



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 262 OF 2007**

**PETER KARIUKI GIATU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Peter Kariuki Gitau, the appellant herein was charged with the offence of attempted defilement of a girl contrary to **Section 9(1)** of the **Sexual Offences Act 2006**. The particulars of the charged are that on 9/5/07 in Nakuru, attempted to cause penetration of his genital organs into the vagina of M.M.G, a girl of the age of 14 years.

In the alternative, the appellant was charged with the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act 2006. It was alleged that on 9/5/07, he indecently assaulted the complainant by touching her private parts, namely, vagina. The appellant denied the offence. The prosecution called a total of 7 witnesses in support of their case. The appellant made unsworn statement in his defence and called no other witness.

At the hearing, the appellant seemed to abandon his appeal on conviction and only asked the court to reconsider the sentence but he did not seem sure of himself. The court will therefore proceed to hear the appeal based on the grounds contained in the memorandum of appeal. The grounds are:-

- 1. That the prosecution relied on inconsistent and hearsay evidence;**
- 2. That the evidence of the complainant was uncorroborated;**
- 3. That the appellant's defence was not considered;**
- 4. That the sentence is excessive.**

Ms Idagwa, learned counsel for the state opposed the appeal for reasons that the complainant's evidence was corroborated by evidence of the doctor.

The complainant, M.M.G (PW2) was at the time a minor, aged 14 years old. She was examined by the court and the court affirmed her. She recalled that on 9.5.07, she went to school. She was then in class 6. She kept her books in class and went to Kariuki's place to get Wangari's Kshs.30/-. The appellant told her to wait as he entered another room. He suddenly grabbed her, removed her pants, put her on a sofa seat and she said "**he did that to her**". In cross examination, she said "**ulinishika**" which is commonly means "you defiled/raped me". After he let her go, she informed her friend Wangari who in turn told PW1's sister W who reported to her mother. She did not tell her parents because she feared. She was taken to Police Station then to the hospital for examination. PW1 told the court that she had been to Kariuki's house two times there before.

PW1, R.W.W the complainant's mother, recalled that on 9/5/07, in the evening she was informed by W, PW4 that PW2 had left her books in school, in the morning and gone to Kariuki's house. That is when she asked PW2 to explain and PW2 informed her that she went to collect money from Kariuki and it is then he defiled her. The complaint's mother came home and took her to police station and then hospital.

Ruth Wangari, (PW3) a girl aged 14 years was also affirmed. She recalled that on 9/5/07, PW1 went to ask her if she could escort her to Kariuki's house to collect money. PW3 was busy and did not escort her. Later, when she went to school she looked shocked when PW3 enquired from PW1 what was the matter, she did not reply. The next day, she learnt from PW4 that PW2 had been taken to hospital.

PW4, M.W.G aged 12 was also affirmed. She was a class 6 pupil at the time. She is a sister to PW2. She said that on 9/5/07, PW2 left for school before her. However, PW2 arrived at school at 10.00 a.m. She said that PW3 told her that the complainant had gone 'up there' but she did not know whose place. She told her parents who started talking to the complainant and next day she was taken to hospital.

D.G.M, (PW5) the father of the complainant arrived at home about 8.00 p.m. when PW1 informed him that PW2 had gone to Kariuki's house while on the way to school. PW5 asked the complainant what had taken place and she explained that she had gone to get Ciku's money from Kariuki who had asked her that they love each other (wapendane) and forced her to have sex. He reported to Ndundori Police Station and they took the complainant to Ndundori Health Centre where she was examined. They were issued with a treatment chit (PEx.1) and a P3 form.

Dr. Philip Winaina, PW6, examined the complainant, M.M, aged 14 years with a history of rape. He found that she had a small tear at the posteria aspect at back of vagina, about 5 days which was consistent with defilement. She was treated and several tests were done. He noted that there were spermatozoa. He observed that though there was no penetration, there was ejaculation.

Sgt. Evans Chea, PW7, received the defilement report and arrested the appellant from members of public. He charged the appellant for attempted defilement.

