



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 115 OF 2011

NOAH MWAITA AINEA APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal arising from the decision of Hon. T. A. Odera SRM, in Kitale Chief Magistrate's Court in Criminal Case No. 928 of 2010)

J U D G M E N T

The appellant was charged with defilement of a child contrary to Section 8 (1) as read with 8 (3) of the Sexual Offences Act No. 3 of 2006. Particulars are that on the 22nd day of March 2010 at **[particulars withheld]** Village in Trans-Nzoia West District within the Rift Valley Province intentionally and unlawfully by use of his genital organ namely penis caused penetration into the genital organ namely vagina of M M N, a girl aged 14 years.

The appellant was convicted and sentenced to serve 20 years in prison. He preferred an appeal to this Court and raised the following grounds:-

1. *That the Learned Trial Magistrate erred in law and fact in convicting the appellant on insufficient evidence.*
2. *That the arresting officer was never called to testify.*
3. *That the Learned Trial Magistrate erred in law and in fact in relying on the Prosecution case which was full of contradictions.*
4. *That the Learned Trial Magistrate erred in law and fact by shifting the burden of proof to the appellant.*
5. *That the Learned Trial Magistrate erred in law and fact by rejecting the appellant's defence of alibi.*

The facts of this case are that Pw 1 M M the complainant herein is a girl aged 14 years. She was a class 4 pupil at **[particulars withheld]** Primary School. On 22/03/2010 at 4.00pm, she left school headed for her home. The appellant who was outside his house called her. She went to the appellant's house where the appellant asked her for sex. She accepted and had sex with the appellant after which the appellant gave her Kshs. 5. On the following day at around 7.00 am as she was going to school, the appellant again called her to his house where he again had sex with her. He then gave her tea and bread and 5 shillings. As she was leaving for school, she was stopped by a man (Pw 2) whom she had seen near the appellant's house. The man accompanied her to school. At school, Police Officers came and her friend M N was called. The complainant was taken to Matisi Police Post after which she was taken to Kitale District Hospital where she was examined. The appellant who was arrested was also brought to school before being taken to Kitale Police Station where he was charged.

Pw 2 John Wanyonyi Fungo is the appellant's neighbour. He had been seeing the complainant and another girl known as M N go into the appellant's house. On 22/03/2010 he saw the complainant's friend M W standing at the gate while calling complainant. He went to the appellant's house and opened the door and saw no one at the living room of the appellant. He went and sought the assistance of a Police Reservist to come and arrest the appellant but, the reservist declined. On the morning of 23/03/2010 as he was taking tea in his house, his wife told him that she had seen one of the girls who used to visit the appellant go to the appellant's house. He rushed to Matisi Police Post and reported the incident. He quickly went back and found the complainant leaving. He held the complainant as Police later arrived and arrested the appellant who was taken to **[particulars withheld]** Primary before being taken to Kitale Police Station.

Pw 3 PC Jackson Mwendwa testified on how he received information from members of the public that there were girls of **[particulars withheld]** Primary School who used to visit a certain house in turns. He informed his in-charge who asked him to go and investigate. He proceeded to the house of the appellant where he found the appellant. He arrested him and took him to **[particulars withheld]** Primary School where he picked two girls and took them to Matisi police post where he interrogated them. The girls one of whom is the complainant told him that they usually used to go the house of the appellant where they will have sex with him. He asked PC woman Esther who took the complainant to Kitale District Hospital where she was examined and her age assessed at 14 years.

Pw 4 Kirwa Labat is a Clinical Officer attached to Kitale District Hospital. He testified on how he received the complainant who was said to have been defiled. He observed that the complainant's vagina was painful on examination and that the hymen was torn and fresh looking. There was also a whitish discharge from the vagina. He produced the P3 form and treatment notes as *exhibit 2* and *3* respectively.

The appellant in his defence stated that he deals in the business of buying and selling maize. That he leaves his home in the morning and returns at 6.00pm. On 23/03/2010, a Police Officer called Masai came to his home and asked him if he knew him to which he answered in the affirmative. He then handcuffed him and took him to Matisi Primary School where he found three women, two men and two young girls. He identified one of the two men as Mwendwa a Police Officer. Mwendwa asked the girls to tell him whether the appellant was their husband to which the girls answered that he was not their husband. Mwendwa then took the girls to Matisi Police Post where he threatened them into admitting that they knew her.

