



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 30 OF 2012

YOHANA EMAKHAKHA FUNDI ::: APPELLANT

=VERSUS=

REPUBLIC ::: RESPONDENT

JUDGMENT

The Appellant, **YOHANA EMAKHAKHA FUNDI** alias **JOHN FUNDI** was convicted on 3 counts of Defilement of a Child Contrary to Section 5(1) as read with Section 8(2) of the Sexual Offences Act.

He was then sentenced to Life Imprisonment on each of the 3 counts.

In his appeal, the appellant has asserted that he was not the person who committed the offences. As far as he was concerned, although he is named **JOHN**, the person who committed the offences was a different **JOHN**. The said **JOHN** used to live at Ali's home.

Secondly, the Appellant submitted that the evidence tendered in relation to the dates when the offences were allegedly committed, did not tally with the particulars in the charge sheet.

Thirdly, the Appellant pointed out that the scene of crime was not specified. He said so because there were two sets of evidence, which indicated that the offence was committed in a forest, whilst the other set indicated that the offences were committed on a bed, which was inside a house.

The Appellant described the prosecution evidence as being very unsatisfactory. Therefore, he urged this court to quash the convictions.

Mr. Mulati, learned state counsel, opposed the appeal. He submitted that although there had been another **JOHN**, it is the Appellant who had defiled the 3 children.

As regards the dates when the offences were committed, the Respondent submitted that the medical evidence made it clear that the offences were committed within the 3 days preceding 13th February, 2011.

In the event, I was invited to dismiss the appeal.

P.W.1 and P.W.2 were the complainants in count 1 and count 2, respectively. P.W.1 was unable to give any factual evidence. She was too young to do so.

P.W.2 testified that **JOHN** slept in the kitchen, whilst the children slept in their mother's bed.

According to P.W.2 nobody injured her on her mother's bed. She also said that nobody removed her inner-wear.

P.W.3 is the complainant on count 3. She said that;

JOHN wronged me. He did tabia mbaya. I felt pain here

(points at her pubic area). He told me to lie down.

I did not have an inner wear. He removed his trouser. I

laid on my back. He laid on me. I did not cry. I raised

alarm when he hurt me.”

P.W.3 said that **JOHN** did the same things to P.W.1 and P.W.2. During her testimony, P.W.3 pointed at the Appellant, when she made reference to the person named **JOHN**.

But during cross-examination, P.W.3 said;

“You did not lay on me. It is JOHN of Ali's house who

laid on me in the forest.”

That answer prompted the learned trial magistrate to direct the Investigating Officer to carry out further investigations regarding the **“second John”**.

When the court re-convened, the prosecutor informed the court that the Investigating Officer had verified that there was another person named **JOHN**. That other **JOHN** worked for **ALI KIPKORIR TOMNO**.

However, the prosecutor also added that P.W.3 had said that it is the Appellant herein who had committed the offence. Of course, the statement made by the prosecutor did not constitute evidence.

Thereafter, P.W.3 proceeded to give her further evidence. She stated that the **JOHN** who did **“tabia mbaya”** to her, was the appellant herein.

During cross-examination, P.W.3 said to the Appellant;

“It is you who defiled me. You defiled me in the forest.”

On her part, P.W. 4 testified that the complainants had nightmares after the incidents. P.W.4 also said that she knew the Appellant as **John**, and that the Appellant used to be at Ali's place.

During cross-examination, P.W.4 said that the Appellant had lived at Ali's place for seven years.

P.W.5 is the mother of P.W.1. At the time of the incident, P.W.5 had gone to Nairobi, but she had left both P.W.1 and P.W.2 at home, in Kabimoi. It was the evidence of P.W.5 that the Appellant used to work for her brother-in-law, **Ali**. However, just before P.W.5 traveled to Nairobi, the Appellant had been sacked. At the Appellant's request, P.W.5 allowed him to sleep in her kitchen.

P.W.6 was the house-help to PW.5. She confirmed that when P.W.5 went to Nairobi, she allowed the Appellant to use the kitchen for sleeping.

After it transpired that the complainants had been defiled, P.W.6 told the Appellant about that fact.

According to P.W.6, the Appellant was worried, and he said that he wanted to go away. P.W.6 testified that although she did not know the exact time when the girls were defiled, she used to leave the girls with the Appellant.

P.W.7 was the Investigating Officer. The complainants told her that they had been defiled by somebody who was known to them.

The Investigating Officer established that the children had been defiled by a person named **JOHN FUNDI**.

“who lived in their kitchen ... when their mother was in Nairobi.”

P.W.8 was a Clinical Officer at the Eldama Ravine District Hospital. She examined P.W.3, and verified that she had been defiled. P.W. 3 had a discharge. Her hymen was missing and her vaginal walls were redenned.

P.W.9 is a Clinical Officer at Eldama Ravine District Hospital. He examined P.W.1, who had abdominal pain and difficulty in walking. Her hymen was torn completely and her vulva was swollen. P.W.9 concluded that the child had been defiled.

P.W.9 also examined P.W.2, and found that her hymen was torn. The complainant had pains on passing urine.

According to P.W.9, the injuries to the complainant dated back 3 days from the date when the complainant was examined.

