



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 320 of 2008

JOHN MWANGI KAMANDEAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 10712 of 2004 in the Chief Magistrate's Court at Thika – L. W. Gicheha (SRM) on 8th

February 2008)

JUDGMENT

1. **John Mwangi Kamande**, the appellant herein was charged with defilement of a girl contrary to **Section 145(1)** of the **Penal Code**. It was alleged that he had carnal knowledge of D.W.N, (identity concealed on account of her age) a girl aged below 16 years, on 1st December 2004 at Thika District of Central Province. In the alternative he had been charged with indecent assault on a female contrary to **Section 144 (1)** of the **Penal Code**.

2. At the close of the trial the learned trial magistrate found the appellant guilty of the offence of attempted defilement as allowed under **Section 186** of the **Criminal Procedure Code**. She convicted him accordingly and sentenced him to serve 15 years imprisonment.

3. Being aggrieved by the decision of the court the appellant filed an appeal relying on 6 grounds of appeal which I have compressed as follows:

1) The appellant was convicted on insufficient evidence that was contradictory and unreliable.

2) The proceedings were conducted in a language that the appellant did not understand.

3) The sentence was manifestly harsh and excessive and contrary to what is provided under Section 145 (1) of the Penal Code.

4. The state opposed the appeal through the learned state counsel Miss Maina, who urged that the evidence from the prosecution was sufficient to sustain both the conviction and sentence.

5. I have re-assessed and re-evaluated the evidence on record afresh in line with **Boru & Anor V Republic Cr. App No. 19 of 2001 [2005] 1 KLR**. In the foregoing casethe learned judges of the Court of

Appeal held *inter alia* that:

“A duty is imposed on a court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with any question of law raised on the appeal?”

6. The case for the prosecution revolves on the evidence of **PW2** a minor who was aged 5 (five) years. She was the only witness as to what was done to her and the identity of the perpetrator.

7. A summary of the prosecution’s case was that on 1st December 2004 **PW2**, the complainant was with her friend called Lucy, also a minor, and they were taking milk to her auntie named Waithera. She stopped at the appellant’s shop as Lucy went on ahead. The appellant gave her a cake and a sweet, before he removed her panties and placed her on some timber next to his shop. He unzipped his trouser and inserted something into her private parts. **PW2** felt pain in the area which she uses to urinate. When the appellant was done with what he was doing he washed the genitals of **PW2** with water, and released her to go, warning her not to tell anybody what had happened.

8. The minor went to her aunt’s place and waited for her mother **PW3**, without informing her aunt what had transpired. **PW3** came later that evening and took **PW2** home, and that is when **PW2** disclosed to her what had happened in the day. **PW2** took her to the nearby hospital where she was examined and referred to Thika hospital where she was examined the following morning. The matter was reported to the police whereupon the appellant was arrested and charged.

9. The learned trial magistrate subjected **PW2** to **voire dire** examination and found her to be intelligent, although she was too young to understand the meaning of oath. Her evidence was taken without oath.

10. **PW1**, Dr. John Irungu confirmed that **PW2** was brought to him on 9th December 2004, by a police officer and her parents. Upon examination he noted that **PW2** had earlier been treated at Thika Hospital on 1st December 2004 where it was observed, that;

- a) *There was extreme redness on the inner anus introitus;*
- b) *There was a tear on the left aspect of the introitus;*
- c) *The hymen was intact;*
- d) *There was no presence of discharge or sign of infection;*
- e) *She had a P.T.S full vaginal sore which showed red blood cells and pus cells;*
- f) *A urinalysis showed presence of pus cells but no spermatozoa was seen;*
- g) *There was evidence of act of penetration.*

11. **PW1** completed and signed the P3 form on 9th December 2004, based on the treatment card from Thika Hospital. He formed the opinion that there had been an attempt to defile the minor. He produced the evidence as exhibit 1.

12. **PW3** was the mother to the minor and she testified that that on 1st on December 2004, she left in the morning at 9 a.m. when the minor was at school, and returned in the evening at 6 p.m. to find her crying. On inquiring the minor confided in her what “**baba Kamande**”, the appellant herein had done to her. **PW3** examined the minor and observed her genitals were swollen. She reported to her father in law, whose daughter is married to the appellant and also to the police station at Kirwara Police Station. The child was taken to hospital for treatment.

