



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 37 of 2007

RAPHAEL KAVOI KIILU :::APPELLANT

VERSUS

REPUBLIC :::RESPONDENT

(Being an Appeal from the sentence and conviction in Senior Resident Magistrate's Court Criminal Case No. 1585 of 2006 by R.A Oganyo, SRM on 19.2.2007).

JUDGEMENT

1. The Appellant, Raphael Kavoi Kiilu was a 55 year old man when he was arraigned before the Kajiado SRM's Court on 12.10.2006 to face the charge of "defilement of a child aged eleven years or less contrary to section 8(2) of the Sexual offences Act 2006". It was alleged that "on the 23rd day of September 2006 at [particulars withheld pursuant to section 76 (5) of the Children Act, 2001], had carnal knowledge of M. M., a girl of the age of 3 1/2 years." The Appellant denied the offence and at his trial the evidence tendered evidence was as follows:-

2. PW1, John Oloo Oguti, a clinical officer at Loitokitok Hospital recalled that on 24.9.2006 he examined the victim of the alleged defilement having first seen her the previous night at 8pm. He found that she had an offensive discharge in her genitalia with blood oozing therefrom. The child was in pain and was also in tears. She had scratch marks on the neck and in her pubic region she had dried seminal fluid. He entertained the opinion of defilement. He went on to find that her labia was inflamed and the hymen broken. After a vaginal swab was taken and examined, she was found to have been infected with gonorrhoea. PW1 filled the P3 form (P, Exhibit 1) on 24.9.2006 after treating the child.

3. On 9/10/2006, PW1 examined the Appellant and his underpant was smelly with discharge spots. His penis had ulcers on the glans and the penis also had a discharge. On squeezing the penis, pus oozed out and upon a swab being taken and examined, he was found to have been infected with gonorrhoea. A P3 form was filled and produced as P. exhibit 2.

4. PW2, M. M., a 3 1/2 year old child gave unsworn evidence as the learned trial magistrate found that she was a child of tender years. Her evidence was that on 23.9.2006 she was playing with her siblings when the Appellant whom she knew as "Kiilu" called her to his house and placed her on his bed. That he removed her pant and inserted the "thing he uses to urinate" into where she uses to urinate which she called "anus" and she felt a lot of pain. She did not cry as the Appellant threatened her. After he did what he did, the Appellant walked out and she also went out. Later she told her mother what had happened and she was taken to hospital.

5. PW3, M. M., mother of PW2 recalled that the Appellant was her neighbour on or about 22.9.2006 and that on the material date, she left home to go and perform casual work and returned at about 3pm. She found PW2 sitting outside and shortly told her that her ribs were aching and PW3 gave her malarial tablets thinking that "change of weather" had affected her. As she cooked, the child returned and told her that the place she uses to urinate was paining and then explained that Kiilu had called her to his house and put "his thing" into her and when PW3 checked the children's private parts she found that it had pus and blood. She screamed and "People" came. Some of them later took the accused to the Police Station while PW2 was taken to hospital.

6. PW4, PC Richard Malel received the accused at Loitokitok Police Station after he was brought there by members of the public and Administration police on allegations that he had raped a child. Shortly after re-arresting him, PW2 was brought to the station and was issued with a P3 form. The next day she was examined. After recording witness statements, PW4 charged the Appellant with the offence of defilement.

7. PW5, APC Muisya Mwekei was the one to whom the initial report was made and he was the one who arranged for the accused person to be taken to Loitokitok Police Station and the child to hospital.

8. In his defence, the Appellant stated that on the material date he had been engaged in his daily chores upto 3.30p.m when he returned home and while cutting vegetables, PW2's father came and after exchanging pleasantries, he left and after a while the Appellant also left and returned at 6pm and went to pick firewood. PW3 then came and asked about her husband and when the Appellant told her that he last saw him at 4pm, she left. She returned at 7pm and demanded to search the house and threatened to burn it. As they exchanged words, one Titus Nzioka came and asked for his faulty radio. He gave it to him and then two Tanzanias walked in with weapons and got hold of him and tied him with ropes and started beating him. He was taken to the local AP Camp and that is where he was told that he had raped a 3 year old child. Later he was taken to the Police Station at Loitokitok.

9. DW1, Titus Nzioka did not know anything about the charges facing the Appellant and gave no useful information. The other witness for the accused declined to testify as per the trial court's record.

10. The learned trial magistrate in a short judgment found that the offence had been proved beyond reasonable doubt and convicted him. A sentence of life in prison was then meted out.

11. This court is obligated to analyse the evidence above afresh and evaluate it and reach its own decision – see **Achira vs Republic [2003] KLR 707 at 710**. In doing so I have taken into account the submissions by the Appellant and learned Principal State Counsel, Mr. O'mirera.

12. Firstly, from the evidence of PW1, the minor, PW2 was indeed defiled and infected with an STD namely gonorrhoea. The Appellant denied any contact with the children but admitted that he saw her father and had an altercation with her mother on the material day. In his submissions, he stated that he was framed-up and that he was innocent of the charge of defilement. The evidence however points to the fact that the child, PW2 was able to narrate to the court exactly what happened and it was that the Appellant called her into his house, removed her pant, threatened her and proceeded to defile her. PW3 received the information from PW2 and having sought help from people who reacted to her screams of shock, arranged to apprehend the Appellant.

13. Secondly, the evidence of PW2 that she was indeed defiled by the Appellant whom she knew as "**Kiilu**" was properly corroborated by PW3 who saw the pus and blood in her pubic area. PW1 later the same night examined her and the next day treated her and found the same evidence as did PW3.

14. Thirdly, the evidence of gonorrhoea infection in both PW2 and the Appellant is a clear indicator that the two had sexual contact and the defilement of the minor by the Appellant is thus properly proved.

15. On the defence tendered, sadly the same was a windy, irrelevant exposé of what the Appellant did on the material day and he never laid a basis for it in cross-examination. In fact in cross-examination, the Appellant tended to infer that he was drunk or not sober on the material day and it is unclear what he was trying to achieve. The defence in any event is of no use to the Appellant in view of the overwhelming evidence against him and I dismiss it as it is a loose straw and afterthought.

16. Having so said I find that the conviction was based on sound evidence and the offence was proved beyond reasonable doubt.

17. As to sentence, it was proper. The Appellant, aged 55 years, defiled a child who was 3½ years old. He infected her with an STD and has probably ruined her life forever. He deserves no mercy and is best kept away from society and the life sentence is proper for the life that he has ruined. I see no reason to interfere with the sentence.

18. The Appeal is dismissed.

19. Orders accordingly

Dated and delivered at Machakos this **14th** day of **October 2008**.

Isaac Lenaola

Judge

In the presence of: Mr. Wang'ondur for Republic

Appellant in person

Isaac Lenaola

Judge