



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NUMBER 67 OF 2018**

KENNEDY MASINDE KIPTUI.....APPELLANT

**-VERSUS-**

REPUBLIC.....RESPONDENT

*(Being an Appeal against both the conviction and the sentence of Chief Magistrate Hon. Gicheha*

*delivered on the 10<sup>th</sup> August 2018 in Nakuru SPM Criminal Case No. 33 of 2018 in Republic v Kennedy Masinde Kiptui)*

**JUDGMENT**

1. The Appellant was charged with the offence of **defilement of a girl contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on 20<sup>th</sup> day of February 2018 at [Particulars Withheld] Trading Centre in Gilgil Sub County within Nakuru County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of **XY** a child aged 16 years.
2. In the alternative, the appellant was charged with the offence of **committing indecent act contrary to Section 11 (1) of the Sexual Offences Act No.3 of 2006**. Particulars are that on 20<sup>th</sup> day of February 2018 at [Particulars Withheld] Trading Centre in Gilgil Sub County within Nakuru County the Appellant intentionally and unlawfully touched the vagina of XY a child aged 16 years with his penis.
3. In the lower court trial, the prosecution availed three witnesses. The appellant was placed on his defence. He gave unsworn statement in his defence. He was convicted of the main charge and sentenced to 15 years imprisonment.
4. Being aggrieved by decision of the trial magistrate, the appellant filed this appeal on both conviction and sentence on the following grounds:-
  - i. **That the trial magistrate erred in fact and law by not finding that there was no identification of the appellant**
  - ii. **That the trial magistrate erred in fact and law by relying on evidence that was inconsistent and contradictory of each other**
  - iii. **That the trial magistrate erred in fact and law by failing to consider that the appellant was not served adequately with all material evidence that prosecution were relying on in his case**
5. The Appellant relied on amended grounds of appeal and submissions filed.
6. **Ms. Nyakira** for the state submitted that the appellant forcefully defiled the minor who was coming from the maize mill; that he chased her, knocked her down and proceeded to defile her. She submitted that the doctor PW6 confirmed that the girl had been defiled as she had a freshly torn hymen and a tear of 0.4 cm in her vagina; she submitted that the penetration was forceful.
7. On identification, she submitted that the minor was able to identify the appellant from the light from his mobile phone; she said she had previously seen the appellant at [Particulars Withheld] area. Further that the appellant was known to PW3 the mother of the complainant who testified that he was a neighbour and that he worked as a watchman.
8. On prove of age, the state counsel submitted that immunisation card which was produced as Exhibit 3 proved the age of the complainant; that it indicate that she was born in the year 2001. She urged court to confirm sentence and conviction.
9. In a rejoinder, the appellant submitted that the complainant did not know him well. He denied having been a watchman or a neighbour as

the complainant's mother said. He said he did not know her but he used to see her at the trading centre as she passed through where he worked at [Particulars Withheld] centre. Appellant said he was employed in a video shop and that his role was to collect money from customers. He submitted that the complainant said she was defiled at 5.30 pm as she went to the posho mill at page 8 of proceedings while at page 9 she said she had gone to the posho mill at 6pm; and in cross examination she said she left the posho mill at 1 pm; that at page 10 she said she did not know the appellant and at page 11 she said he had a red sweater.

### **ANALYSIS AND DETERMINATION**

10. This being the first appellant, I am required to re-evaluate evidence adduced in the trial court and arrive at an independent determination. This I do with the knowledge that unlike the trial court, I did not get the opportunity of taking evidence first hand and to make observation on demeanour of witnesses, for this I give due allowance. The principles that apply in the first appellate court are set out in the case of **OKENO VS REPUBLIC [1972] EA 32** where it was stated as follows:-

**“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”**

11. I have perused proceedings before the trial court and considered submissions herein.

12. I wish to consider whether the ingredients of the offence of defilement have been proved; this being age of the complainant, penetration and identification of the assailant. Penetration was proved by the doctor's report while age was proved as 17 years by immunization card produced in court. From submissions by appellant, he has challenged prove of identification.

13. I note from the complainant's evidence that she indicated she went to the posho mill at 6pm. She said she was chased and defiled while going back. This therefore mean it was after 6pm. She further stated that she did not know the appellant before the incident and that it was dark when she was defiled. She said that when she told police that she was raped by Ken because she heard people at the centre say he is Ken. In cross-examination, she said she saw the appellant using light from his mobile phone. She further said she saw him for the first time at the time of defilement and that she left the posho mill at 7 p.m. She said that she takes 2 hours to reach home from the posho mill.

14. From evidence adduced, there is no doubt that the incident occurred during darkness. The complainant confirmed this. She also confirmed that she was seeing the appellant for the first time. She alleged that she used light from appellant's phone to see the appellant. It is not indicated whether she saw accused's face or his clothing because she talked of red sweater in cross-examination though during examination in chief she said she did not recall what the assailant was wearing.

15. There is no mention of an identification parade having been conducted to rule out any mistake on identification in view of the fact that the complainant was seeing the appellant for the first time. The complainant's mother confirmed that her child did not know the appellant well. In her testimony PW3 said, the appellant was a watchman and also said he was a student at [Particulars Withheld] primary school. Appellant denied being a watchman or PW3's neighbour. The inconsistency in PW3's evidence casts doubt on her knowledge of appellant.

16. From the foregoing, I find that there is no doubt that the complainant was defiled and that she was a minor aged 16 years but the identification of the assailant is in doubt. In the presence of doubt on identification, I find that it was unsafe to convict the appellant.

### **17. FINAL ORDERS:**

**1. Appeal on conviction and sentence is allowed.**

**2. Sentence imposed is set aside.**

**3. Appellant to be released unless lawfully held.**

**Judgment dated, signed and delivered at Nakuru this 11<sup>th</sup> day of December, 2019.**

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**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Court Assistants – Schola and Jeniffer

Appellant in person

Kibiru for state