



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 31 OF 2019**

**KELVIN NGUGI NJERI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in Gatundu Senior Principal Magistrates Court Criminal Case No. 3014/2014 (S.O) by Hon. L.M. Wachira (SPM) on 10/4/2018)*

**J U D G M E N T**

1. **Kelvin Ngugi Njeri**, the Appellant, was charged with **Defilement** Contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. Particulars of the offence were that on diverse dates between the year **2011** and **2014** in **Gatundu North Sub-County** within **Kiambu County**, intentionally and unlawfully committed an act that caused penetration with genital organs namely penis into the genital organs namely vagina of **MNN** a child aged **11 years**.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** Contrary to **Section 11(1)** of the **Sexual Offences Act NO. 3 of 2006**. Particulars of the offence were that on diverse dates between **2011** and **2014** in **Gatundu North Sub County** within **Kiambu County**, intentionally and unlawfully touched the vagina of **MNN** a child aged **11 years**.
3. Having been taken through full trial he was found guilty of the main Count, Convicted and Sentenced to **life imprisonment**.
4. Aggrieved, the Appellant appeals on grounds that the elements of the offence were not conclusively proved; PW1's credibility was questionable; the prosecution's case was based on suspicion; essential witnesses did not testify and failure on the part of the Magistrate to establish that a grudge existed between the appellant and PW1's family was erroneous.
5. Facts of the case were that on diverse dates between the year **2011** and **2014**, the Appellant would have carnal knowledge of the complainant under the pretext that he was removing dirt from her body. On the many occasions that he would do it, he would threaten her therefore she was not telling her mother what was happening. When her mother got to learn about it she caused the Appellant to be arrested and he was charged with the offence.
6. Upon being put on his defence the Appellant stated that he got to hear of the allegations of Sexual assault that he denied. That the complainant's mother wanted to have a sexual relationship with him but he declined. That he was supposed to marry her daughter but the allegations of sexual assault came up therefore he postponed the wedding as he was arrested three (3) weeks later.
7. The Appellant canvassed the appeal through written submissions. He urged that the prosecution failed to prove the fact of penetration of the complainant's genital organs by the Appellant. He questioned why the complainant never reported the alleged incidents to her mother and why **R** who allegedly ultimately informed the complainant's mother was not called to testify. He argued that the only medical evidence adduced regarding the offence was a broken hymen but this was not proof of defilement as stated in **the case of P.K.W. Vs. Republic (2012) eKLR**. That allegations did not emanate from PW1 but her sister therefore the case was based solely on suspicion. In particular **R** the sister of the complainant was not called to testify which in his opinion meant that she would have tendered adverse evidence.
8. The Respondent through learned counsel **Ms Ndombi** opposed the appeal. She argued that the age was proved through the immunization card; the offence occurred on diverse dates when the child was between **nine (9)** and **eleven (11) years**; the minor's hymen was broken and her testimony was consistent that the appellant defiled her on several occasions. She called upon the court to disregard the allegations of the mother of the complainant wanting to have a sexual relationship with the Appellant or existence of a grudge between them.
9. This being a first appellate court, my duty is to subject the entire evidence adduced at trial to a fresh and exhaustive examination before reaching at my independent conclusion, bearing in mind that I neither saw nor heard witnesses who testified (**See Kiilu & Another Vs. Republic (2005) IKLR 174**).

10. The prosecution had the duty of proving the age of the victim, the act of penetration and the identity of the perpetrator.

11. The complainant was subjected to *voire dire* examination. Following the answers she gave to questions that were put to her, she was found by the trial court to be intelligent and she also understood the nature of oath. She told the court that she was **eleven (11) years** having been born on the **27<sup>th</sup> November 2002**. Her evidence in respect of her age was confirmed by that of her mother, PW2, **JNM**. The prosecution adduced in evidence a child health card (immunization card) which was issued to her parents with the date **27/11/2002** being her **date of birth**. This was proof of age. At the point of arrest of the Appellant the child was **twelve (12) years old**.

