



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 105 of 2011

PETER KALOLA KITAVIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 870/2007 by Hon H.M. Nyaberi,SRM on 24/5/2011)

JUDGMENT

The appellant, **Peter Kalola Kitavi** was charged before the Resident Magistrate's Court at Mwingi with an offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act, particulars being that on 18th August, 2007 at [particulars withheld] Mwingi District within Eastern Province, he committed an act that caused the penetration of his male genital organs to the female genital organs of **M M**, a girl aged 14 years. The appellant also faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act with the particulars being that on the same day and place the appellant intentionally caused contact between his genital organ and that of **M M**. The appellant denied both counts and was soon thereafter tried.

Briefly, the facts of the prosecution case were that the complainant, **M M** (PW1) was a girl then aged 14 years. On the material day at about 6.00 pm, she was in a bush about 500m from her homestead gathering firewood. The appellant suddenly appeared and started making sexual advances at her. She refused his advances and moved in the opposite directions. The appellant followed her and grabbed her, knocked her down, removed her pant and his long trouser and raped her. She felt a lot of pain. After the ordeal, the appellant ran away, whilst warning her not to tell anyone about the incident. She bled from her genitalia and noticed some blood on her skirt. She stood up, picked the firewood and went home. She never found her foster mother but she found her 2 brothers. She went straight to bed because she was experiencing a lot of pain and stomachache. The following day her foster mother came to the room where she was sleeping noticed some blood on the bed and on the skirt. She informed her that she had been raped by the appellant. Her foster mother, **F M** (JPW2) on noticing that the complainant's skirt was blood stained and on learning that she had been raped, informed her husband **J M** (PW3) and later on reported the matter to Nuu Chief's camp. While in the company of PW3, they took the complainant to Nuu Dispensary for treatment. Later, she was referred to Mwingi District Hospital. Blood samples of the complainant and appellant as well as clothes that the complainant was wearing on the material time were collected by **P.C. James Gatheru** (PW9) and forwarded to Government Chemist. According to the evidence of PW4, **Joseph K. Kimani**, a Government Analyst, he found that the blood that was on the skirt, blouse and underpants belonged to the complainant.

PW6, **Doctor Haron. M. Kimani** in his evidence according to exhibit 3, treatment notes from Nuu dispensary, the complainant was bleeding from her vagina and she had an external lacerations on her

private parts. He stated that as regards to treatment card from Mwingi District Hospital, the findings were that high vaginal swab was taken and the result was that there were a lot of blood cells and pus cells noted.

PW7, **Fredrick Mutua** a clinical officer attached at Mwingi District Hospital distanced himself from the P3 form exhibit 1 which purported to have been completed by him. However, he admitted to have completed P3 form (copy) produced as exhibit No. 8. He came to the conclusion that there was forced penetration.

The investigating officer, **P.C James Gatheru** (PW9) in his evidence reiterated the complainant's testimony and produced the blood stained pink pant, cotton wool and the skirt as exhibits. He recorded witnesses' statements and finally the appellant was arrested by administration police officers from Nuu AP camp and he subsequently charged the appellant. He also prepared samples of blood from the complainant and the appellant and forwarded to a Government Chemist, Nairobi.

He alluded further to the fact that when he came from leave he noticed that the P3 form that was in the police file was not the same as the one he had left. As a result he managed to secure a copy of the correct P3 form and caused it to be certified by the MOH Mwingi District Hospital.

At the close of the prosecution case, the court made a ruling that the appellant had a case to answer. The appellant in his sworn defence stated that on the material date he had visited his cousin **Ngena Solomoni** to assist her in smearing her house within Ngaani village. He left her house at about 8.00 pm. He confirmed in his evidence in chief that he had known the complainant before. He could not therefore have committed the offence. In support of his defence, he called 3 defence witnesses.

Whereas DW2, **Regina Ngena** told the court that DW1 and DW3, **Mercy Kamene** had visited her on the material date to assist her in smearing her house. They left at about 8.00 pm for their home which was 1km away. DW3 also reiterated the evidence of DW1.

After analyzing the facts of the case and evidence on record, the learned magistrate came to the conclusion that the prosecution had proved its case beyond shadow of doubt, convicted the appellant and sentenced him to 20 years imprisonment.

It is against this conviction and sentence that the appellant through **Messrs Nyamu & Nyamu Advocates** lodged the instant appeal on 14 grounds to wit:-

“1. Trial magistrate erred in law and fact in finding that the prosecution had proved its case beyond any shadows of doubt as against the appellant.

