



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 85 OF 2013**

**KAHINDI KARISA KERAGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

*(Being an appeal from the original conviction and sentence in Criminal case Number 3455 of 2011 in the Chief Magistrate's court at Mombasa – Hon. G. O. Kimanga (RM))*

**JUDGMENT**

1. **Kahindi Karisa Keragu**, the appellant herein, was charged with the offence of defilement contrary to Section 8(2) of the Sexual Offences Act No. 7 of 2006. The particulars of the charge were that on 6<sup>th</sup> November 2011 at [Particulars Withheld] Areas of Bamburi Location within Coast Province unlawfully and intentionally cause his penis to penetrate the anus of **TD** (*particulars withheld*) a girl aged 9 years.

2. The appellant also faced the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He pleaded not guilty, to both the main count and the alternative charge and a trial was conducted in which the prosecution presented the evidence of a total of 4 witnesses and at the close of the case, the court found that the prosecution had proved its case, against the appellant, beyond reasonable doubt whereupon the appellant was convicted and sentenced to life imprisonment. The appellant thereafter appealed against both the conviction and sentence through a petition of appeal in which he faulted the trial court for failing to note that the prosecution witnesses presented contradictory evidence and that the case was not proved to the required standards.

3. At the hearing of the appeal, the appellant submitted that some of the key witnesses mentioned by the prosecution did not testify so as to clear the air on what had actually transpired. For this argument the appellant cited the decision in the case of **John Kenga Vs. Republic Criminal Appeal No. 118 of 1984** wherein the Court of Appeal, in overturning a conviction, held:

*“We acquit the appellant in this case due to the fact that some of the mentioned witnesses were not summoned during the trial to clear doubt of her arrest especially those who arrested him.”*

4. The appellant further submitted that PW1 and PW2 gave unreliable, contradictory and unsatisfactory evidence thereby casting doubt on their credibility and integrity. The appellant relied in the decision in the case of **Ndungu Kimani vs Republic [1979] 282** wherein it was held:

*“We lay down the minimum standard as follows: The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not straight forward person and raise suspicion about his trust worthiness or do or say something which should indicate to court that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.”*

5. The appellant further submitted that the medical evidence was insufficient to support a conviction as it was not possible for a child who had been defiled to walk for a long distance without any pains. For this argument the appellant cited the decision in the case of **John Cardon Wagner vs Republic [2010] eKLR**. The appellant further argued that he raised a strong defence against the charges leveled against him and there was no cogent evidence to link him to the offence of defilement.

6. On his part, Mr. Alekha, learned counsel for the state submitted that there is no legal requirement on the number of witnesses that the prosecution must call in order to establish its case. For this argument, counsel relied on the provisions of Section 143 of the Evidence Act which provides that:

*No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.*

7. Counsel also relied on the decision in the case of **Keter vs Republic [2007] e KLR** wherein the court held:

***“The prosecution is not obliged to call superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”***

8. Counsel further submitted that there was sufficient oral and documentary evidence to prove that the complainant had been defiled which evidence was not rebutted by the appellant.

9. As a first appellate court, this court is under a duty to re-consider and reanalyze the evidence tendered before the lower court afresh with a view to arriving at my own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. This principle requires me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court’s findings. ***See Okeno v Republic [1973] E.A. 32; Pandya vs. R. (1957) EA 336, Ruwala vs. R. (1957) EA 570.***

10. I have considered the instant appeal and the submissions of the appellant and counsel for the state. The main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt.

11. A summary of the prosecution’s case was that on 6<sup>th</sup> November 2011 at about 3pm, PW1, the complainant herein, then a class 4 pupil, was playing outside their home when the appellant lured her and led her into a building that was still under construction where he sodomized her. She reported the incident to her mother who then escorted her to hospital.

12. PW2, the complainant’s mother, testified that she was on the material day not at home but that on returning home at about 5pm, PW2, who was in distress, informed her that the appellant had hurt her. She reported the matter to the community policing team who assisted her in arresting the appellant who was identified by the complainant at the time of the said arrest.

13. PW3, Dr. Lawrence Ngone, examined the complainant and filled the P3 form which indicated that the complainant had lacerations on the anal opening.

14. PW4, Sergeant Clemencial Munyako, was the investigating officer. He testified that the age assessment done on the complainant established that she was 9 years old.

15. When placed on his defence, the appellant gave an unsworn testimony and explained that he was arrested outside his house and taken to the police station without being informed of the reason for his arrest.

16. The critical ingredients of the offence of defilement are; the age of the complainant, proof of penetration and the positive identification of the assailant. (See the case of **Dominic Kibet Mwerang Vs Republic (2013) eKLR**).

17. Having regard to the totality of the evidence presented during the trial, I find that all the ingredients of the offence of defilement were proved to the required standards. On the age of the complainant, I note that PW2, the complainant’s mother testified that the complainant was 10 years while PW4 stated that the age assessment of done on the complainant showed that she was 9 years old. I am therefore satisfied that the minority age of the complainant was proved to the required standards despite the slight 1 year variation of the said witnesses on the complainant’s actual age as at the time of the offence.

18. Turning to penetration, I note that the complainant testified as follows:

***“He held me and I started screaming. He held my mouth using his hand. He removed his clothes and did “tabia mbaya” on me at the rear.”***

PW2 on the other hand testified as follows:

***“She said she had been hurt on her rear. I removed her clothes. I saw she had some white substance watery.”***

PW3, the medical doctor testified that:

***“There were lacerations on the anal opening. She had been sodomized on 6<sup>th</sup> November 2011. The injury was harm.”***

19. Having regard to the extract of the testimonies of PW1, PW2 and PW3, I am satisfied that penetration of the complainant was similarly proved to the required standards.

20. On the identification of the appellant as the perpetrator of the offence in question, I note that the offence in question was committed in broad daylight at about 3pm. The complainant testified that the appellant was known to her as she used to see him in the area and she was able to positively identify him as her assailant at the time of his arrest. I also note that the appellant was arrested on the same day of the attack at about 5pm. I am therefore satisfied that the appellant was positively identified by the complainant as her assailant.

21. I have considered the appellant’s testimony when placed on his defence and I note that it was merely an explanation on the circumstances under which he was arrested which explanation did not oust the otherwise watertight evidence pointing towards his guilt.

22. On the appellant's claim that certain witnesses mentioned by the prosecution witnesses were not called to testify, I find that the evidence presented by the prosecution witnesses was sufficient to establish the offence of defilement and that no negative inference can be drawn from the failure by the prosecution to call the witnesses that were mentioned to have assisted in tracing the whereabouts of the appellant. My take is that the failure by the prosecution to call such witnesses was not fatal to their case and does not take away the fact that the complainant was defiled.

23. On sentence, Section 8(2) of the Sexual Offences Act stipulates as follows:

***A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***

24. In this case, the appellant was, upon conviction, sentenced to life imprisonment. I therefore find that the sentence is lawful and indeed, the mandatory sentence prescribed for the offence of defilement of a child below 11 years.

25. I sum, I find that the instant appeal is not merited and I accordingly dismiss it.

**Dated and signed at Nairobi this 11<sup>th</sup> day of March 2019**

**W. A. OKWANY**

**JUDGE**

**Dated, signed and delivered in open court at Mombasa this 8<sup>th</sup> day of April 2019**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Appellant present

Ms Marindah for the Director of Public Prosecution

Mr Oliver Musundi – Court Assistant