



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.93 OF 2016

JOSEPH WANJAU GICHURU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in Sexual Offence Case No.10 of 2013 of the Senior Principal Magistrate's Court at Karatina)

J U D G M E N T

The appellant herein **Joseph Wanjau Gichuru** was charged with the counts of Defilement contrary to section 8 (4) of The Sexual Offences and 2 alternative counts of indecent Act with a child contrary to section 11(1) of the Sexual Offences Act.

Charge

Both offences are alleged to have been committed between the month of May 2013 and the 24th June 2013 at [particulars withheld] in Mathira West District of Nyeri County. The victims were MMW and CWM both aged 16 years old.

The case was heard by four different Magistrates over a period of three years. It started before one, Hon. Onkwani Ag SRM who heard 2 witnesses. She left the station. The next one Hon. S. Mwayuli RM started *de novo*. She went on transfer after hearing 4 witnesses. Hon. Kachuodho, PM took over and heard 3 witnesses. This magistrate determined that the appellant had a case to answer. However, she never got to hear the defence and it was heard by Hon. E. Michieka RM who also wrote the judgment.

After summarizing the evidence, the Hon. Michieka found that the prosecution had proved their case against the appellant. He found him guilty of both counts of defilement contrary to section 8(4) of the Sexual Offences Act, convicted him to and sentenced him serve two concurrent terms of 15 years' imprisonment. He found as a fact that the accused person had sex with the 2 minors in turns for which he paid them. He found that the evidence was corroborated by their individual testimonies in court and by the medical evidence.

He found as a fact that the 2 minors were found in the house of the appellant on the morning of 24th June 2013 without their under garments and the appellant without his trouser, and that they were all spotted and on the appellant's bed.

He rejected the appellant's defence as a mere denial.

It is against these findings, the conviction and sentence that the appellant brings this appeal. The appellant is entitled to review and re-evaluation of the evidence as was held in **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR held that: -**

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

He attacked the judgment on two fronts; the trial court's reliance on contradictory and inconsistency evidence of the 2 minors and the failure to consider his defence.

The appeal was opposed by the state.

When it came for hearing the appellant relied on his written submissions. He relied on section 212 of the CPC, Articles 25(c), 50 (1), (2) (3) of the Constitution. The case of **Ndung'u Kimani -Vs- Republic 1979 KLR 282** section 33 as read with section 77 of the Evidence Act, and **Bukenya-Vs- Uganda 91972) EA 459.**

Counsel for the state Ms. Jebet made oral submissions and opposed the appeal.

Case for prosecution

At the time of testifying the 2nd time PW1 MM was 17 years old and in Secondary School. The appellant was employed in someone's homestead not far from her home.

From around May 2013 he began calling her and her friends who included the second victim to his house where he would cook eggs for them and then have sex with them. Sometimes in a day he would have sex with four of them, and sometimes he would give each one of them Ksh.20/- after having sex with them.

On 23rd June 2013 the two, MM and CWM visited the appellant in the company of MM's brother one PN. "On Sunday" he told them to go to his house but not with her brother. Apparently they later went to the appellant's house. At some point the appellant told them to hide because he had seen MM's mother. They left and went to hide at the tea collection Centre where the appellant agreed to meet with them. They hid till 1.00am, then went to the appellant's house. He had sex with them in turns, telling each one to look away as he had sex with the other one. He wore a condom.

At 6.00am he went to buy milk and came to make tea for them. It is at that moment that CWM's mother came by and found them. They tried to hide but she raised the alarm while holding them.

It was then that one M came, and also helped in calling the villagers to come and help. MM's mother came, and the father of CWM. The appellant ran away but was later apprehended. The girls were taken to the police station and to the hospital where they were examined and P3's and PRC's completed.

On cross-examination PW1 MM told the court that on 23rd June 2013 the appellant slept with both MM and CWM on the same bed. That they never told anyone about the sex because he told them not to tell. She said she would lie to her mother that she was at her aunt's while she was at the appellant's house. That wherever she slept at the appellant, she did not go to school. That the appellant would sleep with many of them, and at one time slept with 6 of them.

PW2 CW spoke about the 26th May 2013 when MM visited her at her home with her brother. While there the appellant came by and they gave him tea. Later CW's mother came home from church and sent the appellant for rice.

Later, MM asked CW to escort her back home so that she could take her baby brother home. On the way they met the appellant who told them to accompany him back to CW's home, and he would escort them to MM's home. When they got to CW's home he told MM to hide near the gate so that CW's mother would not see her.

When CW got home, she told her mother she had escorted MM to her home. The appellant delivered the rice he had been sent for, and came out. CW followed and found the appellant with MM. He requested them to accompany him to the shopping Centre which they did. From there they parted ways, he left, and they went to MM's home through a short cut. MM's mother was not at home. MM fed the baby, 'made him sleep', put him in bed, and they again left for CW's home.

