



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 88 OF 2016

ANDREW KAHURIA WAKAHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the judgment in S. O. No. 14 of 2015 at Murang'a

by A. K. Mwicigi, Principal Magistrate, on 13th October 2016]

JUDGMENT

1. The appellant was adjudged guilty of *defilement* contrary to section 8 (1) of the **Sexual Offences Act**. He was sentenced to 20 years imprisonment.
2. The offence was committed on 3rd May 2015 at I. village [*particulars withheld*], Murang'a County. The particulars were that he caused his penis to penetrate the vagina of BMW [*particulars withheld*], an imbecile aged 13 years.
3. The appellant has lodged a *petition of appeal*. On 24th July 2018, I granted leave to the appellant to amend the grounds of appeal.
4. There are four *amended grounds* of appeal. Firstly, that the charge was *not* proved beyond reasonable doubt. Secondly, that the trial court *overlooked* the following provisions: section 124 and 125 of the **Evidence Act**; section 208 of the **Criminal Procedure Code**; and, **Article 50 (7)** of the **Constitution**. Thirdly, that the evidence was contradictory or unreliable; and, fourthly, that the appellant's defence was disregarded.
5. At the hearing of this appeal on 21st May 2019, the appellant relied wholly on his home-made submissions filed on 24th July 2018.
6. The appellant highlighted the contradictions between the evidence of PW1 and PW2. PW1 was the first at the scene. She said she saw the appellant and complainant dressing up hurriedly. PW2 who arrived later said she saw them naked.
7. Since the complainant (PW3) testified through an intermediary, the appellant said he was denied an opportunity to cross examine the victim. The appellant further challenges the findings on the complainant's intelligence or the right of the intermediary to appear in on her behalf.
8. The appellant pointed out inconsistencies between the dates in the charge sheet and the evidence of PW4. He also submitted that the charge sheet cited a non-existent section 8 (1) (3). He added that his constitutional rights were violated due to lack of counsel. On that point, he claims he was ill-advised when he failed to offer any defence to the charge.
9. The appeal is contested by the State. Learned State Counsel, Ms. Gichuru, submitted that all the ingredients of the offence were proved to the required standard. She submitted that penetration was proved; that the age of the minor was established as 13; that the trial was fair; and, that the appellant made an informed choice *not* to offer any rebuttal.
10. Regarding the sentence, she submitted that the penalty given was the minimum sentence. I was implored to dismiss the appeal.
11. This is a *first appeal* to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. **Njoroge v Republic** [1987] KLR 19, **Okeno v Republic** [1972] E. A. 32.
12. PW1 is a sister to the complainant. She is a minor. The trial court carried out a *voire dire* examination. The record contains the *questions* by the court and her *answers*. The learned trial magistrate formed the opinion that she did not understand the nature of an *oath*. She made an

unsworn statement.

13. I am satisfied that the trial court complied with the procedure of taking the evidence. *Johnson Muiruri v Republic* [1983] KLR 445.

14. On 3rd May 2015, PW1 and the complainant were playing together. The complainant went towards the nearby road. PW1 saw the appellant holding her hand. She knew the appellant well as a neighbor. She saw the two enter the appellant's house and secure it with a lock. She rushed back and disclosed it to her aunt (PW2).

15. The relevant part of her testimony went as follows-

"The two were in [appellant's] house. I saw [appellant] inside the house. My aunt knocked on the door until it was opened. I saw all this. [Complainant] and [appellant] were dressing up. [She] was hurriedly putting on her trouser and so was [appellant]. [Appellant] tried to hide behind the door."

16. PW2 said the complainant has "special needs...she needs to be attended to at all times". On the material day, Peter alerted her that the complainant had wandered off to the road. After 10 minutes, she came out of the house. Peter told her that the complainant and the appellant had gone to the appellant's house and locked themselves inside.

17. She and Peter went there immediately. It took them five minutes. She peeped under the door and saw the complainant's shoes. She forced the door open. She found the complainant and appellant naked. He had no trousers; and tried to hide behind a door. The complainant was also struggling to wear her clothes. Some other relatives came to the scene.

18. PW2 made a complaint at Koimbi Administration Police Post and later at Kirogo Police Post. They were issued with a P3 Form. The child was treated at Murang'a District Hospital and discharged.

19. Under cross examination, she denied having any grudges with the appellant over stolen macadamia nuts. She was emphatic that when she entered the appellant's house, she found him and the complainant naked; and, that they were the only ones inside the house.

20. PW3 was the complainant. She testified through an intermediary. She said as follows-

"I attend K. Special School {particulars withheld}. I don't know how old I am. I don't know why we are in court today. [Appellant] did bad manners to me. I don't know [him] (looks at the accused seated in the dock). [He] held my hand and led me to his home. He stripped me naked. It is that man (points at him with her lips then stands and points at him). [He] removed my jeans and other clothes. He lay on top of me. He thrust his tongue in my mouth. He then put his thing inside me (she points at her pubic area). He put his thing inside me. [He] has it. The thing is attached to his body.....Nobody came to the house. We were alone.....my aunt broke the door open. I put on my jeans and rushed home. I left my aunt, Peter and [appellant]."

21. It is not true that the appellant did not cross examine PW3. I understood the appellant to say that he would have preferred to cross-examine the complainant directly instead of through the intermediary. In cross examination, PW3 said that she raised an alarm but no one came to the house.