12. Penetration is defined by the Sexual Offences Act as:

***“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;”***

13. The complainant was examined by a Medical Doctor following allegations of sexual assault, the general body, the genitalia inclusive were normal save for the hymen that was broken. The physician was not able to tell anything significant because of the time when the victim was examined.

14. It has been held that the fact of rape can be proved by oral evidence of a victim or by circumstantial evidence (**See Kassim Ali V. Republic, Criminal Appeal NO. 84 of 2005 (MSA)**).

15. PW1 gave a tale of the Appellant having started violating her sexually at a tender age of about **nine (9) years**. She stated that at the outset the Appellant accused her of doing bad manners with another boy and argued that it was necessary to remove the dirt from her body and the method of doing it was by inserting his genital organs into hers; as she would bleed to death if she went to hospital. According to her, the act was done the following day when she accompanied him to another lady's home. He allegedly took her to their (complainant's) shop that was under construction, lifted her up and *“removed dirt from her body”*. She used leaves to wipe herself while the Appellant used tissue paper. She did not tell her mother what had befallen her because the Appellant gave her money, Kshs. 10/= and she bought a pencil. The second episode happened when she accompanied the Appellant to his house to collect jerricans. The third episode according to her happened at their home. After the Appellant sent her brother and sister to go and buy a cake and beans, he defiled her. On the fateful date she alleged that she resisted and the Appellant who had a cooking stick kept banging it on the table. Nelly their neighbour passed by and the Appellant pretended to be drinking water. Soon after Nelly left, the Appellant defiled her amidst threats that he would take her to Kamumu. On that date she threatened to tell her mother what was going on and he pinched her and left. Thereafter she learnt from her sister R that the Appellant was also molesting her and Ruth told their mother what was happening to both of them.

16. The Appellant was known to the complainant. He lived at **Githurai** with the complainant's brother, according to the evidence of PW2 and he used to take care of her sons during the initiation period. Seemingly, he would do some menial work for the family of the complainant and her relatives. Due to this fact there was familiarity between him and the complainant.

17. In his defence he contends that he was framed having turned down PW2's indecent proposal to him. These were mere allegations, but the burden of proving the case beyond reasonable doubt lay with the prosecution. The accused had no burden to prove his innocence, an explanation he was expected to render is on a balance of probabilities.

18. It is alleged, the act went on for a duration of **four (4) years** without the complainant divulging the information.

19. The complainant was a child of tender years (**See Kipkering Arap Koske & another vs. Republic (1949) (6 EACA 135)**). According to the proviso to **section 124 of the Evidence Act** a court could convict on such evidence if it was satisfied that the child was telling the truth, and reasons to that effect have to be recorded in the proceedings.

20. The trial court did consider the testimony of the child that it found to be consistent and detailed. However, it failed to interrogate the allegation that R is the one who gave information to PW2 about what was happening. This being the case R should have been a vital witness. I am seized of the knowledge that the prosecution is not obligated to call unnecessary witnesses who may be of no use to the case, but as it has been stated over and again where the evidence adduced leaves a doubt that should be filled, it is necessary to call crucial witnesses.

21. This was a case that required the evidence of R to confirm the allegation that the Appellant was indeed molesting both of them. It would have been important for Nelly to testify as to having found the Appellant and the complainant as alleged. This would have confirmed the evidence of the complainant.

22. Without evidence of the two (2) witnesses to confirm the allegation, it was unsafe to convict the appellant.

23. In the result the appeal is allowed, the conviction is quashed and sentence imposed set aside. The Appellant **shall be set at liberty forthwith unless otherwise lawfully held**.

24. It is so ordered.

**Dated, Signed and Delivered at Kiambu this 12<sup>th</sup> day of September, 2019**

**L.N. MUTENDE**

**JUDGE**