As the P.3 Form was dated 14th February 2011, the Appellant submitted that that implies that the offence had been committed on 10th February,2011.

Therefore, as the charge sheet indicated that the offences were committed between 15th January, 2011 and 9th February, 2011, the Appellant submitted that the evidence tendered did not support the particulars of the charge.

P.W.10 is a Clinical Officer at the Eldama Ravine District Hospital. He examined the Appellant, and found that he had no syphilis. His urine was also normal.

After the Appellant was put to his defence, he gave an unsworn testimony. He confirmed that he lived in Kabimoi, where he had worked as a shamba boy for 7 years.

The Appellant said that he also used to take care of one boy and one girl. However, he denied all knowledge about the complainants. In his view, he had been framed.

I have re-evaluated all the evidence on record. There is absolutely no doubt that the three (3) young children had been defiled.

However, two (2) of the children were unable to testify about the facts. It is only P.W.3 who told the Court about what had happened to all the three (3) children.

The evidence of P.W.3 was corroborated by the results of the medical examination which was conducted on each of the three (3) children.

The children had known the Appellant even prior to the incidents. He stayed in P.W.5's kitchen after his employer had sacked him. Therefore, the allegation that he was framed because his employer

owed him some wages cannot be realistic at all.

It is the Appellant who asked P.W.5 to help him, by allowing him to use her kitchen as his bedroom, until he was able to get his own place. That means that P.W.5 was an ally, rather than an enemy.

The Appellant had not worked for P.W.5, therefore she did not owe him any wages.

And had there been any bad blood between the Appellant and P.W.5, there would have been no way that the Appellant could have sought P.W.5's help.

I therefore find the Appellant's assertion about an alleged framing-up, to be incapable of belief.

And whilst there was another **JOHN** in that area, it is only the Appellant who was sleeping within the kitchen of P.W.5. It is also only the Appellant who had worked for P.W.5's brother-in-law, Ali.

In my considered view, the evidence tendered by the clinical officer was consistent with the particulars of the charge sheet.

P.W.9 said that the complainant's

***“vagina was reddened, and hymen torn. Hymen
tear was fresh. It was about 3 days old”.***

In effect, the clinical officer gave an approximate age, when he talked of the tear being ***“about 3 days old.”***

The date in the charge sheet would imply that the tear was 4 days old, by the time P.W.9 examined the complainant. The difference of one day, brings the evidence within an acceptable time-span, as estimated by the clinical officer.

Is the **JOHN** from Ali's home one and the same person as the Appellant? Is he the **JOHN** who P.W.5 left at her kitchen when she went to Nairobi? P.W.5 said that the appellant was the **JOHN** who worked for her brother-in-law, Ali.

The Appellant did not raise any questions about that evidence. My take is that when the Appellant was cross-examining P.W. 3, the complainant was very scared of the Appellant, that she dared not state publicly, that it is he who had defiled her.

But when P.W.3 was prodded further, she made it clear that it is the appellant who had defiled her.

P.W.1 identified the Appellant as a ***“bad person”***, whilst P.W.2 said that it is the Appellant who used to sleep in their kitchen.

In my considered opinion, all the evidence points at the Appellant as the person who defiled the three (3) complainants.

However, P.W.1 did not testify. Meanwhile, P.W.2 categorically denied having been injured on her mother's bed. She said that nobody removed either her inner wear or her clothes.

Considering that line of questioning, it was implied that the offence was committed on the bed of P.W.2's mother.

That would be consistent with the evidence of P.W.3, concerning the place where the offence was committed.

However, it is noteworthy that whilst P.W.3 testified that she saw the appellant removing P.W.2's clothes, P.W.2 said that her clothes were not removed.

In effect, the evidence of P.W.2 was not consistent with that of P.W.3. I also note that P.W.3 first said that the appellant lay down upon her, on a bed inside the house of P.W. 2's mother.

However, when P.W.3 was being cross-examined, she said that the appellant did not lay on her. If anything, she said that it is: “ *John of Ali's home who laid on me in the forest*”

That indicates, as the learned trial magistrate noted, that a person named **JOHN**, but who was not the appellant, is the one who defiled P.W.3.

On further cross-examination, P.W.3 stated that it was the appellant who had defiled her.

According to P.W.3, there were two different people who were both named **JOHN**. Whether it is the **JOHN** who lived at Ali's home or the appellant who defiled her, P.W.3 said that the incident took place in the forest.

In effect, P.W.3 kept on changing her story. Therefore, I have no idea whether the incident took place inside the house of P.W.2's parents or in the forest.

If the incident was inside the house, P.W.3 could have seen what happened to the other 2 complainants.

But, then again, P.W.2 denied having been at the receiving end of the appellant's sexual molestation.

In the result, although there is evidence that the 3 young children were defiled, there are some glaring gaps in the case put forward by the prosecution.

It is possible that the person who defiled the 3 young children was the appellant. But the evidence tendered did not prove the case against him beyond any reasonable doubt. I therefore, reluctantly, hold that the benefit of doubt must be granted in favour of the appellant.

The appeal is allowed. I quash the convictions and the 3 sentences. I order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT ELDORET,

THIS 14TH DAY OF NOVEMBER, 2013.

FRED A. OCHIENG

JUDGE.