



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBER 32 OF 2015

SAMWEL KINGOO KIKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Chief Magistrate Hon. M.KN. Maroro delivered on the 28th January 2015 in Nakuru CM Criminal Case No. 252 of 2013 in Republic v Samwel Kingoo Kioko)

JUDGMENT

1. The Appellant was charged with the offence of **defilement of a girl contrary to Section 8(1) (2)** as read with **section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 27th day of November 2013 within Nakuru County the appellant unlawfully and intentionally committed an act by inserting a male genital organ (penis) into the female genital organ (vagina) of **IA** a child aged 10 years.
2. In the alternative, the appellant was charged with the offence of **indecent act contrary to section 11 (1) of the sexual offences Act No.3 of 2006**. Particulars are that on the 27th day of November 2013 within Nakuru county appellant unlawfully and intentionally did commit an act by touching the private parts namely buttocks and vagina of **IA** a child aged 10 years.
3. In the lower court trial, the prosecution availed five 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 life 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 failing to appreciate that the appellant was not taken for medical examination to ascertain whether the sperm found in the alleged victim was actually his; and by failing to find that prosecution failed to prove connection with the alleged act.
 - ii. That the trial magistrate erred in fact and law by failing to find that the evidence was marred by discrepancies.
5. The appellant relied on ground of appeal filed.
6. In response, the state counsel **Ms Nyakira** submitted that the appeal is opposed by the state and urged court to uphold both conviction and sentence. She submitted that the state is required to prove age of complainant, act of penetration and whether it is the appellant who committed the act.
7. She submitted that the prosecution proved all the above ingredients. She submitted that the age of the girl was proved by document produced by PW5, which proved that she was 11 years old. She added that the girl testified how the appellant pulled her outside the gate, covered her mouth, took her to chicken house and penetrated her thus proving the act of penetration. That her evidence was corroborated by PW2 who found the appellant with the minor with the appellant's trouser at his ankles; that the doctor also confirmed that the girl's hymen was broken.
8. She added that there is no question on appellant's identification as the minor said that the person who defiled her once lived at Stima Line Estate she also lived and that he had known the appellant for a period of 2 years.
9. On medical evidence adduced, she submitted that **Section 77 of evidence Act** allow expert witness to produce medical report as long as the handwriting of the medical practitioner confirm that he worked with the doctor. She said the medical doctor confirmed that the hymen was freshly broken.

10. On the allegation that the child's mother beat her, she submitted that it is true her mother beat her after the incident but the beating was not intended to coerce her.

11. On the issue of defective charge, she submitted that the question is whether prejudice was occasioned; that no prejudice was occasioned as the appellant understood the charges. He knew he was being charged with defilement of a girl aged 10 years and he was able to prepare his defence. She urged court to re-evaluate evidence adduced and come up with a conclusion.

ANALYSIS AND DETERMINATION

12. This being the first appellate court, I am obligated to re-evaluate evidence adduced in the trial court and arrive at an independent determination. This I do bearing in mind the fact that unlike the trial court, I never got the opportunity to take evidence first hand and observe demeanour of witnesses. For this I give due allowance. The guiding principles on role of first appellate court are set out in the case of **OKENO VS REPUBLIC [1972] EA 32** where the court 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.)”

13. On perusal of the court record, I note that the child's birth certificate was produced confirming that she was born on 12th August 2003 which confirmed that she was 10 years at the time of the alleged defilement. On identification of the assailant, the child testified that the appellant worked for the owner of the plot they lived in at Stima Line Estate; she said the appellant was herding cattle for the landlady and that they had lived in the plot for long. It is evident therefore that the child had lived in the same plot with the appellant and she knew him very well. She said that as she was going to the toilet at 7.00p.m., the appellant called her to go with him outside the gate, when the girl refused he pulled her outside the gate covered her mouth with his hand while pulling her; he took her to a chicken house in the plot and forced her to lie down facing up; then removed his trouser and, removed her skirt and pant and inserted his penis in the girl's vagina.

14. The child testified that the appellant threatened to beat her if she told anyone what happened. She said a woman who had found appellant on top of her reported to her mother; her mother beat her on learning of defilement and took her to hospital.

15. PW2 who was the complainant's neighbour confirmed that their landlady had employed the appellant. She said she met appellant on top of the child. She said there were security lights.

16. PW3 the child's mother confirmed that she learnt from her neighbour PW2 that the child had been defiled. She said she had known appellant for 2 years. She confirmed that there were light in the plot.

17. PW4 the doctor testified that the child was examined on 28th November 2013. He confirmed that the child's hymen was freshly broken. He said the age of 9 years indicated in P3 was an estimate as age assessment was not done.

18. When placed on his defence the appellant gave unsworn statement. He confirmed that he was herdsboy. He denied having defiled the minor. He said he was washing his legs outside at the material time and that he had locked chicken house.

19. From evidence adduced the ingredients of the offence of defilement were proved. There was prove of age, penetration and appellant was known to the child and PW2 before the incident, PW2 and PW3 confirmed that the lights in the plot were on. Appellant also put himself in the scene. He confirmed that he was in the plot, had closed chicken house and was washing his legs in the plot. This corroborates PW1 and PW2'S evidence.

20. There is no doubt that the child was defiled and appellant was identified as the person who defiled the child. On charge sheet, it is clear that the appellant understood that he was being charged with defilement of a child whose age was approximated as 9 years and that the age was confirmed by birth certificate produced in court.

21. From the foregoing, I see no merit in the appeal against conviction.

22. In respect to sentence, I am guided by the decision in the **Muruatetu** case and do agree that discretion in sentencing should not be taken from the court. In the premises, I am inclined to reduce the sentence imposed to 15 years imprisonment.

23. FINAL ORDERS

- 1. Appeal on conviction is hereby dismissed**
- 2. Sentence reduced to 15 years imprisonment.**
- 3. Sentence to run from the date of sentence by trial court.**

Judgment dated, signed and delivered at Nakuru this 4th day of December, 2019

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RACHEL NGETICH

JUDGE

In the presence of:

Schola Jeniffer – Court Assistant

Appellant in person

Nyakira Counsel for state