I have carefully gone through the evidence adduced by the Prosecution witnesses as well as the defence of the appellant. I have now to analyze the evidence and reach a conclusion whether the appellant was properly convicted or not. This being a first appellate Court, its role was stated clearly in the case of **Okeno Vs Republic [1972] EA 32**. The appellant is entitled to have the evidence submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. Allowance has however to be given for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

In the present case, there is evidence from Pw 2 that he complainant and another girl used to visit the appellant. This witness testified that he had seen the girls go to the appellant as earlier as February 2010. The complainant herself testified that on 22/03/2010, she visited the appellant and had sex with him after which the appellant gave her 5 shillings. Though the complainant said that this was the first time she met and had sex with the appellant; it is very unlikely that this was so. The way the appellant called her and went and had sex with her shows that she had known him before. This confirms the evidence of Pw 2 who stated that the complainant and another girl had been to the appellant's house before.

On 22/03/2010 when the appellant had sex with the complainant, Pw 2 saw the complainant's friend M N calling her while at the gate. He went and peeped into the appellant's living room and found that he was not in the living room. He went to seek assistance of a Police Reservist to effect arrest but no help was forthcoming as the police reservist declined to help.

Again on 23/03/2010 that is the following day, Pw 2's wife informed him that one of the two girls who

had been visiting the appellant had entered the appellant's house. He went and reported and came back in time to find the complainant leaving. He took the complainant to school as a Police Officer from Matisi came and arrested the appellant.

The complainant was examined and found to have been defiled. The evidence of Pw 2 is confirmed by Pw 3 PC Jackson Mwendwa who testified on how he received a report about girls who used to go to appellant's house. When the appellant was arrested, the complainant admitted that she had had sex with appellant on 22/03/2010 and again on 23/03/2010.

The appellant complained that his defence was not considered by the Trial Magistrate. What the appellant raised in his defence amounts to an alibi. In law he did not assume any burden of proving it. He said that he was not at home at the time the offence occurred. The evidence by the Prosecution displaced his alibi. On the 22/03/2010, he was at home when he defiled the complainant from 4.00 pm to 6.00 pm. On the following day again when he defiled the complainant, he was at his home. This was at 7.00 am. The appellant himself admitted in his defence that he was arrested from his house at 7.30 am.

It is Pw 2 who had gone to alert the Police about the complainant's presence in the appellant's house. The complainant herself testified that on 23/03/2010 as she was leaving the appellant's house, she met a man whom she had seen near the appellant's house as she entered the appellant's house. This is Pw 2 who held her and took her to school.

The appellant had claimed in his defence that when he was arrested he was accompanied by his wife to *[particulars withheld]* Primary School. The appellant called his wife as defence witness. The wife testified that when the husband was arrested, she did not accompany him. This is contrary to the claim by appellant that his wife accompanied them to *[particulars withheld]* primary. The alleged wife of the appellant was nowhere during the two times the appellant defiled the complainant. She was talking of her husband being arrested on 22/03/2010, when the arrest took place on 23/03/2010. This shows that she was lying. Her claim that the appellant's relationship with Pw 2 was strained was an afterthought and it only came out by the way during cross-examination. The appellant did not himself say whether his relationship with the appellant was strained.

The complainant's testimony was consistent. It was not shaken during cross-examination. The evidence was corroborated by Pw 2 as well as medical evidence produced by Pw 4. Pw 2 is not a relative of the complainant. He was just a good neighbour who was concerned about the welfare of young school going children being defiled by an adult.

There were no material contradictions as the appellant alleged in his submissions. He claims that there were no spermatozoa seen since the complainant alleges to have defiled again on 23/03/2013. The P3 form and the evidence of the Clinical Officer is clear that there was a whitish discharge from the vagina of the complainant. This could have been the spermatozoa. In any case even if there were no spermatozoa traced, it is immaterial. It is enough to prove that there was penetration. Even if an assailant penetrates a victim and does not ejaculate, the offence is complete as long as there is penetration.

The appellant contended that he was arrested on 23/03/2010 and kept until 30/03/2010 when he was arraigned in Court. He urged the Court to acquit him as was the appellant in the case **Gerald Macharia Githuku Vs Republic [2007] e KLR** in which the Court of Appeal ordered release of the appellant who had been brought to Court three days after the permitted 14 days allowed to keep an accused in a capital robbery. There are subsequent decisions of the Court of Appeal which have held that violation of the accused's constitutional rights does not automatically guarantee an accused an acquittal. An accused whose constitutional rights have been violated can seek damages in Court.

In the present case, I find that there was ample evidence to sustain a conviction. The Trial Magistrate gave 20 years which is the minimum allowed. I find that the conviction and sentence was proper. I affirm the conviction and sentence. The appellant's appeal is hereby dismissed.

Dated, signed and delivered at Kitale on this 27th day of November, 2013.

E. OBAGA

JUDGE

In the presence of:

M/S Limo for State.

Court Clerk: Lobolia

E. OBAGA

JUDGE

27/11/2013