2. The trial magistrate erred in law and fact by failing to critically analyze the evidence on record especially the evidence advanced by the prosecution witnesses which is highly contradictory and creates a lot of doubt to warrant a conviction under section 215 of the Criminal Procedure Code.

3. The trial magistrate erred in fact by failing to critically analyze the exhibits produced by the prosecution as 4(a) (b) and (c) that is the stained pink pant, cotton wool and skirt since the said exhibits were never identified and conflicting colours given by the complainant, PW1, the complainant's foster mother, PW2 and the complainant's father, PW3 respectively in court who gave evidence as to having seen them and handed them over to the police.

4. The trial magistrate erred in fact by failing to take cognizance of the evidence of the Government Analyst (PW4) who examined a pink underwear pant of the complainant item STI whilst the exhibit produced in court in support of the prosecution case was a white underwear pant of the complainant.

5. The trial magistrate erred in fact in failing to critically analyze the evidence of the Government Analyst who illustrated clearly that the under pant, the blouse and the skirt had no semen or

spermatozoa which can stay on clothes or under pant for many years before convicting and sentencing the appellant.

6. The trial magistrate erred in fact in failing to put into consideration that the exhibits produced that is the pant, blouse and skirt had the complainant's blood only as per the report of the Government Analyst with no semen or spermatozoa from the appellant so as to prove the act of defilement as against the appellant.

7. The trial magistrate erred in law and fact in failing to find that both the complainant and the appellant suffered the same venereal disease.

8. The trial magistrate erred in law and fact in failing to make a finding that the 1st medical examination of the complainant did not confirm contraction of a venereal disease.

9. The trial magistrate erred in fact in failing to find that the prosecution had failed to prove that the appellant had any venereal disease which the complainant alleges to have contracted from the appellant.

10. The trial magistrate erred in failing to analyze the evidence of Dr. Kamau (PW4) who despite agreeing that the complainant hymen was absent stated that this could have been caused by anything and not necessary defilement.

10. The trial magistrate erred in failing to establish and critically analyze the medical evidence adduced, which had a lot of contradiction that is two P3 forms were produced as exhibits by two different doctors Dr. Kamau and Dr. Mutua respectively whose result of the examination was at variance including the age of the child which created a lot of doubt as to whether there was defilement or the appellant had been framed up for the act to warrant a conviction.

11. The trial magistrate erred in making a finding that the complainant was defiled while the evidence especially from the government analyst and the P3 forms showed clearly that there were neither spermatozoa nor sperm on the under-pant.

12. The trial magistrate erred in failing to appreciate the defence evidence which was sincere and honest.

12. The sentence passed by the lower court is in the circumstances both harsh and excessive and pray for the conviction and sentence to be set aside and the appellant to be acquitted under section 215 of the Criminal Procedure Code."

When the appeal came up before me on 13th August, 2012 for hearing, **Mr. Kago** and **Mr. Mukofu**, learned counsel for the appellant and State counsel respectively agreed to canvass it by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

In her written submissions, the State has conceded to the appeal on the grounds that it was improper for the trial court to convict and sentence the appellant under section 8(1) (2) of the Sexual Offences. The appellant in his submissions did not refer to this aspect of the matter, yet it rendered the entire proceedings a nullity.

Right from the charge sheet through to the judgment of the learned magistrate, it is evident that the appellant was charged with defilement contrary to section 8(1) (2) of the Sexual Offences Act. The particulars of the charge were that on 18th August, 2007, the appellant defiled the complainant who was then aged 14 years old. The complainant herself testified that she was born in 1994. At the time of the commission of the offence she was then aged 13 years. Her foster father too testified that she was aged 13 years. **Dr Haron M. Kimani**, (PW6) similarly confirmed that the complainant was aged 13 years at the time. However, the evidence of **Zaphania Kamau** (PW8), puts the complainant's age at 15 years.

It is clear from the foregoing tn cases of this nature was not established. Section 8(2) under which the appellant was charged provides that a person who commits the offence of defilement with a girl aged 11 years or less shall upon conviction be sentenced to imprisonment for life. The complainant in terms of age therefore fell outside the provisions of section 8(2) under which he was charged. Even the sentence imposed was illegal as a consequence of the foregoing.

In the premises, the State Counsel was right in conceding to the appeal. The same is accordingly allowed, conviction quashed and sentence imposed set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH dayof SEPTEMBER 2012.

ASIKE MAKHANDIA
JUDGE