As they were closing the door of MM's house, they saw both their mothers coming. They ran away into the shamba. At that time the appellant was approaching through the short cut. He chased them, got hold of them, and told them not to go back home. He would go back himself and say he had not seen them.

They stayed in hiding until midnight when they went to the appellant's house. At his house it is MM who went in first as CW waited at the gate. She waited for quite a long time. She was worried and called out, and she too was opened for and she entered the house.

The appellant had cooked ugali and eggs. She was served and while she was eating he called MM to the bed and told her he had Kshs.50/- and he wanted her. MM told her that he wanted her too and he had Ksh.150/- for her. When she finished eating they both went to the bed where the appellant was sleeping and MM woke him up. He was naked. He had sex with each one of them. They slept.

He woke up early- around 5.20am, lit the fire, put water to boil and went to buy milk. He locked them inside the house. He came back around 7.20am. It was then that her mother also arrived and saw them, and got hold of them, but the appellant disappeared. She called for help and some people came, a villager elder, and the class 8 representative for MM's school. CW's father also came and they were taken to the police station and hospital.

On cross-examination CW told the court that the appellant was with at her home at 7.00pm when her mother sent him for rice. She said they hid from around 9.00pm to midnight when they went to his house to get some goodies he had promised them. That her mother found them in his house in the morning. She said that the appellant slept with both of them on the material night. She stated that on the day she recorded her statement she was full of fear because her parents were present.

PW3 AK the mother to MM testified that on "the material day" she went to church and left her two children -MM and another at home. She came back at 3.00pm but they were not at home. She went to look for the children at her friend's place they were not there.

The following day she learnt from CWM's mother that "the children" had been found in another man's house in the neighbourhood. She went to that place and found MM, CWM, CWM's mother, one M but the appellant was not there. She learnt later that he had been arrested. She testified that she used to see the appellant but did not know what he did for a living.

Later they went to the police station and hospital where the girls were treated and they later recorded statements.

On cross-examination she said that she found the baby, her son asleep in the house but did not know who had brought him. Her daughter did not sleep at home that night.

PW4 John Mwangi testified that he was a village elder of [particulars withheld].

On 23rd June 2013 he received a call from one Charles Njogu reporting that some children were missing from home. It was around 10.00pm. He went to where this Charles was. He met a Mr. M. *“They found the children coming from Joseph Wanjau’s homestead and they ran away”*. They proceeded to search for the *“children who were hiding in the bushes”* until 3.00am when they gave up. The following day he learnt that the children had been found and he assisted in taking them to the police station and hospital.

On cross-examination he told the court that the appellant accompanied them in searching for the children, that they all parted ways when they failed to find the children. It is only the following day at 11.00am that he learnt that the children had been found.

On re-examination he confirmed that the appellant accompanied them in the search. That they were suspicious of him but did not arrest him that night.

PW5 J M W testified that on 23rd June 2013 he came from work about 7.00pm. He learnt from his wife that PW3 was looking for her two children. She requested him to assist. He met one Gathogo who told him he had seen the two with one Wanjiku. He went to Wanjiku’s home, and spoke to her mother, who called her. She told them she had seen the 2 children with the appellant, who was an employee of his neighbour. He went with the mother of CWM to appellant’s home. The appellant told them he had not seen the children.

PW4 now rang the village elder.

They all went looking for the children. They found them at PW3’s place (mother of MM) but when the children heard them coming they ran away. They gave chase in vain and as it was already 1.00am they abandoned the chase.

On 23rd June 2013, around 10.00am he received a call from the mother of CWM telling her that she had found the children at the appellant’s place. He went there and found her struggling with the appellant *“in the kitchen door to prevent the children from leaving”*. He calmed both of them and called the village elder. The appellant said he was going to check on the goats but disappeared. The girls were taken to police and hospital.

In cross-examination he told the court that the appellant assisted in searching for the children. That the children were seen at PW3’s place at 11.00pm. they abandoned the search and could have reached their homes between 2.00am and 3.00am.

He said it is the children who claimed he had defiled them. He said he saw them in his house. He denied that in his statement he had recorded that he saw the children with a man.

In re-examination he told the court that the appellant assisted in looking for the children, that they found the children in his house the following day but the appellant had not reported that he had found them.

PW7 Dr. Steven Wang’ombe testified on behalf of Dr. Mengi, who was the one who had examined the two complainants. According to the record this doctor testified that the children were found having sex with a 46-year-old man. None of them had any injuries except that the hymen of each was broken. The conclusion was that that proved that there had been sexual penetration. He produced the P3 forms, PRC forms.

PW8 No.6625 Cpl Alice Kichuna, attached to Kiamariga Police station at the material time was on patrol duties on 24th June 2013 when she received a call from her colleague that there was a defilement case reported at the police station. She instructed him to issue P3’s and escort them to hospital, which he did. She returned to the police station about 6.30pm and the appellant was brought in seen thereafter. She recorded statements, formed the opinion that the two were defiled by the appellant between May and 24th June 2013, charged him with this offence.

She produced their birth certificates.

