



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 1 OF 2016

BETWEEN

JAMES NJOROGE KAMAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Murang'a Cr. case No. 12 of 2015 delivered by Hon. Masiga J. J. (RM) on 8<sup>th</sup> March, 2016).*

JUDGMENT

#### **Background**

1. The Appellant, **James Njoroge Kamau**, in count 1 faced a charge of defilement contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars thereof were that on the 5<sup>th</sup> day of April, 2015 within Murang'a County, intentionally caused his penis to penetrate the vagina of **RN**, a child aged thirteen (13) years old.
2. In count II he was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars thereof were that on the 5<sup>th</sup> day of April, 2015 within Murang'a County, intentionally touched the vagina of **RN**, a child aged thirteen (13) years with his penis.
3. He pleaded not guilty to both charges. Upon trial, he was convicted of count 1 and sentenced to serve twenty (20) years imprisonment. Aggrieved by both his conviction and sentence, he preferred the instant appeal.

#### **Grounds of Appeal**

4. The Appellant raised the following grounds of appeal in his undated Petition of Appeal:
  - a. *That the learned trial magistrate erred in both law and fact by imposing such a harsh sentence on him.*
  - b. *That the learned trial magistrate erred in both law and fact when he did not consider the status of the complainant who had unsound mind.*
  - c. *That the learned trial magistrate erred in law and fact in relying on the child's uncorroborated testimony.*
  - d. *That his defence was not considered.*
  - e. *That the learned trial magistrate erred in both law and fact because he was not paraded for identification by the complainant.*

#### **Summary of Evidence**

5. I am minded that this is the first appellate court whose duty is to re-evaluate the evidence and make independent conclusions. See: **Okeno v Republic (1972) EA,32** and **Kiilu & Another v Republic (2005)1 KLR, 174**. I thus summarize the evidence adduced as follows,
6. On the morning of 5<sup>th</sup> April, 2015, the Appellant and his roommate **PW3, Fredick Githendu Ndungu** who was also the caretaker of an incomplete storey building at [particulars withheld] where they lived, woke up and went to Mukuyu market. While at Mukuyu, PW3 was

called to go home. The Appellant told him that he would go back to their house.

7. At about 2.00 pm, **PW2, ANN** received information that her thirteen-year old mentally challenged daughter, one **RN**, the complainant herein, had been defiled and was seen at [particulars withheld] near Fortune Green Hotel. PW2 went there and found the complainant bleeding and crying. The complainant told her that she had been defiled in a building nearby by the Appellant who was wearing a white shirt. The Appellant had lured her into the house by promising to give her Kshs. 100/=. They went into the said house and found a white shirt in a bucket. Thereafter, PW2 went with the complainant to the police station to report the incident.

8. The investigating officer, **PW5, Corporal Mwanabili** of Murang'a Police Station was in the office at about 16.30 pm when PW2 booked the report of the complainant's defilement. Since the complainant was bleeding, PW5 rushed her to Murang'a District Hospital. On physical examination, the complainant was found to have hyperemic inflammation of the eye. She also had bruises on the lower limb, neck and on both arms. On genital examination, she had vaginal bleeding. Fresh blood was noted on the vulva. She had a vaginal tear and her hymen was freshly broken. A high vaginal swab revealed the presence of red blood cells, yeast cells and spermatozoa. Urinalysis test also revealed blood and yeast cells. Pregnancy and HIV tests were negative. The conclusion made was that there was evidence of penetration. The complainant was put on treatment and admitted in hospital. She also had to undergo counselling.

9. The following morning on Monday 6<sup>th</sup> April, 2015, PW3 who had returned to the house that he shared with the Appellant the previous evening, saw some shoes behind their house. He asked the Appellant whom they belonged to and the Appellant told him that he did not know so PW3 did not bother much.

10. On the same day, the complainant's intermediary in this case, **PW1, Jenepher Wanjiku Gichare** was informed by one of the teachers from the special unit class where the complainant had been enrolled, that she had been admitted in ward 4 at Murang'a General Hospital. PW1 went to the hospital and found the complainant and PW2. The complainant told her that a man she identified with a storey building had done bad manners to her.

11. Come Wednesday, the Appellant's roommate PW3 went to Mukuyu Market and a lady told him that the complainant had been defiled in their house on Sunday. PW3 went to PW2 to find out more about the issue but PW2 told him that the complainant knew the person who had defiled her and that the incident had already been reported to the police. That evening PW1 accompanied PW5, the area chief and a community worker to the house where the complainant had allegedly been defiled. They found the complainant's shoes still in the compound. They arrested both the Appellant and PW3 and escorted them to the police station.