In his unsworn defence the appellant said that on 9/5/07 at 7.30 a.m. the complainant went to collect a book she had left in his house. On 10/5/07 he went to work and returned home at 7.30 p.m. He met his friend P, uncle to PW2 who asked him to go to the police station for something minor. He did so. The 4<sup>th</sup> day, the complainant's father alleged that the appellant's cows had grazed in his garden and he had to be charged.

PW2 was alone when she went to the appellant's house. She is a lone witness to the crime but there is nothing that bars the court from basing a conviction on the evidence of one witness provided the court believes it to be cogent and truthful. **Section 143** of the **Evidence Act** provides that:-

**"No particular number of witnesses shall in the absence of any provision by law, to the contrary, be required for the proof of any fact."**

It means that the prosecution can rely on the evidence of one or more witnesses provided that a particular law does not prohibit it. In addition, the proviso to **Section 124 of the Evidence Act** provides that in sexual offences, the court can receive evidence of the victim and proceed to convict for reasons that the court will record if the court is satisfied that the victim is telling the truth notwithstanding the fact that such evidence may have required corroboration (**Section 19 of Oaths & Statutory Declarations Act**).

The complainant was not a stranger to the appellant. PW2 stated that she had gone to collect Shiko's Kshs.30/- from the appellant when the appellant forced her to take part in a sexual activity. Infact, the appellant did admit that on the material date i.e. 9/5/07 about 7.30 a.m. PW2 went to his house to collect her book. PW2 also said that it was not the first time she had been there. The appellant's identity was not an issue and he did have the opportunity to commit the offence.

Although PW2 told the court that after the incident, she informed her friend Wambui, the complainant's friend who testified is Ruth Wangui recalled being asked by PW2 to escort her to the appellant's house but she was busy and could not. She saw PW2 later, when she came back from the appellant's house, looking shocked. In addition, PW2 vividly explained to the court what happened to her when she went to the appellant's house. She said:-

**“He pulled me, put me on a seat and lifted my school uniform. He removed my pants; he put me on a seat – the one that has 3 cushions. He did that to me. I felt pain...”**

The trial magistrate did not indicate what the magistrate understood by **“he did that to me”**. I believe it meant the appellant defiled her from the explanation preceding that statement and later in cross examination she said **“ulinishika”** a phrase which commonly means **“you defiled/raped me”**. Dr. Kamau, PW6 who examined PW2 on 14/5/07 found that she had a small tear at the posteria aspect of the back of the vagina, about 5 days old, and that it was consistent with defilement. He also found traces of spermatozoa, although he came to the conclusion that no defilement occurred. The trial magistrate arrived at the same opinion and came to the conclusion that the appellant only attempted to defile PW2. **Section 2 of the Sexual Offences Act** defines penetration to mean:-

**“means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”**

In my considered view, the tear on PW1's vagina and the presence of spermatozoa is evidence of penetration. It needed not to be complete. The appellant seem to have committed a more serious offence than just of attempt. The trial court believed the evidence of PW2 which was corroborated by that of the doctor and I have no reason to doubt it. Though affirmed, PW2 was cross examined and her evidence was never challenged.

The appellant's defence is that he was framed by the complainant's father because cows had grazed in his farm and so the appellant had to be charged. The court rejects that defence as untrue because when PW5 testified, the appellant never put to him such question. It is an afterthought.

In the end, I find that the appellant got off light. He was charged with a lesser offence than what he should have been because the facts disclose an offence of defilement. I therefore find no good reason to interfere with the conviction and I confirm it. As regards the sentence, conviction for attempted defilement attracts a minimum sentence of 10 years. Because the facts disclose a more serious offence, I will enhance the sentence and substitute the 10 years with 18 years imprisonment. The appeal is dismissed. It is so ordered.

**DATED and DELIVERED this 23<sup>rd</sup> day of March, 2012.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT**

The appellant in person – present

Mr. Nykundi for the State

Kennedy – Court Clerk