

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The sentence meted out was imprisonment for 21 years. This sentence is below the statutory minimum. As the minor was aged 10 years, I vacate the sentence and impose a sentence of life imprisonment as provided for under Section 8(2) of the Sexual Offences Act, 2006. There is absolutely no merit in the Appeal and dismiss it in its entirety. Appellant has a right of appeal to Court of Appeal in 14 days.

Dated, signed and delivered this 28th day of November 2013

Nzioki wa Makau

JUDGE