



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 1 OF 2018

JOSEPH MURIMI WANJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant herein Joseph Murimi Wanjiru, 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 before the Senior Principal Magistrate's Court at Baricho. The particulars of the offence were that on diverse dates between 8th day of May, 2016 and 11th May, 2016 at [particulars withheld] Township in Mwea West Sub-County within Kirinyaga County, he intentionally and unlawfully caused his penis to penetrate the vagina of LGK a child aged 11 years.

He also faced an alternative charge of Committing an Indecent Act with a Child Contrary to Section 11(1) of the Sexual Offences Act Number 3 of 2006, the particulars being that on diverse dates between 8th May, 2006 and 11th May, 2016 at [particulars withheld] Township in Mwea West Sub-County within Kirinyaga County, he intentionally and unlawfully touched the buttocks, breasts and vagina of LGK with his hands, a child aged 11 years.

He pleaded not guilty to the charge and after the trial he was found guilty, convicted and sentenced to a life sentence. Being dissatisfied with both the conviction and the sentence, he has appealed to this court and has listed seven grounds of appeal in his Petition of Appeal filed on the 10th January, 2018.

The Appellant was aggrieved by the following;

1. That the Learned Magistrate relied on the evidence of a single witness on identification.
2. That the Learned Magistrate convicted him of the offence on the basis of evidence that was contradicting.
3. That the Learned Magistrate failed to consider that the age of the complainant was in contention.
4. That the Learned Magistrate failed to consider his defence.

5. That the Learned Magistrate failed to consider that the complainant was allegedly taken to hospital for medical examination after a week and thus the medical report was not comprehensive.

This being a first appeal, this court is enjoined to analyze and re-evaluate the evidence adduced before the trial court and arrive at its own independent finding on whether or not to uphold the decision of the trial court. The court, however, has to take into account that it never saw or heard any of the witnesses. (See the case of *Okeno Vs. the Republic* 1972 EA 32.

In support of the prosecution's case, five witnesses testified. The complainant (PW1) stated that she was born on 7th July, 2004 and was 12 years old when she testified but that at the time the offence was committed, she was 11 years. That on 8th May, 2016 she left home at Kagio at 5am to visit her sister, HW who was residing in Waithaka in Nairobi. Her sister had promised to take her to a boarding school and since she knew her parents would refuse to take her to a boarding school, she did not inform them where she was going. She left the house without their knowledge and boarded a motorcycle which dropped her at Kukena stage in Kagio town where she could board matatus to Nairobi city. She had only kshs. 30/- which she paid to the bodaboda rider. At Kagio stage, she saw the Appellant loading people's luggage in a matatu and borrowed his phone to call her sister so that she could send her fare for Nairobi but the Appellant told him that his phone did not have airtime. He requested her to accompany him to a nearby shop to buy credit and on following him, they went to a nearby petrol station called Huhi from where he lead her to his house.

The Appellant entered one of the houses and asked her to stand outside, which she did, but after a while he pulled her into the house which was a single room and told her to sit on the bed. She asked him to allow her to go but he threatened to kill her if she screamed as a result of which, she got scared and kept quiet. The Appellant forcefully removed her clothes after which he removed his and inserted his penis into her vagina. She stated it was her first sexual encounter and that it was painful and she bled.

After having sex with her, the Appellant locked her in the house until 6pm when he went back to the house and defiled her again. He told her that he would have sex with her whether she liked it or not. He had sex with her again and on 10th May, 2016 in the morning, he ordered her to dress up and led her through unfamiliar route until they reached Sagana town where he stopped a matatu and asked her to board. He gave her a cell phone, make "Ikon" and Kshs. 200/-. She arrived at Tea-room in Nairobi from where she boarded another matatu to a place called "Muthama" where she used to live with her parents before moving to Kagio. On arrival, she found a former neighbor who was her mother's friend called Mama Doreen whom she explained to, what had happened to her. Mama Doreen called her aunt who lived in Dagoretti estate who picked her up from Mama Doreen's place. Her parents went for her the following day in whose company she went back home to Kagio. They reported the matter at Kagio Police Station and she recorded her statement. She was taken to Baricho Health Centre where she was treated and upon examination she was found to have an infection and she was issued with a P3 form which was filled at Baricho Health Centre. She later took police officers to the Appellant's house on the day she recorded her statement. The Appellant was later arrested and taken to Kagio Police Station where she indentified him.

