



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 129 OF 2019

JAMES MWANGI KINGURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. **JAMES MWANGI KINGURU** (“the appellant”) was charged with the offence of defilement contrary to **section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on diverse dates between 17/12/2017 and 19/12/2017, the appellant caused his penis to intentionally penetrate the vagina of JK, aged 15 years.
2. The appellant faced an alternative charge of indecent act with a child. It was alleged that on diverse dates between 17/12/2017 and 19/12/2017, the appellant intentionally touched the vagina of J.K. a child of 15 years.
3. After trial, the appellant was found guilty, was convicted and sentenced to 15 years imprisonment.
4. Aggrieved by the said decision the appellant preferred this appeal setting out ten (10) grounds of appeal. The same may be summarised into three as follows; **that the trial Court erred in relying on the evidence of the complainant who was the only eye witness thereby occasioning a miscarriage of justice, that the trial Court erred in convicting the appellant for the offence of defilement where there was no evidence to support the same as no samples were taken for examination and though the appellant was subjected to medical examination the results were never disclosed, and that the trial Court erred in relying on the P3 form which was flawed as no emergency treatment was done as the complainant went to hospital after two days.**
5. As the first appellate court, this Court is enjoined to reconsider and re-evaluate the evidence afresh and come to its own independent findings and conclusions, bearing in mind however, that it did not see the witnesses testify. **See Okeno v R [1972] EA. 32.**
6. At the trial, the prosecution called seven (7) witnesses while the defence called two (2). **Pw1 Seberina Kaimatheri**, a clinical officer attached to Kanyakine Hospital produced the P3 Form. It was her testimony that the same was filled after three (3) days. That on examination, the complainant was found to have bruises in her lower part of the vagina and the hymen was absent. There were pus cells and bacteria but no spermatozoa was seen. It was concluded that the bruises and absence of the hymen was indicative of penetrative sexual intercourse.
7. **Pw2 JK** testified that on 17/12/2017, she was in church when she developed a headache. That on her way home, the appellant who requested to escort her. That since she had known the appellant as for sometime she acceded to his request. She accompanied him to his house near Nkubu Shell Petrol Station. That she stayed in his house for two days during which time, they had sexual intercourse severally.
8. That on a Tuesday morning the appellant, who had gone to work leaving her behind, returned in the company of some other woman, her mother and police officers. They searched for and found her clothes which the appellant had hidden. They were both arrested and taken to the police and thereafter, to hospital where she was examined.
9. **Pw3 MI**, mother to the complainant, told the Court that her daughter was born on 2/10/2002. She produced a birth Certificate to that effect. She testified that on the material day, her daughter complained of a headache while in church and she allowed her to go home to take medication. That when she later left church and went home, she did not find the complainant neither the complainant return home that day. The next day she reported the matter to the area Assistant Chief by the name Kinoti.
10. That on Tuesday, she was called by the Assistant Chief who informed her that he had traced her daughter. That on the same day, she accompanied the Assistant Chief together with two officers from Mwichuine Chief’s office and went to their neighbour’s house where the appellant worked as a painter. That the officers interrogated the appellant who confirmed that her daughter was in his house. They then went with the appellant to his house and found the complainant. The complainant and the appellant were taken to the police station and later to Kanyakine Hospital for examination.

