



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL APPEAL CASE NO. 40 OF 2011

J N N.....APPELLANT

VERSUS

REPUBLICRESPONDENT

***(Being an appeal from the original conviction and sentence in Criminal Case No. 785 of 2009
Republic vs. J N N in the Principal Magistrate's Court at Kikuyu by C. Otieno Resident Magistrate
on 7th February 2011)***

JUDGMENT

The Appellant was charged with the offence of defilement contrary to **Section 8(1) and (3)** of the **Sexual Offences Act** and in the alternative the offence of committing an indecent act with a child contrary to **Section 11(1)** of the same statute. Upon his plea of not guilty, the trial court proceeded to conduct a trial and to convict the Appellant for defilement and to sentence him to serve a prison sentence of 20 years.

The Appellant then filed this criminal appeal vide his Petition of Appeal dated 14th February 2011 filed on 15th February 2011 on the following grounds:

1. That the learned magistrate erred in law and fact for not considering that the Appellant stayed in police cells for two days hence violating his constitutional rights.
2. That the learned trial magistrate erred in both law and fact by finding a conviction based on contradictory and inconsistent evidence.
3. That the learned trial magistrate erred in both law and fact by basing his conviction on unproved medical evidence.
4. That the learned magistrate erred in both law and fact in finding a conviction by shifting the burden of proof from the prosecution to the defence.
5. That the learned magistrate erred in both law and fact in finding a conviction having rejected his defence without giving cogent reasons for so doing.

The Appellant later filed his Amended Grounds of Appeal giving the following grounds of appeal:

1. That the learned trial magistrate erred in both law and fact by convicting on incurably defective charge contrary to the **Sexual offences Act** and **section 214 of the Criminal Procedure Code** hence a prejudice.
2. That the trial magistrate erred in both law and fact in convicting the appellant on an incomplete trial and hence a mistrial contrary to **section 85(2) and section 88(1) of the Criminal Procedure**

Code.

3. That the instant matter was riddled with contradictions and that **section 33 and 77(1) of the Evidence Act** was violated.
4. That the trial magistrate erred in both fact and law in failing to appreciate the fact that the standard of proof was far below the required standards of proof and hence the instant matter was premised on suspicion and fabrication.

On the first ground, the Appellant submitted that the charge was incurably defective for stating that the Appellant committed the offence of defilement contrary to **section 81(3) of the Sexual Offences Act**, which is non-existent. He further stated that the charge sheet indicates he was arrested on 26th August 2009 and arraigned before court on 27th August 2010, a year later whilst in actual fact, he was arraigned before the court on 28th August 2009. On those grounds he submitted that the charge was incurably defective and cannot stand. I have studied the relevant provisions of the **Sexual Offences Act**. Indeed, the offence of defilement is set out in **section 8(1) of that Act** and **not section 81(3)** as indicated on the charge sheet. Further, I have also noted that the charge sheet does indicate that the Appellant was arrested on 26th August 2009 and arraigned in court on 27th August 2010, 1 year later. Clearly, I observe that these two errors do exist as submitted by the Appellant. The next question that I need to answer is what the effect to those errors are in this appeal. To my mind, these two errors do not in any way prejudice the substance of the charges levied against the Appellant and further do not vitiate the prosecution's case in any way whatsoever. I also find that the Appellant was not prejudiced in any way by those two errors as to be incapable to understanding the first offence he was charged with as well as the particulars of the same. What I am saying is that the stated two errors did not make the entire charge sheet as incurably defective to warrant a reversal of the findings of the trial magistrate. Accordingly, I do not see any merit in this particular ground of appeal and conclude that the same must fail.

On the second ground, the Appellant disputed the composition of the court on the ground that the trial magistrate failed to record the coram to show the officer of the court present at any particular time and pointed out four instances in the record when this was not adhered to meaning that the court was not properly constituted during those instances. His submission was that he was that as a result, he was accorded an incomplete trial or a mistrial contrary to **section 85(2) and 88(1) of the Criminal Procedure Code**. The first instance highlighted by the Appellant, I note that the trial magistrate indicated the court attendance as follows: "Coram as Before". In the second instance, again the court indicated "Coram as Before". In the third instance, again the court indicated "Coram as Before". In the fourth instance, the court record indicates that the court noted the coram of the court as comprising the Hon C A Otieno RM, court clerk Muchoki, Court Prosecutor IP Warui, Accused as being present. At 9.30 a.m, the court indicated "Coram as Before". The term "Coram as Before" is quite clear in its meaning, which is that the constitution of the court stated earlier also pertains at the material time indicated. I am not aware of any legal provision or authority which requires the trial magistrate to set out in verbatim the constitution of the court at every single time the court commences business. In light of my findings, I am of the view that there was nowhere that the trial court was not recorded as being properly constituted to hear and decide the trial against the Appellant. Accordingly, I find that this ground of appeal must fail.

On the third and fourth grounds, the Appellant submitted that PW3 should not have produced the medical report of Dr. Muhombe who is deceased, as that was expert evidence. To my mind, the Appellant had every right to object to the production of that medical report by PW3 during trial but he did not do so. I do not see that he has a valid reason to raise that issue not at the appeal level. In the same breath, the Appellant further submitted that in this case, a key ingredient of the offence of defilement being penetration was not proved. I have reviewed the evidence adduced especially by PW1 and the doctors who examined PW1. It was PW1's uncontroverted evidence that the Appellant made her lie down on the seat in the Kitchen area of the ACK Church in (particulars withheld), lifted her skirt up and inserted his penis into her vagina. She further testified that to gain access to her vagina, the Appellant tore her black pant. Upon examination by Dr. Muhombe of Nairobi Women's Hospital, PW3 testified that indeed the complainant was found to have a hymenal tear at the 9 o'clock position and that both a urine analysis and a hi-vaginal swab of the complainant showed the presence of spermatozoa. Clearly, there was sufficient evidence adduced before the trial court to make a finding that the complainant was indeed defiled. I therefore disagree with the Appellant on this issue and arrive at the conclusion that the Appellant's third

and fourth grounds of appeal must also fail.

Further to the above, the evidence adduced by the prosecution points to a clear chain of events that led to the arrest and charging of the Appellant. To my mind, the evidence adduced by the prosecution, part of which I have reproduced above, shows that the Appellant was positively identified by the complainant as to have been the one who defiled her. While no DNA analysis results linked the Appellant to the fluids found on the complainant, I was satisfied that the complainant convincingly identified the Appellant as the man who defiled her. She testified that she had known the Appellant for a long time as he had been her Sunday School teacher for a long time. She therefore identified someone she had known for a long time. Further, she testified that the offence was committed within the church premises. This evidence is consistent, credible and was corroborated by the testimony of PW2, who was the complainant's sister. It is my finding that the prosecution discharged its burden of proof by proving its case beyond reasonable doubt. I also find that the Appellant's defence did not in any way create any reasonable doubt in the prosecution's case.

Overall, I find that the Appellant has failed to prove his grounds of appeal.

I therefore uphold the trial court's conviction of the Appellant for the offence of defilement contrary to section 8(1) of the Sexual Offences Act and further uphold the sentence meted out against the Appellant of 20 years imprisonment. This sentence is in compliance with **section 8(3) of the Sexual Offences Act** which prescribes a minimum of 20 years imprisonment for anyone convicted of defiling a child between the age of twelve and fifteen years. In this case, the complainant was aged 13 years at the time the offence was committed.

SIGNED AND DELIVERED IN NAIROBI ON THE 15th

DAY OF November 2013

MARY M. GITUMBI

JUDGE