The father to the complainant AKN gave evidence as PW2. He stated that his daughter was born on 7th July, 2004. He testified that his wife told him she heard the sound of the main door opening and when they went out to check, they found the door was indeed open but everything in the house was intact. He went round the compound using a torch and he confirmed nothing was missing. He asked his wife if all the children were in the house and she answered in the affirmative. It was not until around 6am when he went out to milk the cow that his son namely N asked him why the complainant went to school so early that day. He sent his son to find out if the complainant was in her aunt's place. The aunt was their neighbor but the complainant was not there and it is then that he realized she was missing.

That he went to the Nairobi stage in Kagio town and enquired if someone had seen her at the stage and he was told she had been there and was asking for help to call her sister in Nairobi to help her with bus fare. He was shown her bag which she had left in the Sacco office and one man told him that the girl had been taken away by the Appellant who at the time was not at the stage. He was given his name as Murimi. He waited for the Appellant to return and by 11.00am he had not returned. He returned at around 1 pm and one of the drivers pointed him out and told him that he was the man who went with L(the complainant). That on being asked by the mother to the complainant, her whereabouts, the Appellant insulted her and told her that his work was not to look after children. He left Kagio stage at 7.30pm and made a report at Kagio Police Station in the morning of 7th May, 2016, but continued with the search. It was not until the 15th May, 2016 when he was informed by his wife that their daughter had been seen at Kawangware in Nairobi. They travelled to Nairobi and found her with her sister, S. PW1 took her to Kagio Police Station and she reported that the Appellant had defiled her. She told the father (PW2) the same as well. He took her to Baricho Health Centre and he was later called to Kagio Police Station where he indentified the Appellant as he had seen him at Kagio stage earlier.

PW3, John Ngatia Githaiga is a Clinical Officer working at Baricho Health Centre at the material time. On the 19th Day of May, 2016, he examined the complainant and found that she had bruises of the labia minora. The hymen was absent and white discharge was noted. Based on examination and the history given, he made an impression of defilement. A lab test namely high vaginal swab was done. Pus cells were found meaning she had an infection. She was given antibiotics. He stated that the dates of the alleged offence were 8th to 11th may, 2016. There was evidence of defilement.

PW4, SNN is an aunt to the complainant. She was called by one AK to proceed to Waitthaka Estate to pick the complainant. She picked her and took her to her house from where her parents picked her the following day.

The investigating officer testified as PW5. He was instructed to investigate the case by the OCS. On 9th May, 2016, in the company of the father to the complainant, they went to Kagio stage but they did not find the Appellant there. He requested for assistance from one John Njogu Muriuki, the Assistant Chief of Githumbu Sub-Location to trace the Appellant. The Appellant was arrested on the 14th day of May, 2016 with the help of the Assistant Chief and he was taken to Kagio Police Station where he interrogated him and took his statement.

That the Appellant told him that he saw the complainant on the material day and he assisted her with his cell phone after which she proceeded to Nairobi. He took them to his house about 30 meters away from the stage. It was a single room in a row of about 6 houses but the complainant was not there. The complainant was later taken to the police station by her father on the 18th May, 2016 at about 4.00pm and she narrated to him how she met the Appellant on 8th May, 2016 at Kagio stage and he lied to her that he would assist her but instead, took her to his house where he defiled her from 8th May, 2016 to 11th May, 2016 after which he escorted her through the back street, to Sagana and put her in a matatu to Nairobi. That later, the complainant took him to the Appellant's house which was the same house that the Appellant had taken them but the Appellant was not in the house. The Appellant was re-arrested at Kagio Stage the same day and was taken to Kagio Police Station. On 20th May, 2016 the complainant was taken to Baricho Health Centre where she was examined and a P3 filled for her. He produced the P3, and Birth Certificate of the complainant as exhibits.

At the close of prosecution's case, the Appellant was put on his defence. In his evidence, he stated that he was at Kagio stage on 8th May, 2016 when a motorcyclist arrived carrying a young girl (the complainant in this case) and an old man. That the complainant approached him and borrowed his cell phone to call her sister to which he agreed and after making the call, the complainant walked towards the road facing Kutus direction. At 1 pm a woman went to their offices claiming she was the mother of the complainant and he told her he did not know where the girl left for. On the 14th day of May, 2016 he was summoned to the Chief's Office in Kagio where he found the complainant's father, village elders and police officers. That he was released but later re-arrested on the 18th day of May, 2016 and charged with the offence of defilement.

At the conclusion of the trial, the Appellant was convicted and sentenced to serve life imprisonment and being dissatisfied with the conviction and sentence, he filed an appeal to this court.

