



No. 138/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 332 OF 2010

BENARD KIOKO KATIKOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kajiado Senior Resident Magistrate's Court Criminal Case No. 51 of 2010 by Hon. W.N. Kaberia , SRM 24/11/2010)

JUDGMENT

1. **Benard Kioko Katiko**, the appellant was charged with the offence of defilement in violation of Section 8(1) of the Sexual Offences Act, No. 3 of 2006. Particulars thereof being that on the 30th day of December, 2009 at **[particulars withheld]** in Loitoktok District within the Rift Valley Province, intentionally and unlawfully committed an act which caused penetration of his genital organ into a female genital organ of a girl child **F R** aged 13 years.
2. In the alternative he was charged with the offence of committing an indecent act with a girl child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars thereof being that on the 30th day of December, 2009 at **[particulars withheld]** in Loitoktok District of the Rift Valley Province, committed an indecent act with a girl child aged 13 years by touching her private parts namely breasts.
3. The appellant was tried found guilty and convicted on the main charge. He was sentenced to 20 years imprisonment. Being aggrieved by the conviction and sentence now he appeals on the following grounds.
 - i. **That** the pundit magistrate erred both in law and fact by basing conviction on the evidence of PW1, PW2, PW3 and PW4 that was doubtful.
 - ii. **That** the pundit magistrate erred in both law and fact by convicting on the defective charge which contravened Section 214 of the Criminal Procedure Code and by rejecting the defence without cogent reasons, which was in contravention of Section 169 (1) of the Criminal Procedure Code.
4. At the trial the prosecution presented 5 witnesses. PW1 **F R**, a child aged 13 years in standard 5 at **[particulars withheld]** Primary School knew the appellant as their neighbour. On the 30th December, 2009 she went to sleep at their neighbours place. **N** the neighbour was at home. She excused herself to go and collect money from the appellant their neighbour. This was some Kshs. 150/= she had worked for. She found him at home. He asked her to cook for him food. She agreed. As she prepared food the appellant said she would sleep at his house. As she cooked, her mother knocked at the door. The appellant advised her to hide under the bed. She complied. The

- appellant told the mother she was not in the house. She left and returned with the brother I. They searched the house and found her. The appellant was arrested.
5. It was further her evidence that when the appellant first had carnal knowledge of her she did not resist but she did not inform her mother because the appellant threatened to kill her.
 6. PW2, **M S** discovered that PW1 was not with N as she had told her when N went looking for her. She went in search for her only to find her at the appellant's house. The first time she knocked at the door the appellant claimed PW1 was not there. The second time she went there with her son I she found PW1 inside the house. They had the appellant arrested. That is when she learnt that it was not the first time PW1 was engaging in Sexual intercourse with the appellant.
 7. PW3, **J H** a step father to PW1 participated in the search and caused the appellant to be arrested.
 8. PW4, **Josphat Sawe** a clinical officer produced in evidence the P3 (medical examination report) in respect of PW1. On examination it was established that she had a lacerated labia minora and labia majora. There was discharge from her vagina.
 9. PW5, **No. 78117 Corporal Josphat Kyango** rescued the appellant from members of the public who wanted to lynch him. He interrogated PW1 and had the appellant charged.
 10. In his defence the appellant stated that the complainant was the neighbour's daughter. On the fateful date the complainant went to his house to collect money her mother had worked for, Kshs. 150/= prior to her leaving her mother arrived. She left and returned with her husband and other people. They arrested him. At the police station the complainant denied having been defiled. He said that he disagreed with the girl's mother at one point because her chicken destroyed his crop.
 11. The appellant having come to this first appellate court he is entitled to expect evidence tendered at the lower court to be subjected to fresh and exhaustive examination prior to a decision being reached by this court. As I do so I must bear in mind that I did not have the advantage of hearing and seeing the witnesses which I give allowance to. (*see Okeno versus Republic [1972] E.A. 32 and Mwangi versus Republic [2006] 2 KLR 28*)
 12. In his written submissions the appellant merged grounds 1 and 2 of the appeal. He stated that PW1's evidence contravened Section 19 of the Oaths and Statutory Declaration Act. No *voire dire* examination was carried out yet the child was under the age of 18 years. Section 19(1) of the Oaths and Statutory Declarations Act, Cap 15 Laws of stipulates as follows:-

“Where, in any proceedings before any court or any person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section”.

13. However, evidence of a victim children under the Sexual Offences Act is received pursuant to Section 124 of the Evidence Act which stipulate as follows:-

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.

The children's Act 2001 define a child of tender years in Section 2 as:-

“A child under the age of ten years”.

14. The complainant herein was a child aged 13 years in standard 5. The trial court was therefore not duty bound to comply with the requirements of Section 19(1) of the Oaths and Statutory Declarations Act (*see Ayieyo versus Republic [2008] 1KLR G&F) 684.*
15. As to whether the evidence adduced supported the charge, the appellant claimed the charge was

- defective but did not point out the alleged defect.
16. In opposing the appeal the learned State Counsel **Mr. Mukofu** stated that the complainant was found hiding under the appellant's bed. According to him the complainant in her evidence gave details of the sexual encounter, how the appellant undressed her and did "*tabia mbaya*" to her. And further, that her evidence was supported by that of the clinical officer.
 17. In his findings the learned trial magistrate concluded that the penetration had happened before 30th "December, 2009 but that was evidence of defilement.
 18. In her evidence the complainant said she was preparing chapatis for the appellant when he held her shoulders and told her that she would spend the night at his house. Soon thereafter her mother knocked at the door and she hid beneath the bed.
 19. On the material night the appellant did not have sexual intercourse with her. But she said that two (2) weeks back she had engaged in sexual intercourse with the appellant. According to her it was a consensual intercourse, she did not resist because he had locked the door. She however, did not tell her mother because of a threat to be killed if she did.
 20. In reaching his findings the learned trial magistrate stated:-

"The complainant who appeared to me to be a honest girl recounted to court how accused had on several occasions lured her into his house and defiled her".

21. In her evidence the complainant denied having been defiled by the appellant on the night of 30th December, 2009. However, on being examined she was found with a lacerated labia majora and minora. There was also a discharge and blood from her vagina. A perusal of the treatment notes made when the complainant was seen in hospital on the 2nd January, 2010 shows that per the history the complainant had been defiled more than 2 weeks prior to the date of examination. Externally her hymen was perforated. The question arising would be, if she was defiled two (2) weeks prior to 30th December, 2009 and her labia minora and majora were found to be lacerated, then who was responsible? If it was not the appellant could there be a possibility that it was another person? The child having lied to her mother that she was going to N place but was found at the appellant's house could not be said to be honest. In such circumstances, some other evidence was required to confirm that indeed it was the appellant who penetrated her genital organ.
22. Having analyzed and evaluated the evidence adduced in the lower court. It is apparent that the prosecution did not prove the case against the appellant beyond reasonable doubt. The appeal is meritorious. Accordingly, it is allowed. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 21ST day of NOVEMBER, 2013.

L.N. MUTENDE

JUDGE