



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 524 OF 2009

SIMON KARANJA KIARIEAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. 255 of 2009 of the Resident Magistrate's Court at Gatundu by D.G. Karani – Resident Magistrate)

JUDGMENT

The appellant, **SIMON KARANJA KIARIE**, was convicted for the offence of Attempted Defilement **contrary to section 9 (1) of the Sexual Offences Act.**

The trial court held that the appellant definitely attempted to defile the complainant.

Thereafter, the appellant was sentenced to 10 years imprisonment.

In his appeal, the appellant has asserted that the charge sheet was defective as it was not drafted in conformity with the alleged offence.

As far as he was concerned, the offence of Attempted Defilement could only occur between an adult male and a female who was a minor. In this case the complainant and the appellant were both males.

Secondly, the appellant submitted that the evidence adduced by the prosecution did not prove the offence to the standard required. It was his contention that the prosecution witnesses were not credible.

In particular, he contended that the credibility of **PW 1** was impeached as that witness had testified that the person who attempted to defile him was ELIUD KARANJA, not the appellant, SIMON KARANJA KIARIE.

Thirdly, the prosecution is faulted for failing to call 3 essential witness. Those are the 2 children who were with the complainant before the appellant carried away the complainant to a nearby shamba. As the 2 boys were allegedly locked up inside PW 2's house by the appellant, their testimony is said to have been crucial, to prove the case against the appellant.

Another person who the appellant considers to be a crucial witness is the person who treated the complainant, after the latter was allegedly strangled and scratched by the appellant.

The appellant also faulted the trial court for rejecting his defence for no good reason.

His defence was that the complainant's mother had a grudge against him after he refused to work for her. He therefore attributed his tribulations to the threat by PW 2, that she would teach him a lesson.

In answer to the appeal, Miss Maina, learned state counsel, submitted that the case against the appellant had been proved beyond any reasonable doubt.

The respondent also said that the evidence of **PW 2** corroborated that of **PW 1**.

Thirdly, the offence was committed in broad daylight, thus ruling out any mistaken identification.

Being the first appellate court, I am obliged to re-evaluate all the evidence on record.

The evidence shows that the appellant was a neighbour to the complainant's family.

PW 1, the complainant, testified that the incident took place at 6.00p.m. Therefore, as **PW 1** had known the appellant prior to the incident, there is no room for any possible mistake in his identification.

Secondly, the appellant first dragged **PW 1** to their house, where he locked in Kaharuka and Wanderi.

he appellant then carried **PW 1** on his shoulders. But **PW 1** struggled with him until **PW 1** fell down.

The appellant picked up **PW 1** and carried him to the Shamba where there are mango trees. The distance from the house of **PW 1**'s family upto the shamba is about 120 metres.

In effect, it was not very near.

Once they reached the shamba, the appellant first strangled **PW 1**. He then removed **PW 1**'s shorts. Next, the appellant removed his own trousers.

As **PW 1** continued struggling with the appellant, **PW 1** was called by his mother. As soon as the appellant heard the voice of **PW 2** (the mother to **PW 1**), calling out to her son, he released **PW 1** and ran away.

During cross-examination, the appellant suggested to **PW 1** that he (**PW 1**) had been sent by his mother (**PW 2**) to call the appellant. **PW 1** denied the said suggestion.

PW 1 also said that he sustained a scratch when he fell.

Finally, **PW 1** said that after the appellant had removed his (**PW 1**'s) shorts, the appellant made **PW 1** bend forward.

PW 2 produced an Immunization card for her son, **PW 1**. On that card, the date of birth for **PW 1** was cited as 23rd October 1997.

That card, together with the evidence of **PW 2**, who was the mother to **PW 1**, established the age of **PW 1**.

PW 2 told the court that she had been digging arrow roots from her shamba on the material day. When she reached home in the evening, she found Kaharuka and Wanderi locked up inside the house, from outside.

PW 2 asked Kaharuka and Wanderi where **PW 1** was. They told her that ELIUD KARANJA had taken him away.

PW 2 then called out the name of **PW 1**.

In a few moments **PW 1** arrived and he told **PW 2** that the accused had strangled him, removed his shorts, and then removed his own trousers. **PW 2** was told by **PW 1** that the appellant told him to bend.

After getting that information, **PW 2** apprehended the appellant, with the help of neighbours. And when they went to the scene where the incident took place, they noted that the ground was freshly disturbed.

During cross-examination, the appellant suggested to **PW 2** that she had asked him to be his lover.

PW 2 also denied having sent for the appellant on that day.

It is clear to my mind that if **PW 2** had sent for the appellant, there would have been no reason for the appellant to run away when he heard **PW 2's** voice, as she was calling out **PW 1's** name.

