



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 19 OF 2020

DUNCAN KIRIMI KIMAITA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Conviction and Sentence in Nanyuki

CM Sexual Offence Case No 88 of 2018 – N. Thuku, PM)

J U D G M E N T

1. The Appellant in this appeal, **DUNCAN KIRIMI KIMAITA**, was convicted after trial as follows –

- (i) In count I of *defilement of a child* contrary to **section 8(1) & (2)** of the *Sexual Offences Act, No 3 of 2006*.
- (ii) In count II of *committing an indecent act with a child* contrary to **section 11 (1)** of the same Act.

On 18/02/2020 he was sentenced to life imprisonment in count I and to ten (10) years imprisonment in count II. He has appealed against both conviction and sentence.

2. The convictions are challenged upon the following main grounds as can be seen in the petition of appeal dated and filed on 25/02/2020 -

- (i) That the charge in count II was duplex to that in count I.
- (ii) That penetration was not proved beyond reasonable doubt.
- (iii) That the Appellant was not positively identified as the perpetrator of the crimes.
- (iv) That the evidence tendered by the prosecution was inconsistent, contradictory and inadequate.
- (v) That the trial court ignored the Appellant's defence.
- (vi) That the charges were in any case not proved beyond reasonable doubt.

3. As for the sentences, the complaint is that the trial court did not consider the Appellant's mitigation, resulting in sentences that were manifestly harsh and excessive.

4. Learned counsels **Mwangi Kariuki** and **Chwea** represented the Appellant. Mr. Chwea had also defended the Appellant at his trial. I have considered their able submissions.

5. Learned **Senior Principal Prosecution Counsel, Jackson Motende**, for the Respondent, did not support the convictions.

6. I have read through the record of the trial court in order to evaluate the evidence placed before it and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact.

7. I will deal first with the complaint of **duplicity** of the charges. The particulars of the offence in count I are that –

“On the 5th day of December, 2018 in Laikipia East Sub-county within Laikipia County, intentionally and unlawfully, (the accused) caused his penis to penetrate the vagina of one LMM, a girl aged 7 years.”

The particulars of the charge in count II are that on the same date and at the same place, the accused, intentionally and unlawfully, committed an indecent act with the same child by touching her vagina with his penis.

8. It is apparent that the offence charged in count II was committed in the process of commission of the offence in count I. In other words, the offence in count I could not have been committed without the penis of the perpetrator first touching the vagina of the complainant! Thus, the offence charged in count II was duplex to the offence charged in count I and should have been charged as an alternative charge, not as a substantive second count.

9. The Appellant was thus gravely prejudiced by this duplicity, notwithstanding that he was defended. An accused person is entitled to clarity as to exactly what charge or charges he faces in order to properly mount his defence, and duplicity certainly compromises clarity, and will usually vitiate the trial.

10. Mr. Chwea also pointed out that the offence under section 8 of the Sexual Offences Act is defilement of a **child**, not girl or boy, and should be so stated in the statement of the offence. That may be so, but in the present case, it was made clear in the particulars of the offence in count I that the victim was a girl child aged 7 years; the Appellant thus could not have been in any doubt that he was charged with defilement of a child (a girl child) aged 7 years. But I have already held that the charge was bad in law for duplicity.

11. The complaint regarding **identification** also has merit. Although the complainant, who did not testify under oath, had initially stated that she had known the Appellant before, she later stated that she knew him that day. It was obvious from the testimony of her mother (PW2) that it was she (the mother) who upon questioning her, decided that the perpetrator of the crime was the Appellant. The mother then assumed the position of the complainant; it was she (and not the complainant) who actually identified the Appellant as the perpetrator. As she (the mother) was not a witness to the crime, the complainant's identification of the Appellant ought therefore to have been tested in a properly conducted identification parade.

12. Further doubt was fomented by the fact that at least two other crucial witnesses who ought to have been called to testify were not called. These were the complainant's father (to whom, according to the testimony of PW2, she had gone to get a cake). The complainant herself stated that she was called and pulled by the perpetrator from just outside a kitchen where her father worked. So, did the father see the Appellant about? Did he see his daughter with or near the Appellant?

13. The other witness was the lady who allegedly heard the complainant screaming as she was defiled; she allegedly asked what was going on and was answered by the perpetrator. This would have been a very important witness. No reason was given for not calling her.

14. In these circumstances, the Appellant's alibi defence was entirely plausible and was not disproved by the prosecution. He testified to that alibi on oath and called one witness.

15. As for **penetration**, there was indeed proof beyond reasonable doubt that the complainant was defiled. First, there was her own testimony and that of her mother. She was also medically examined just a few hours after the defilement. Her clothing was wet and soiled with both water and what appeared to be blood. She had some injuries around her privates and her hymen was freshly broken. Although a high vaginal swab did not reveal the presence of spermatozoa, there was nevertheless a whitish discharge which the clinical officer (PW3) stated could have been semen.

16. The complainant also had a sexually transmitted infection; but then the Appellant himself appears to have been examined and he did not have such an infection, further adding to the doubt that he was the perpetrator of the crime.

17. Upon my own evaluation of the evidence, the Appellant's convictions are entirely unsafe as he was not positively identified as the perpetrator. They could not be allowed to stand even if there was no duplicity in the charge. Learned prosecution counsel properly conceded the appeal.

18. In conclusion therefore, the Appellant's appeal is allowed in its entirety. The convictions are hereby quashed and the sentences set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 14TH DAY OF APRIL 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 15TH DAY OF APRIL 2021