The appeal was disposed of by way of written submissions which the court has duly considered. I propose to consider all the grounds of appeal together and in so doing, the court will be guided by the key elements that the prosecution is required to prove in a case of defilement which are;

1. Penetration
2. Age of the victim
3. Identification of the assailant

On the issue of penetration, the evidence available and particularly by the Clinical Officer who testified as PW3 is that the complainant had bruises on the Labia minora, her hymen was broken and a white discharge was noted. The laboratory test that was done revealed pus cells which meant that she had an infection. The clinical officer concluded that there was evidence of defilement.

In his submissions, the Appellant argued that the hymen could have been broken earlier and that there was no evidence that it was intact before the alleged incident. He further argued that the vaginal infection could have been caused by other factors and not necessarily through sexual contact. He contended that the examination was carried out 12 days after the alleged offence and therefore the medical results could not have been comprehensive. The court has considered the submissions made with regard to this issue, it is now trite that medical evidence is not the only way of proving the offence of defilement.

The court in the case of *George Kioji Vs. R (Criminal Appeal No. 270/2012 unreported)* held thus

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome we however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person”.

The court is of the considered view that the fact that medical examination was carried out after 12 days, does not negate the fact that there was defilement, in the face of the evidence adduced by PW1 to prove penetration. The Clinical Officer’s conclusion that there was defilement was based both on the medical evidence and the evidence of PW1 and there could not have been defilement without penetration.

On the issue of the age of the complainant, the Appellant submitted that she was above the age of 11 years at the time of the alleged offence and for that reason, he was charged under the wrong Section of the Law. According to PW1, she was born on 7th July, 2004. This evidence was corroborated by that of her father who testified as PW2. The investigating officer who testified as PW5 produced a copy of the complainant’s birth certificate and it was marked as an exhibit in the case. The court has perused the said document and I am able to confirm the date of birth as 7th July, 2004. The offence herein was alleged to have been committed between 8th May, - 11 May, 2016. The Appellant avers and rightly so that the complainant was above the age of 11 years by several months. In his view, he was charged and convicted under the wrong Section of the Law. Looking at the birth certificate and the evidence on record and considering the submissions by the parties, there is no dispute that the complainant was a minor at the time the offence was allegedly committed. The issue that the Appellant raises is the Section under which he was charged and convicted.

The court has had a chance to peruse Section 8 (2) and 8 (3) of the Sexual Offences Act, no. 3 of 2006. Sub Section 2 talks about the age of 11 or less while Sub-Section 3 talks about a child aged between twelve and 15 years. Under (2) the sentence provided for is life sentence while a term of not less than twenty years is provided for under Sub-Section (3).

The sentence provided for under (2) is a mandatory sentence and the court has no discretion on the term. My understanding of (3) is that the complainant must have attained the age of 12 years for an accused to be charged and sentenced therein. In our case, the complainant was below the age of twelve years and therefore, the Appellant could not have been charged and convicted under Sub Section(3). The argument by the Appellant in that regard, therefore, does not hold any water.

On the issue of identification, there is ample evidence that the complainant interacted with the Appellant long enough before and during the incident. The Appellant detained the complainant in his house between 8th and 11th May, 2016 which was more than sufficient time for identification. The complainant was with the Appellant at Kagio bus stage, in his house, up to and until she boarded a matatu at Sagana when they parted with the Appellant. The Appellant admitted in evidence having met the complainant at Kagio stage when she borrowed his phone to call her sister and he obliged. Even after they had parted, he admitted to having followed her to inform her of the message that came through his phone. The father to the complainant who testified as PW2 stated that when he went to look for her he was told that the complainant had left in the company of the Appellant. It is also on record that when he went back to Kagio stage later in the afternoon, on the 8th day of July, 2016 a person who knew the Appellant well, pointed him out to the father of the complainant.

It is also noted that the complainant identified the Appellant at the police station after he was arrested and she did not have difficulties in doing so. In fact she led the police to his house where he had defiled her and it is the same house that the Appellant led the police to, after he was arrested.

As regards the contradictions and inconsistencies of the testimony of the witnesses as alleged by the Appellant, this court finds that the same, if all, were not material and could not affect the credibility of the evidence tendered before the trial court.

In view of the foregoing, I am satisfied that there were no material misdirection or application of the wrong principles by the trial court as alleged, to warrant the interference by this Honourable court.

The appellant's conviction and sentence were legal and proper. I therefore uphold the same accordingly.

The appeal lacks merit and it is hereby dismissed.

SIGNED, DATED AND DELIVERED AT KERUGOYA THIS 4TH DAY OF OCTOBER, 2019.

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L. NJUGUNA

JUDGE