22. PW4 was Police Inspector Otieno. He arrested the appellant on 5th May 2015. I agree with the appellant that the witness gave contradicting dates. For example, he said the complaint was lodged on 4th May 2015; and, that the offence took place on 9th May 2015. I will revisit the matter shortly. He produced the birth certificate (exhibit 5)

23. There is then the evidence of Linus Muturi (PW5). He is a clinical officer at Murang'a District Hospital. He examined the minor on 3rd May 2015. He produced the P3 Form and Post Rape Care Form (exhibits 3 and 4). He said the following-

"The hymen....was perforated. She was also found to be mentally retarded.....she had a whitish discharge from the vagina. A HVS was taken. There were no spermatozoa seen. She had yeast cells. She was also referred.....for counselling and psychiatric support. In conclusion there was vaginal penetration"

24. The learned trial magistrate placed the appellant on his defence. The record shows (page 46) that section 211 of the **Criminal Procedure Code** was explained. The appellant replied as follows-

"I have nothing to say. I leave the matter to the decision of the court"

25. A number of matters arise from that evidence. I will first dispose of four legal or procedural issues. Firstly, the appellant takes up cudgels on the nomination of an *intermediary* by the court. From the evidence of PW2 and the clinical officer (PW5) it is clear that the complainant is *retarded*. Under the **Children Act**, it was open to the trial court to find the child was *vulnerable*; and, to appoint an *intermediary*.

26. Furthermore, the appellant was granted an opportunity to cross examine the child through the intermediary. He cross examined her. I am *not* persuaded that he was prejudiced or that the procedure negated a fair trial.

27. The second issue relates to a victim's evidence in a sexual offence. The appellant contends that there was violation of sections 124 and 125 of the **Evidence Act**. Under section 124 of the Act, the evidence of the victim is sufficient to sustain conviction.

28. But in this case there is *corroborating* evidence from the clinical officer (PW5) and the complainant's aunt (PW2). The offence took place in the appellant's house. Only he and the complainant were inside. He had a clear *opportunity* which amounts to *further corroboration*. **Opo v Republic** [1976-80] 1 KLR 1669.

29. The third issue relates to failure by the appellant to mount a defence. The record shows (page 46) that the trial court complied fully with section 211 of the **Criminal Procedure Code**. The appellant elected to keep quiet. He said: "*I have nothing to say. I leave the matter to the decision of the court*".

30. The nature of the charge did *not* entitle him to *free* legal counsel. He participated fully in the trial. Having elected not to tender any defence or call witnesses, it cannot now fall from his lips that he was denied his rights. I find that there was no breach of **Article 50** of the **Constitution**. The fresh argument is a red herring.

31. The fourth issue is the reference in the charge sheet to section 8 (1) (3) of the **Sexual Offences Act**. I agree with the appellant that there is no such section. The correct reference should have been *section 8 (1) as read with 8 (3)*. But I am not persuaded that it invalidated the charge. It referred to the *primary* section of the statute. The error was curable under section 382 of the **Criminal Procedure Code**.

32. I will now turn to the inconsistencies between the evidence of PW1, PW2 and PW4. PW4 was an investigating officer. Such an officer relies largely on information from the complainant and other witnesses. It is evident that the two dates he gave regarding occurrence of the offence; and, when the report was made are *erroneous*. Logically, the offence could not have taken place on 9th May 2015 when a report had already been made on 3rd May 2015.

33. There are some insignificant differences between the evidence of PW1 and PW2. For example, PW1 was the first at the scene. She said she saw the appellant and complainant dressing up *hurriedly*. PW2 who arrived later said she saw the two *naked*; and that they struggled to put on their clothes.

34. I do not think the discrepancies are material. In any trial, there are bound to be such discrepancies. **Joseph Maina Mwangi v Republic**, Court of Appeal, Criminal Appeal No. 73 of 1993.

35. I will now turn to the age of the complainant. It is *material* in offences of this nature. See **Kaingu Kasomo v Republic**, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported), **Felix Kanda v Republic** Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR.

36. I am satisfied from the evidence of PW2, PW5 and the birth certificate (exhibit 5) that the complainant was born on 13th June 2002. She was thus aged 13 at the time of the offence.

37. The key question is whether penetration was proved. The answer is affirmative. *Penetration* is defined in section 2 of the **Sexual Offences Act** as "*the partial or complete insertion of the genital organs of a person into the genital organs of another person*".

38. From the graphic evidence of the complainant; the P3 Form; and the medical evidence of PW5, there was *full* vaginal penetration.

39. The next key question is whether the *appellant* penetrated the complainant. The appellant and complainant were *not* strangers. They were neighbours. The appellant was caught red handed by PW2. He and the complainant were still naked. The medical examination corroborated that the complainant was defiled. The appellant elected to keep mute when he was placed on his defence.

40. In the end I find that the prosecution proved all the elements of the charge beyond reasonable doubt. The appeal on conviction is *dismissed*.

41. Section 8 (3) of the **Sexual Offences Act** provides for a *minimum* sentence of *twenty years*. That is the sentence that was handed down to the appellant.

42. The entire appeal is devoid of merit. It is *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 12th day of June 2019

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant.

Ms. R. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.