12. The following morning, PW1 went and picked the complainant from Kenol Children's Home, where she had been taken upon being discharged from hospital and went with her to the police station so she could identify the perpetrator. The complainant identified the Appellant herein in an identification parade conducted at the police station by touching him. She told them that he was the one who had called her to the house and defiled her then promised to give her Kshs. 100/=.

13. During trial, **PW4, Linus Muturi Kaburu**, a Children's Officer in charge of Murang'a District Hospital produced the complainant's treatment card and P3 form. The P3 Form had been filled and signed on 9<sup>th</sup> April, 2015 by PW4's colleague Mr. Mwangi who had by then gone back to school.

14. On the other hand, PW5 produced a school register of Mbiri Primary School indicating that the complainant was not in school on the said date; an assessment report showing that she was attending a school for the mentally challenged, a letter from the children office, discharge summary and birth certificate showing that she was born on 22<sup>nd</sup> July, 2020, as well as the dress and panty that the complainant was wearing on the day of the incident.

15. The Appellant gave an unsworn statement. He denied being in Murang'a on the day that the offence is alleged to have been committed by him. He stated that on the said day, he was in Kangema.

#### ***Analysis and determination***

16. The Appeal was canvassed through both written and oral submissions. The Appellant filed his written submissions on 31<sup>st</sup> August 2020 and personally orally highlighted them. The Respondent on the other hand was represented by the learned State Counsel, Ms. Gichuru who tendered oral submissions. After considering the evidence on record and the parties' respective rival submissions, I find that the only issue for determination is whether the prosecution proved its case beyond a reasonable doubt.

17. **Section 8(1)** of the **Sexual Offences Act** provides as follows regarding the offence of defilement:

***“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”***

18. In determining this offence, the court is enjoined to establish three elements namely: the age of the complainant, penetration and the identification of the Appellant.

19. As regards whether the age of the complainant, PW5 produced a Birth certificate in evidence showing that the complainant was born on 22<sup>nd</sup> July, 2000. This proves that she was fourteen years old as at 5<sup>th</sup> April, 2015 when the offence was committed.

20. As regards penetration, PW2 and PW5's testimonies were well corroborated by the medical evidence tendered by PW4. PW2 stated that upon being informed that the complainant had been defiled, she went to [particulars withheld] and found her bleeding and crying. The complainant told her that she had been defiled in a nearby building. PW2 went with her to Muranga Police Station to report the incident.

PW5 escorted her to Muranga District Hospital for examination and treatment since she was still bleeding. On genital examination at the hospital, the complainant had vaginal bleeding. Fresh blood was noted on the vulva. She had a vaginal tear and her hymen was freshly broken. A high vaginal swab revealed the presence of red blood cells, yeast cells and spermatozoa. The conclusion made was that there was evidence of penetration. It is therefore not in doubt that the complainant's vagina was indeed penetrated.

21. This brings us to the third issue which is whether the Appellant is the one who caused the penetration. On this the Appellant questioned how the complainant who was said to have been suffering from a mental illness and thus not able to testify in court, was able to identify him in an identification parade as alleged. He questioned why the prosecution failed to produce the identification parade forms in evidence to prove the same, if at all. Further, the Appellant questioned why the white cloth found in a bucket in the house where the complainant was defiled was not tendered in evidence to prove that it was the one that the complainant had been referring to and that it indeed belonged to him. It was also his contention that the shoes found in the compound where he lived was not enough proof that he committed the offence since there were many other people in the compound. It was further his contention that the fact that the complainant tested negative for HIV proved that he did not defile her because he has been HIV positive since December, 2003.

22. In rebuttal, Ms. Gichuru submitted that the intermediary's evidence in this regard was well corroborated by the evidence of other prosecution witnesses.

23. It suffices to state that a report on the complainant's state of mind filed in the trial court on 15<sup>th</sup> September, 2015 disclosed that the complainant suffers a serious mental disability. As a consequence, the trial magistrate declared her a vulnerable witness under **Section 31(1) of the Sexual Offences Act** and appointed the complainant's head teacher, **PW1 Janepher Wanjiku Gichare**, to be her intermediary and testify on her behalf. Notably however, under **Section 31(10) of the Sexual Offences Act**, a court shall not convict an accused person charged with an offence under the Act solely on the uncorroborated evidence of an intermediary.

