



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 46 OF 2010

JOHN NJENGA MUGURE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.874 of 2009 of the Senior Resident Magistrate's Court at Nairobi by A.O. Aminga – Resident Magistrate)

JUDGMENT

The appellant, **JOHN NJENGA MUGURE**, was convicted for the offence of Defilement contrary to **section 8 (3) of the Sexual Offences Act**. He was thereafter sentenced to 10 years imprisonment.

The particulars of the charge were that on 16th June 2009, in Kiambu West District, the appellant, intentionally and unlawfully defiled the complainant by “penetrating” his male organ (penis) into her vagina. At the time of the incident, the complainant was said to be under the age of 18 years.

The appellant has raised 5 issues in his appeal, and the same can be summarized as follows;-

- (a) ***The charge sheet was defective.***

- (b) ***The prosecution tendered contradictory evidence .***

- (c) ***The trial court ought not to have relied on the evidence of a minor, as that was in contravention of section 124 and section 125 of the Evidence Act.***

- (d) ***The trial court should not have disregarded the evidence of the grudge between the appellant and the complainant's mother.***

- (e) ***The plausible alibi defence should not have been dismissed by the court.***

When canvassing the appeal, the appellant submitted that the charge sheet was fatally defective because the particulars thereof were not consistent with the evidence tendered by the prosecution.

In particular, the date of the alleged offence was doubtful.

The witnesses did not appear to know the dates when the alleged defilement took place.

The witnesses were also not consistent about;

- (i) ***The date when the appellant was arrested; and***

- (ii) ***What transpired when the complainant was taken to the Nairobi Women's Hospital. In particular, it was not clear if she was treated and discharged, or if she was admitted in hospital for six (6) days.***

The evidence of the complainant is said to have lacked any corroboration. It is for that reason that the appellant submitted that the trial court ought not to have accepted it.

Also because the complainant's mother, as well as the Assistant Chief had conceded the existence of a grudge between the appellant and the said complainant's mother, it was submitted that the said lady had

simply conspired to “fix” the appellant.

Furthermore, as the complainant’s mother had allegedly tried to get Maina to give false evidence against the appellant, she was said to have been an unreliable witness.

In answer to the appeal, Miss Maina, learned stated counsel, submitted that the evidence on record was sufficient to sustain conviction.

The respondent pointed out that the medical evidence proved that the complainant had been defiled.

And because the complainant and the appellant lived within the same plot, the complainant had recognized the appellant.

In the discharge of my obligation as a first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions from the evidence, whilst bearing in mind the fact that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses when they were testifying.

PW 1 was 9 years old. She testified that on 16th June 2009, at about mid-day, she was lying down in a field when a man called John Njenga came to where she was. The man forced her legs apart and then touched her on the stomach.

Thereafter, the man went away.

PW 1 was categorical that on that date, the man did not remove her dress, sweater or pants.

It was her evidence that the act of defilement had taken place on an earlier date. On that, undisclosed, date the appellant is said to have inserted his male organ that he uses in urinating, into the complainant’s organ.

PW 1 felt pain, and later she saw blood.

The incident when **PW 1** was defiled is said to have taken place at the premises where the appellant was running the business of a pool table.

Whilst **PW 1** was still at that premises, Maina arrived and threatened to beat up the appellant.

PW 1 did not tell anybody about that incident because the appellant had threatened to burn her in the forest, if she told her mother.

PW 1 also said that although the pool shop was near the matatu stage, she did not scream as the appellant strangled her.

Eventually when **PW 1** could no longer withstand the physical pain from her ordeal, she told her mother about it.

PW 2, DR. OBUTO OMOL, was a medical officer at the Tigoni District Hospital. He signed and filled the complainant's P3 form on 29th July 2009.

By the time he examined **PW 1**, he did not notice much, because more than one month had lapsed since the complainant was assaulted.

PW 2 relied on the medical records from the Kijabe Hospital, when filling the P3 form. The reason is that the complainant had been treated at AIC Kijabe Hospital.

The report from the AIC Kijabe Hospital indicated that **PW 1** had tears in her hymen, which were consistent with sexual assault. **PW 1** also had a discharge that should not occur in a child.

As a result of those observations, the doctor who examined her at Kijabe Hospital expressed the professional opinion that the complainant had been sexually assaulted.

PW 3 is the complainant's mother. On 11th July 2009, the complainant told her that the appellant had defiled her.

Before that date, **PW 3** had noticed that **PW 1** had complaints about pains on her legs, but **PW 1** was evasive when she was asked about the nature of the problem causing the pains.

PW 1 told **PW 3** that the appellant had defiled her in mid-June 2009. Thereafter, **PW 3** went to see the Head Teacher at the complainant's school. The said Head Teacher informed **PW 2** that he had sent **PW 1** home on 16th June 2009, because **PW 1** had not paid Kshs.100/- towards the salary of a teacher employed by the school's Board of Governors.

As **PW 1** had said that the incident happened when she had been sent home from school, **PW 3** concluded that the incident was on 16th June 2009. That date was reflected in the school's register, as the date when **PW 1** was sent back home.

PW 3 testified that **PW 1** was treated at Kijabe Hospital; and also that the P3 form was filled at Tigoni District Hospital.

The doctor at Tigoni District Hospital referred **PW 1** to Nairobi Women's Hospital for further treatment. When further tests were conducted on **PW 1** at Nairobi Women's Hospital, she was admitted for six (6) days.