11. **Pw4 Patrick Kinoti** confirmed that he received the report of the missing child from **Pw3** on 18/12/17. That he conducted investigations and established that some painter had gone with **Pw3's** daughter. That he called the officers from Mwichiune and they went to where the appellant was working. That the appellant admitted that the complainant was in his house. He took them to his rented house in Taita where they found the complainant. They took the two to the children's office and later to the police station and then to Kanyakine Hospital.
12. **Pw5 APC Lucas Tunje** and **Pw6 APC John Mwangi**, attached to Mwichiune Ap Post told the Court how the area Assistant Chief called them on 19/12/2017 and reported that he had a suspect whom he wanted arrested. That they arrested the appellant at Baranga who took them to his house at Nkubu where they found the complainant locked in.
13. **Pw7, PC Cylene Mueni** corroborated the testimony of **Pw3, Pw4, Pw5 and Pw6**. She stated that she escorted **Pw2** to have the P3 Form filled. That when she interrogated the complainant, she established that the appellant had locked her in his house and had had sexual intercourse with her severally.
14. **Dw1 James Mwangi**, the appellant gave sworn evidence and told the Court that on 19/12/2017, he was working at Baranga when at around 11:30 a.m. police officers came to where he was. They beat him and asked him to take them to his house. That he took them to his house and when they opened his house, they found the complainant there.
15. He told the court that he had not left the complainant in his house as he was living with another person. They were both arrested and taken to Mwichiune and later Nkubu where statements were taken. They were both taken to hospital where they were examined and he was placed under custody while the complainant was released.
16. **Dw2 Joseph Mutisya** testified that he is the one who called the appellant to work on the site where he was arrested. That the appellant was working in the same house with another person. That he was later informed that a girl had been found in the house where the appellant was living with another person.
17. The parties filed their respective submissions which the Court has duly considered. The first ground was that the trial Court erred in relying on the evidence of the complainant who was the only eye witness thereby occasioning a miscarriage of justice
18. The record shows that apart from the testimony of the complainant who told the Court that the appellant had sexual intercourse with her severally on the two days he locked her in his house, the medical examination corroborated that evidence. **Pw1** a Clinical Officer at the Kanyakine Hospital told the Court that the complainant was brought to the institution on 19/12/2017 when she was examined. The examination revealed that there had been penetrative sexual intercourse with the complainant. She produced the P3 Form which she had filled on the 20/12/2017.
19. Further, under **section 124 of the Evidence Act**, the evidence of the complainant is admissible. That section provides:-
- “Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of a child of tender years is admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him”.***
20. It is common knowledge that sexual offences are not committed before prying eyes. The evidence of the complainant was clearly corroborated by the medical evidence of **Pw1** as well as the evidence of **Pw4, PW5, Pw6 and pw7** who all testified that they found the complainant in the appellant's house. The appellant also admitted that the complainant was found in her house. The complainant must not have been in the appellant's house holidaying. An examination carried on her immediately thereafter showed that she had been defiled.
21. It was submitted that on the authority of **Geoffrey Muriu Kamau v. Republic NBI Crim. Appeal No. 129 of 2002**, the P3 Form was defective as it was filled by someone who was not a medical doctor.
22. It is common knowledge that the P3 Form in this case was filed by a Clinical Officer stationed at Kanyakine Hospital. It is not necessary for the P3 Form to be filled by a doctor under the **Sexual Offences Act**. See **Raphael Kavoi Kiilu v Republic [2010] eKLR**. Accordingly, that ground is rejected.
23. The second ground was that the trial Court erred in convicting the appellant for the offence of defilement where there was no evidence to support the same as no samples were taken for examination and that though the appellant was subjected to medical examination the results were never disclosed.
24. The evidence on record was that on the material day, the appellant took the complainant to his house where he had sexual intercourse with her severally. **Pw1** testified that there was evidence of penetrative sex with the complainant. This was because there were bruises on the lower part of the vagina and absence of the hymen. Penetration was proved. As regards the age of the complainant, it was proved by production of the birth certificate that the complainant was 15 years.
25. As to the identity of the perpetrator, the complainant stated that she knew the appellant because she had been seeing him near their house. **Pw3, Pw4, Pw5 and Pw6** told the Court that they rescued the complainant from the appellant's house a fact admitted by the appellant. It is the appellant who led them to that premises.
26. The allegation that the appellant was sharing the said house with someone else was an afterthought. The name of the alleged housemate of the appellant was not disclosed. Under **Section 111 of the Evidence Act, Cap 80 of the Laws of Kenya** bestows the burden of proof upon the person with the special knowledge of the existence of circumstances within his own knowledge. In the present case, it was the appellant

who knew who his alleged housemate was, his name and his whereabouts. He never disclosed his name nor did he call him to testify on his behalf.

27. The allegation that the filling of the P3 Form two days after the alleged defilement was fatal. That the results of the examination undertaken on the appellant was not disclosed. To this Court's mind, the delay in the examination of the complainant did not compromise the results that was entered in the P3 Form.

28. There was no prove or any allegation that the complainant left houses between 17/12/2017 and the date she was examined. On the failure to release the results of the examination of the appellant, that does not weaken the prosecution case. What was important is the results of the examination of the complainant.

29. The last ground was that the trial Court erred in convicting the appellant yet the prosecution had failed to call crucial witnesses. It was alleged that the prosecution did not call the father and teacher of the complainant.

30. Firstly, it is not the number of witnesses who testify in a case that matter but the quality of evidence tendered. Secondly, it was not shown how the father and the teacher of the complainant were involved in the commission or discovery of the offence. They were not named at all by any of the witnesses that they either participated or knew anything about the offence. That ground is also rejected.

31. In the circumstances, I find that the prosecution had proved its case beyond any reasonable doubt. Accordingly, the appeal is without merit and the same is dismissed.

DATED and DELIVERED at Meru this 5th day of December, 2019.

A. MABEYA

JUDGE