24. PW1 testified that she accompanied the police and the area chief to the house where the complainant was allegedly defiled and arrested two men, one of whom was the Appellant herein. It was also PW2's testimony that the complainant identified the Appellant in an identification parade conducted at the police station. This evidence was corroborated by PW3 who was arrested and paraded with the Appellant as well as PW4 who stated that the complainant identified the Appellant and told them that he was the one who had called her to the house and defiled her then promised to give her Kshs. 100/=.

25. Further, PW1's evidence that the complainant always pointed at the Appellant as her assailant whenever they attended court for the mention of this case was also well corroborated by the complainant's mother PW2. In addition, PW1's evidence that they found the complainant's shoes in the compound where the Appellant stayed was corroborated by PW3 who stated that he indeed saw the shoes and enquired from the Appellant whom they belonged to but he feigned ignorance.

26. In the circumstances, I find that the Appellant was positively identified as the person who penetrated the complainant's vagina. His allegation that the fact that the complainant was found to be HIV negative exonerates him since he has been HIV positive since 2003 is a mere afterthought which cannot be entertained by this court in light of the cogent and corroborative evidence tendered by the prosecution.

27. The Appellant also argued that it was possible that PW3 committed the offence then arranged with PW1 and PW2 to fix him with the offence since he was a stranger in that area. I find this argument to be baseless and unmerited because there was no evidence of any grudge between the Appellant and any of the said witnesses.

28. Further, the Appellant questioned why the prosecution did not call the following people as witnesses: the motorcycle rider who informed PW2 about the incident; the neighbours that told PW2 that they had seen the complainant earlier; the teacher who informed PW1 that the complainant had been admitted in hospital; the chief who accompanied PW1 and the police to the building where the complainant was defiled; and the lady who informed PW3 that the complainant had been defiled in their house. In his view, this showed that there was a vendetta between PW1, PW2 and PW3 to frame him with an offence that they did not know who committed.

29. It is well settled that the prosecution reserves the right to decide the number and type of witnesses to call in order to prove a fact. (See **Sahali Omar vs. Republic [2017] eKLR** and **Keter v Republic [2007] 1 EA 135**). Indeed, it is my view that the five witnesses called by the prosecution in this case sufficiently proved that the Appellant defiled the complainant.

30. The Appellant also submitted that the prosecution's evidence was full of contradictions. He complained that PW1's statement that PW2 took the complainant to the hospital where she was treated and discharged contradicted the evidence that the complainant was admitted for four days. He contended that PW1's testimony that she was the one who reported the matter to the police contradicted PW2's testimony that she reported the incident to the police after finding her daughter. He also pointed out that PW2's statement that the complainant was admitted for three days contradicted PW5's evidence that she was admitted for four days. In my view, the said inconsistencies were not material to the main issues in question. Further, the evidence led by the prosecution was largely consistent and cogent. This ground therefore fails.

31. Finally, the Appellant faulted the trial court for failing to consider his defence that he was not in Murang'a on the date of the incident. From the record, it is clear that this was an alibi raised by the Appellant as an afterthought which in any case did not weaken the strong evidence tendered against him. Accordingly, this ground lacks merit and also fails.

32. In totality therefore, I am satisfied that the prosecution proved beyond all reasonable doubt that the Appellant defiled the complainant. His conviction was therefore safe and I have no reason to interfere with it.

33. As regards the sentence, whereas I am aware that the Supreme Court decision of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** declared mandatory minimum sentences unconstitutional, nothing stops a court from imposing such sentence so long as it is backed by the circumstances of the case. The offence herein was aggravated by the fact that the complainant was a mentally challenged child. The defilement was also done in such a vicious manner that left the child bleeding. It is clear that the Appellant took advantage of the

Complainant's mental incapacitation in the hope that the heinous act would not be discovered. Fortunately, it was just but a matter of time before fate caught up with him. In the circumstances, I find no reason to interfere with the sentence meted out by the trial court.

**34.** In the end, the appeal lacks merit and is dismissed in its entirety. Accordingly, the Appellant's conviction and sentence are upheld accordingly. It is so ordered.

**DATED AT MURANG'A THIS 3<sup>RD</sup> DAY OF DECEMBER 2020.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Appellant in person.*
2. *Mr. Waweru for the Respondent.*