During cross-examination, **PW 3** conceded that he and the appellant had previously had a minor understanding, after the appellant's wife had taken **PW 3**'s firewood from her house, in the absence of **PW 3**.

PW 3 also said that **PW 1** was defiled on 16th June 2009. It was only after that that, in a second incident, the appellant is alleged to have used his hand to hit the complainant on her private parts.

It is notable that **PW 1** had insisted that the defilement had taken place on a date that was earlier than 16th June 2009.

In effect, the evidence of **PW 1** and **PW 3** were inconsistent in relation to the date when the offence was committed.

PW 4, RICHARD MWANGI KAMAU, is the Assistant Chief of Kijabe sub-location. He arrested the appellant on 28th July 2009.

During cross-examination, **PW 4** said that the appellant had previously reported to him that **PW 3** had stolen his food. **PW 4** further said that the appellant had complained to him that **PW 3** had alleged that a certain lady was a witch. In short, **PW 4** confirmed that there was a grudge between the appellant and the complainant's mother (**PW 3**).

PW 5, PC WYCLIFF SIMATWA, was the Investigating Officer. He was assigned the task by the OCS on 28th July 2009. By that time, PW 4 had already arrested the appellant.

It is **PW 5** who issued the P3 form which **PW 1** took to Tigoni District Hospital.

Later, **PW 5** accompanied **PW 1** and **PW 3** to the Nairobi Women's Hospital.

According to **PW 5**, the complainant (**PW 1**) was treated and discharged.

Effectively therefore, **PW 5** contradicted the evidence of both **PW 1** and **PW 3** regarding the contention that **PW 1** was admitted at Nairobi Women's Hospital for six days.

After the prosecution closed its case, the appellant gave an unsworn defence. He also called 2 other witnesses.

The appellant denied being at his pool shop on 16th June 2009. He said that he had been evicted from that premises on 24th May 2009.

He also said that **PW 3** had offered to pay Maina if he (Maina) gave evidence in court. However, Maina is said to have refused to come to court to give false evidence.

DW 2, YOURI KAGO MWANGI, said that he was the appellant's landlord at the premises where the appellant operated the business of a pool table.

DW 2 said that the appellant had been his tenant from 26th May 2009. As at 16th June 2009, the appellant was still operating that business at the premises which was near the matatu stage.

DW 3, ISAAC KAMAU THUO, was a businessman, who sold soup at the Gichengo Shopping Centre. He was also the caretaker of a building owned by a man whose nickname is "Wathamaki." After Wathamaki gave notice to the appellant to vacate that premises, the appellant vacated on 26th May 2009. Thereafter, the appellant moved over to another premises belonging to Mama Chege.

After **DW 2** testified, the learned trial magistrate issued summons for the arrest of Maina, who had been

mentioned by several witnesses.

PETER MAINA MWANGI testified thereafter. He denied having found the appellant defiling a minor. He even denied knowledge of the complainant by the name of **J.N.**

But during cross-examination, the witness said that the complainant's mother was his aunt. He also said that **PW 3** had promised to pay him if he testified against the appellant.

As that witness had first denied any knowledge of **PW 1**, but it later transpired that **PW 1** was actually his relative, the learned trial magistrate concluded that the witness had perjured himself. He therefore directed the police to arrest and charge that witness.

This court is fully alive to the fact that an accused person does not have any obligation to prove his innocence.

It is the prosecution who are under a legal duty to prove the guilt of the accused. Indeed, an accused person is entitled to remain silent, and that fact alone cannot be held against him unless the evidence adduced by the prosecution is sufficient to lead to a conviction.

However, when an accused person chooses to call other witnesses to support his defence, the trial court is obliged to analyse such evidence in the same manner as the rest of the evidence on record. But the analysis should not extend to the level of determining whether or not the accused had disproved the case against him. The analysis should ascertain whether or not the evidence was plausible, and also whether or not it had given rise to any reasonable doubt on the case put forward by the prosecution.

In this case, even if the appellant had shifted from one premises to another, on 26th May 2009, the fact remains that as at 16th June 2009, he was running a pool-table business. The premises where he was operating the said business was near the matatu stage.

Secondly, the witness who had allegedly been offered payment by the complainant's mother, so that he could testify against the appellant, was found, by the learned trial magistrate, to have perjured himself. I have no reason, in law or in fact, for faulting the trial court's determination in that respect.

However, the said determination does not advance the prosecution's case any further. Logical reasoning, however attractive it may be, cannot be a substitute for evidence.

The complainant testified that she was defiled at the premises where the appellant was operating his pool-table business. But because **PW 1** insisted that the defilement took place before 16th June 2009, her evidence did not support the charge.

Therefore, even if Peter Maina Mwangi, had lied about the fact that he knew the complainant, that would not change the fact that the complainant herself insisted that on 16th June 2009 (when Peter Maina Mwangi allegedly found him at the scene of crime), she was not defiled.

In a nutshell, the evidence of the 2 main witnesses, **PW 1** and **PW 2** are inconsistent about the date when the offence was committed.

Secondly, the medical evidence does not help shed any light on the issue as to the correct date.

Therefore, although there is evidence corroborating the complainant's testimony about her defilement, I regrettably find and hold that the evidence on record does not support the particulars of the charge.

For that reason, and that reason alone, the appeal is allowed. The conviction is quashed and the sentence is set aside. I order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 11th day of April, 2012.

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FRED A. OCHIENG
JUDGE