



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.51 OF 2019

JOHN KARANJA GATHOGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence of E. S. Soita, Resident Magistrate delivered on 23rd July, 2019 in Criminal Case Number 92 of 2018 at Chief Magistrate Court, Molo)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 30th July 2018 at [particulars withheld] area in Molo Sub County within Nakuru County accused intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of **M.W.W** a girl aged 7 years old.

2. The Appellant was also charged with an alternative charge of **committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars are that, on 30th July 2018 at [particulars withheld] area in Molo Sub County within Nakuru County accused intentionally and unlawfully did cause his genital organ namely penis to come into contact with the genital organ namely vagina of **M.W.W** a girl aged 7 years old.

3. The Appellant denied the main and the alternative charge. The case proceeded for hearing with the prosecution calling 5 witnesses in support of their case while the appellant gave sworn defence and called one witnesses. By the judgment delivered on 23rd July 2019, the trial magistrate convicted the appellant of the main charge of defilement and sentenced him to life imprisonment.

4. The appellant being aggrieved and dissatisfied with the conviction and sentence, filed this appeal challenging the conviction and sentence on 7 grounds: -

- i. That the learned trial magistrate erred in law and in fact in convicting the appellant whereas the appellant's constitutional rights under **article 50 (2) of the constitution** were flouted and violated.*
- ii. That the learned trial magistrate erred in law and in fact in failing to appreciate that the prosecution had failed to prove essential ingredients of defilement namely age and defilement thus unsafe and illegal.*
- iii. That the learned trial magistrate erred in law and in fact in failing to appreciate that critical witnesses were never called by the prosecution thus remains unproved.*
- iv. That the learned trial magistrate erred in law and in fact in convicting the appellant on inconsistent and contradicting evidence.*
- v. That the learned trial magistrate erred in law and in fact by applying wrong principles thus arrived at erroneous conclusion.*
- vi. That the learned trial magistrate erred in law and fact in failing to take into account and consider, or give reasons why the appellant defence was disregarded.*

APPELLANT'S SUBMISSIONS

5. The appellant submitted that this matter arose from family dispute over ancestral land which made him decide to leave home for Nyandarua and be self-dependent. He said he later came back to Nakuru County where the offence herein is alleged to have been committed. He denied having committed the offence and stated that the investigating officer believed what he was told without investigating. He further

stated that PW2 said he escorted the complainant after the incident and if it is true that he was defiled, being a child aged 9 years, he could not have been able to walk to school; further that PW2 said he did not see anything unusual on the complainant and even though the doctor said the child's pant was smelling, he did not say what it was smelling and her clothes were not produced in court.

RESPONDENT'S SUBMISSIONS

6. The state counsel submitted that the complainant was 7 years old at the time of the alleged offence. That the accused was the complainant's uncle and there was therefore no issue with identification.
7. In respect to penetration, PW4 observed freshly torn hymen and vaginal bruises which was prove of penetration; further that lab test confirmed foully discharge on the complainant.
8. On grudge, she submitted that the accused never tendered evidence while cross examining the complainant. She concluded that the ground of appeal is an afterthought and it should be dismissed.

ANALYSIS AND DETERMINATION

This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first appellate court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

9. In view of the above, I have perused and considered evidence adduced before the trial court. I have also considered submissions filed. For offence of defilement 3 ingredients have to be proved beyond reasonable doubt. The ingredients are age, penetration and identification. Identification is not an issue here as the appellant confirmed that the complainant was her niece. No doubt was raised on the child's age. The appellant and his wife DW2 in cross examination confirmed that the minor was 7 years old. The doctor's report confirmed that the girl was defiled; from the doctor's evidence, the complainant's hymen was freshly torn and she had foully discharge.
10. The question that arise is whether there was sufficient proof that it is the appellant who defiled the minor. In his defence, the appellant said he slept with his wife on the material night and he was framed up in the charge herein due to family conflict. DW2 who is the appellant's wife testified that on 30th July 2018, the complainant slept at their home that night. She said her husband, the accused slept with her and that he never left the house that night. In cross examination, DW2 said the complainant slept on the seat as their house was a single room; she said she would have noticed if the appellant left the bed.
11. Appellant in his defence said that if he left the bed that night one would have been heard as the house is single room. Evidence adduced by prosecution and defence confirm that the complainant slept in the appellant's house on the material night. In her testimony the complainant confirmed that the appellant's wife was in the house that night but she stated that the appellant slept in the seat while the wife slept in a bed in a portion of the room separated by a curtain. She said appellant woke him up and took her outside and had carnal knowledge of her outside.
12. From record, it is the appellant's wife who called the complainant's mother informing her that the child was not able to go to school as she was injured on her knees and was in a lot of pain. This was the morning after the incident. There is no male of any other person in the house that night apart from appellant and his wife. From evidence of the child her mother and the doctor, the child was defiled. From record, it is clear that the child knew what she said in Court and her evidence was corroborated by the doctor's evidence, DW1'S evidence and her mother's evidence. There is therefore no doubt that it is the appellant who defiled the complainant. The charges are not framed up as he alleged.
13. In respect to sentence imposed, I note that the trial magistrate did not take into consideration the Supreme Court's determination on mandatory sentence in **Muruatetu's** case. She imposed the mandatory death sentence. In view of the fact that the Supreme Court declared mandatory nature of sentence unconstitutional, I will look at the mitigating factors, circumstance surrounding the offence and the age of the child and considering appropriate sentence to impose. The appellant in mitigation stated that he was undertaking a course and also had a wife and a child. Having considered the above, I find it fair and just to reduce the appellant's sentence to 15 years' imprisonment.

14. FINAL ORDERS

1. Appeal on conviction is hereby dismissed.
2. Appeal on sentence is allowed.
3. Sentence is reduced to 15 years' imprisonment.

Judgment dated, signed and delivered via zoom at Nakuru This 9th day of July, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Appellant in person

Rita for State