13. **PW5**, P.C. Lydia Rutere was the police officer to whom the report of defilement was made on 2nd December 2004 at Kirwara Police Station, while **PW4**, P.C. Patrick Rutere made the arrest when the appellant came to the police station accompanied by his father on 9th December 2012, to inquire about the incident.

14. The appellant in his testimony without oath and without calling any witnesses, told the court that he was implicated in this offence by **PW2** and **PW3** because of impending family dispute, between himself and his wife, which had occurred on 30th December 2004. According to the appellant the dispute stems from a debt his mother had incurred at his shop and for which he intended to sue her.

15. In my analysis of the evidence on record I find that this is a straight forward case in which the complainant, an intelligent 5 year old child as assessed by the learned trial magistrate following **voire dire** examination, narrated in detail what happened to her. She then went ahead to identify the appellant, a man whom she referred to in court as “**Baba Kamande**” as the person who sexually assaulted her and warned her not to tell anyone.

16. The learned trial magistrate made the following observation in her analysing of **PW2**:

“PW2 identifies the accused as the person who defiled her after inviting her to his kiosk with a cake and sweet. She also described where he defiled her inside the shop on a timber stand. She describes the pain she felt. This is evidence of an intelligent child who understands what she is saying.....the evidence by this child could not have been tutored to her. She is a five year old child and I doubt she can memorize so much detail”

17. I am persuaded by the submissions of the learned State Counsel Miss. Maina, that from the evidence the complainant had no reason to implicate the appellant in this offence. I note that the five year old minor withstood cross examination beautifully and maintained what she had said in her evidence in chief. The minor’s evidence that she was sexually assaulted by the appellant was fortified by the testimony of her mother, who said that the minor made a report as soon as she arrived home, and upon checking her she found that her genitals were swollen.

18. The appellant on the other hand did not raise the issue of being implicated by either **PW2** or **PW3** during cross-examination. It therefore comes as an afterthought intended only to exonerate him from the offence.

19. The appellant submitted that the evidence of **PW1** and **PW2** was contradictory, inconsistent and insufficient to sustain a conviction. He submitted that the testimony of **PW1** stating that **PW2**’s hymen being intact was inconsistent with **PW2**’s testimony that the appellant knew her carnally. The testimony of **PW1**, **PW2** and **PW3** are in agreement that there was some manipulation of the minor’s genitals by the appellant. It must be however for the reason that the hymen was not breached that **PW1** formed an opinion of attempted defilement, and the trial court also made a finding of defilement as opposed to the actual defilement. There is therefore no inconsistency or contradiction in the evidence of the complainant.

20. As to the language employed by the court during the trial, the record shows that trial court conducted the proceedings in a language in which the appellant understood. The record states as follows:-

“The substance of the charge and every element thereof has been stated by the court to the accused person in the language that he understands, who being asked whether he admits or denies the truth of the charge, replied Main count: “Not guilty” Alternative count: “Not guilty”

21. Secondly the appellant was represented by counsel who would have called this to the attention of the court if the appellant had trouble following proceedings on account of language difficulties. The record also contains extensive cross-examination of witnesses which could only have been possible if the appellant was following proceedings and sought to advance a contrary view to what was being stated.

22. Finally whether the sentence was manifestly harsh and excessive and contrary to what is provided under **Section 145 (1)** of the **Penal Code**, the record shows that the appellant was charged under **Section 145(1)** of the **Penal Code**. This was before the **Sexual Offences Act No. 3 of 2006** came into being, and repealed **Section 145(1)** of the **Penal Code**. Paragraph 3 of the first schedule of the **Sexual Offences Act** allows the court to proceed to conclusion with matters commenced under any written law which is thereafter repealed.

23. Since the appellant was charged and tried under **Section 145(1)** of the **Penal Code** which was later repealed, the conviction should have been in accordance with the same law under which he was charged and tried. For the reason that attempted defilement was an offence which existed in the **Penal Code** and that the **Sexual Offences Act** had not come into being at the time of committing the offence herein, the appellant should have been convicted under **Section 145(2)** of the **Penal Code**, which provided for a sentence of up to 5 years imprisonment upon conviction if the victim was a girl aged below 14 years.

24. The upshot is that this appeal has no merit in regard to the conviction, and the conviction is therefore upheld. The sentence as imposed by the trial court, is however set aside and substituted with a sentence of 5 years in accordance with the provisions of **Section 145(2)** of the **Penal Code**. The sentence will run from the date when the appellant was sentenced by the trial court.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **29th** day of **November 2012**.

L. A. ACHODE

JUDGE