Secondly, if there had been a grudge between **PW 2** and the appellant, it would not make sense for the appellant suggesting that **PW 2** did send for him.

PW 3, DAVID MURANGA KAHARUKA, is the complainant's father. He was at Kagumoini Market when the incident happened. When he got back home, **PW 1** reported to him what had happened.

PW 3 went to look for the appellant; he was accompanied by other people. When they found him, they arrested him and took him to Gatundu Police Station.

PW 4, CPL. BENJAMIN WAMBUA, investigated the case. He visited the scene of crime and found that the ground was disturbed. The ground had human footsteps.

PW 4 also interrogated the appellant. However, the appellant denied committing the offence.

When the appellant was put to his defence, he said that on the material day, he worked until 6.00p.m, when he went to Ituru shopping Centre. At that Centre, he took some tea.

He returned home at about 7.4ap.m. Thereafter, **PW 3** called him out at about 8.00p.m, and asked him why he was interfering with his home.

After a short while Wanja (**PW 2**) arrived with her son called Karanja. The child pointed at the appellant saying he was "the one". The appellant was then escorted to the police station.

He denied committing the offence. He attributes the whole case to the threat by **PW 2**, who had promised to make him pay for refusing to do casual work for her.

Having re-evaluated all the evidence on record, I am satisfied that an incident took place at the shamba. The incident left the ground disturbed.

Although the appellant denied committing the offence, and purported to have been elsewhere at the time the offence was committed, it is obvious from his cross-examination of **PW 1**, that he was asserting that **PW 1** was with him that evening. I so find because the appellant suggested to **PW 1** that he (**PW 1**) did call the appellant, telling him that **PW 2** was calling him.

Similarly, when the appellant cross-examined **PW 2**, he suggested to her that she had called him.

Effectively, therefore, the appellant was placing himself at the scene, even though he later denied it in his defence.

The appellant was a neighbour to **PW 1**, **PW 2** and **PW 3**. Therefore, there was no possibility of any mistaken identification. If anything, this was a case of recognition.

And there has been no suggestion at all that **PW 1** had any ulterior motive against the appellant, which could have caused him to fabricate the story against the appellant.

But then, if both **PW 1** and **PW 2** knew the appellant so well, how come they gave his name as ELIUD KARANJA, instead of SIMON KARANJA KIARIE?

There was no explanation put forward to enable the court answer that question.

But I also noted that the appellant gave the complainant's name as KARANJA, instead of NDUNGU.

Could the use of the name Eliud, in reference to the appellant mean that **PW 1** and **PW 2** had not identified him?

In the circumstances of this case, I find that the answer to that question is in the negative. I so find because even the appellant acknowledged that he had some association or connection with **PW 1** and **PW 2**. He was not a stranger to them.

He said that **PW 1** was sent by **PW 2** to call him. He even asserted that he used to do some casual work for **PW 2**.

And when **PW 3** arrived back home, and was told about what had transpired, he went directly for the appellant. The appellant confirms as much.

And the appellant was arrested in the presence of **PW 1**, who had earlier told his mother and father that it was the appellant who had tried to defile him.

In those circumstances, and because **PW 1**, **PW 2** and **PW 3** did confirm to the court that the person they called by that name ELIUD KARANJA was the appellant herein, I find that the use of that name did not imply that the witnesses had implicated somebody other than the appellant.

But is it possible for a man to defile a male child?

Pursuant to **section 8 (1) of the Sexual Offences Act**;

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

Therefore, the offence is not limited to persons of different gender. In other words, if a man commits an act which causes penetration with either a girl child or a boy child, he would be equally guilty of defilement.

I find no defect in the charge sheet. I also find no basis for declaring that Kaharuka and Wanderi were essential witnesses. At the time the offence was being committed, they were 120 metres away, locked up inside a house. They did not witness the commission of the offence.

PW 2 corroborated the evidence of **PW 1** regarding the fact that both Kaharuka and Wanderi; were locked inside the house, from outside.

Whether or not the assailant had used force when committing the offence would be irrelevant. The ingredients of the offence of defilement do not include either the use of force or the absence of consent.

Therefore, even though no medical evidence was produced to prove that the complainant sustained some injuries in the process of struggling with his assailant that would not prejudice the case against the prosecution.

By removing the complainant's shorts, then removing his own trousers, and then getting the complainant

to bend over, the appellant can only have intended to cause an act which causes penetration with the child. Therefore the prosecution proved the case beyond any reasonable doubt. I uphold the said conviction. I also uphold the sentence.

The appeal is therefore dismissed.

Dated, Signed and Delivered at Nairobi this 1st day of February, 2012

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FRED A. OCHIENG
JUDGE