



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 136 OF 2014

GEORGE KIMINDA GICHUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No. 161 of 2013 of the Senior Principal Magistrate's Court at Molo by Hon. A. Towett– Senior Resident Magistrate)

JUDGMENT

1. **George Kiminda Gichui**, the appellant herein, was convicted for the offence of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.
2. The particulars were that on 25th January 2013 at [particulars withheld] in **Molo District**, of **Nakuru County**, intentionally and unlawfully caused his penis to penetrate the anus of **JK**, a boy aged 8 years.
3. The appellant was sentenced to serve life imprisonment. He now appeals against both conviction and sentence.
4. The appellant at the hearing was represented by Mr. Ikua, learned advocate. He raised the following four grounds of appeal:
 - a) The learned trial magistrate erred in law and in fact by failing to record the language used by each prosecution witnesses.
 - b) The learned trial magistrate erred in law and in fact by failing to appreciate that the evidence adduced was contradictory.
 - c) The learned trial magistrate erred in law and in fact by failing to appreciate that the medical evidence adduced was insufficient.
 - d) The learned trial magistrate erred in law and in fact by failing to comply with section 211(1) of the Criminal Procedure Code.
5. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards. He urged the court to find that the sentence meted was lawful.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. I have noted that the learned trial magistrate did not indicate in which language each witness testified. This is a desirable practice and it becomes handy where there is a claim by an accused that he /she was unable to follow the proceedings. Due to the language barrier. In the instant case the appellant does not claim that he was unable to follow the proceedings. My perusal of the record has shown that the appellant at no time complained that he was unable to follow proceedings. The manner in which he cross examined the witnesses is an indication that he was able to follow the proceedings. He was therefore not prejudiced in any way.
8. Section 211 (1) of the Criminal Procedure Code provides as follows:

At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to

give evidence on oath from the witness box, and that, if he does so, he will be liable to cross examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

This is the section the appellant has claimed was breached.

9. On 31st May 2013, the learned trial magistrate made a ruling that the appellant had a case to answer. He elected to give an unsworn statement of defence. He informed the court that he had one witness to call. The appellant could not have elected in what manner to offer his defence if section 211(1) was not complied and explained to him. This ground therefore lacks merit and is dismissed.

10. Before a conviction can be founded on the evidence on record, the prosecution is obligated to prove three ingredients of the offence of defilement before. These are (a) that there was penetration, (b) that the person accused was responsible for the penetration; and (c) that the age of the complainant was established. These ingredients were spelled out in the case of **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** by the learned judge Joel M. Ngugi. In the instant case I will endeavor to find if these ingredients were established.

11. The evidence of penetration was adduced by **JK (PW2)** the complainant and Rachael **Chepkemoi Chesire (PW2)** the clinical officer who examined the complainant. The complainant initially testified that the appellant inserted his (appellant's) penis into his (complainant's) anus and that he felt a lot of pain. He however changed and said that he escaped as the appellant was inserting his penis. There was no effort by the prosecutor in court to seek a clarification on this obvious contradiction.

12. On her part the clinical officer testified that nothing abnormal was noted at the anal orifice. The only reason she concluded that there was penetration was the reaction of the complainant when she inserted an examining finger into his anus. The fact that the complainant responded with painful spasm of the anal sphincter cannot be an indication of a previous penetration. This is the normal expected reaction.

13. From the evidence of these two witnesses, I find that penetration was not proved.

14. According to the evidence of the complainant, he was able to see and recognize the appellant. He however gave contradictory evidence on the state of the night. At one point he said that it was a dark night, but later talks of light from moonlight. There was therefore insufficient evidence of identification.

15. The Court of appeal in the case of **Ndungu Kimanyi vs. Republic (1979) KLR 282** the Court held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

In the instant case, the complainant's evidence is ambiguous and dents his credulity and cannot be relied upon.

16. Other than the oral evidence by the complainant and what was captured on the P3 form, there was no attempt whatsoever to establish the age of the accused. Age of a victim of defilement is very important for the sentence is pegged on it. The complainant's father JM did not attempt to testify on his age. Again this ingredient was not proved.

17. The learned trial magistrate had very weak evidence at her disposal and which ought not to have formed a basis for conviction.

18. I therefore quash the conviction, set aside the sentence and set the accused at liberty unless if otherwise lawfully held.

DATED and SIGNED at Nakuru this 5th Day of December, 2019

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KIARIE WAWERU KIARIE

JUDGE

DELIVERED at Nakuru this 10th day of December, 2019

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JOEL NGUGI

JUDGE