



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 277 of 2007

ALEX MACHARIA

GACHANJA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

[An Appeal from original conviction and sentence in Nakuru C.M.A.CR.C.NO.113/2007 by Hon E. Tanui and Hon.W. Kagendo, Senior Resident Magistrate, dated 5th December, 2006]

JUDGMENT

The appellant was charged with the offence of **Defilement of a girl** contrary to **Section 8(1)** of the **Sexual Offences Act 2006** and in the alternative with **Indecent Act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**.

According to the particulars of the offence it is alleged that on the 3rd day of December, 2006 at Bahati Mugumo in Nakuru District of the Rift Valley Province the appellant caused penetration of his genital organs into the vagina of RWM, a girl of the age of nine (9) years.

The complainant recalled that on the day in question while in the company of 4 year old DK, they met the appellant, who was not known to them. The appellant asked the two children to go for a *mandazi*. Instead, the complainant explained, the appellant took them to a thicket where he defiled her while D.K watched as he cried. The appellant also hit the complainant in the mouth when she screamed. She sustained an injury on the mouth. When he was finished with the complainant, the appellant took the children to the house of **P.W.3, FNK** where they changed clothes as they had been rained on.

When they got home, their aunt (**P.W.4**), **SNM**, noticed the complainant walking with difficulty. The complainant explained how the appellant lured her with *mandazi* and instead took her to the bush where he defiled her. Upon checking the complainant's private parts, she noticed blood and an injury. She took her to the police station and later to the hospital. At the hospital, the complainant was examined by Dr. John Omboga who found that she had a perineal tear at 6 O'clock position.

The police could not trace the appellant immediately. After four (4) months of searching, he was traced in Nakuru, arrested and later charged as explained earlier.

In his defence, the appellant denied any involvement in the offence. He gave an account of his movement between July, 2006 and December, 2006. He ploughed with a tractor in Kiambogo before moving to Nakuru, where he ploughed the Prison's land. In May, 2007 while eating lunch, the police arrested him in

connection with the offence in question. He maintained that he was framed up by P.W.3, FNK who was his girlfriend after he ended their relationship.

This was the evidence before the trial court upon which that court found the offence proved. Learned counsel for the respondent supported the conviction and sentence arguing that there was overwhelming evidence against the appellant. The appellant has challenged the conviction and sentence on the following grounds:

- i) that the trial magistrate failed to consider his defence
- ii) that the evidence fell short of the required standard to justify the conviction,

and also in his amended grounds, that

- i) his Constitutional rights were violated by being detained by the police for more than 24 hours;
- ii) that the doctor's evidence was not conclusive;
- i) that essential witnesses were not called to testify.

This being a first appeal, it is the duty of this court to re-evaluate the evidence in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses.

I reiterate that the appellant was charged under **Section 8(1)** of the **Sexual Offences Act**, with defilement of a girl, which is committed when there is an act which causes penetration with a child. Penetration on the other hand is defined to mean the partial or completed insertion of the genital organs of a person into the genital organs of another.

Two things are important in proving the offence of defilement, namely, penetration and the age of the child. There was evidence before the trial court that the complainant was nine (9) years at the time of the incident. Regarding penetration, the complainant gave a concise account of how the appellant lured her and DK with *mandazi*. He took her under a tree, undressed her and defiled her. In the course of stopping her from screaming the appellant injured the complainant on the mouth.

From the bush the appellant took the complainant and DK to FNK house where he borrowed clothes for the two children as they were wet following a rainfall. Faith noticed the injury on the complainant's mouth which the appellant explained away as having been sustained in a fall.

In my considered view, the complainant had sufficient opportunity with the appellant. They were seen by Faith and that very day the complainant informed her aunt, P.W.5, SNM and the police the next day of the incident.

In terms of **Section 124** of the **Evidence Act**, the trial court found the complainant's testimony cogent and believable. With respect, I too find that evidence consistent and points to the appellant having committed the offence. His defence of a bad blood with FNK has no relevance to the incident in question as there is independent evidence from the complainant, the doctor and the complainant's aunt. That evidence is indeed overwhelming.

Regarding the ground that the appellant's rights under the constitution were violated, it is now settled, in applying the provisions of **Section 72(3)** of the former **Constitution**, that detention beyond the prescribed period is not a ground for an acquittal. Failure to call certain witnesses did not prejudice the appellant or weaken the prosecution case. The so-called contradictions in the evidence of prosecution case were minor and of no consequence.

For the reasons stated, this appeal has no merit and is accordingly dismissed.

Dated, Signed and Delivered at Nakuru this 18th day of July, 2012.

**W. OUKO
JUDGE**