On cross-examination she told the court that she had relied on the medical evidence, the fact that the children had gone missing on 23rd June 2013 and found on 24th June 2013 at his house. She said the appellant was not taken to hospital for further investigations because she already had enough evidence.

The prosecution closed its case.

On 14th March 2016 the appellant was found to have a case to answer.

The Defence

He gave a sworn statement on 1st November 2016 He told the court that on 23rd June 2013 he went to church and came home. Then went to the Kabiruini town. When he returned home after 7.00pm he learnt that the village elder was looking for him. He went to his house. He was told that three children were missing and had been sported in his shamba. He said he had not seen them. He joined the search partly up to

around 1.00am when the search was called off. He went home.

The following day he learnt that they had been found at CWM's house sleeping. While in the shamba some three people came to check on him. They rang the village elder and told her that they had found him.

At 5.30pm some police officers showed up and told him they had come for him. They went with him to Kiamariga police station where he was charged with this offence. He denied that the children were found in his house.

On cross-examination he told the court that he used to work for one Peter Wachira who had since died, to take care of his home. However, he used to sleep in his house. He said that the children were found in the home of M W. He never saw the children that day.

Submissions

In his submissions the appellant pointed out that the evidence of the witnesses was inconsistent. That it was contradictory. The state counsel submitted that it was not the first time for the complainants to go to the appellant's house, that they would go to his house, he would have sex with then and pay and that they ran away to live with the appellant.

That when the children were being looked for the appellant told them to go into hiding while he joined the parents. They searched in vain, he went back to his house, was joined by the children when he had sex until that night, and the following morning. He went, bought tea for them. While inside his house, the mother of one of them heard her daughter's voice, went in, found the children, the appellant struggled with her to run away but she overpowered him, locked the door and raised alarm. People came to the scene but the appellant disappeared.

The state counsel submitted that the evidence of PW1, 2, 3, 4, 5 was consistent. There was no doubt in the case for the prosecution, and this was further supported by that of the Doctor PW6.

About his defence, she submitted that it did not challenge the case for the prosecution. She urged the court to dismiss the appeal.

Analysis

I have carefully considered the evidence before me. The first thing that stands out is the absence of the testimony of the mother of CWM. She was the key witness for the prosecution. She is the person who allegedly found the two MM and CWM inside the house of the appellant. She is the one who allegedly raised alarm and called for help. She is the one who according to PW1, PW2 and PW3 who caught the appellant literally 'in flagrante delicto'. She did not testify. This is the mother of one of the complainants. Her testimony was the most crucial in placing the two girls inside the appellant's house on the morning of 24th June 2016. It she who had firsthand evidence on the state in which she found the appellant and the girls. The prosecution did not give any explanation for not calling her. That begs the question- why? The answer could be that her testimony would not have advanced the case for the prosecution. That leaves the case for the prosecution with a humongous dent.

Secondly, the incredibility of the testimony by the two complainants. PW1 claimed the appellant had been having sex with her, PW2 and many other school girls sometime six of them in one night. That he slept with then severally and every night she slept in his house she did not go to school.

The really incredible part is where PW1 claims that between May 2013 and June 2013 she missed school on several days, slept out on several nights yet neither her teachers nor her mother ever raised any concern. Why would there be such great concern raised only on this one day? Sleeping out and saying she was at an aunt's place was one thing, but sleeping out and missing school more than once would surely raise alarm if the case for the prosecution is to be believed that missing for a few hours caused an alarm leading the village into a search. The PW1's mother who testified as PW5 and never mentioned anything about PW1 sleeping out several nights out and telling her she was at an aunt's house, yet now she had confirmed the child was always at the appellant's house.

According to PW1 she used to go to the appellant's house with her friends. On other occasions where he would cook eggs for them and gave them money. How is it that the parents of these children never noticed such abnormal behavior? This piece of evidence was not investigated at all to give it credence hence it remained an allegation.

It is the prosecution's case that on 23rd June 2013 there was some sort of special arrangement between the appellant and the two girls. However, there is no evidence to support that. PW1 and PW2 for some reason, ran away from PW3's house, were chased by the villagers, including the appellant, who searched for them till 3.00am in vain. They claim they did all this because the appellant had promised them some goodies. That evidence also just fell from the sky. There was no evidence of when they met to discuss the alleged goodies, which in any event were not defined. If indeed it was true that they had slept in house his severally, this drama does not add up. To run away from the house to, take the risk of hiding in the bushes and tea collection Centre till 1:00am? The submission by counsel for the state that they ran away from home to live with the appellant is not supported by this evidence.

This whole story does not make sense.

Again there are contradictions and the inconsistencies on the evidence as to what transpired that night. According to PW1 she had met the appellant during the day while in the company of PW2 and her baby brother. He told her to go back without the baby. She said they went to appellant's after 6.00pm. While there he told them he had seen her mother. He told them to hide. They went and hid at the tea collection Centre till 1.00am. They then met and went to his home and found that he had not even cooked. He told them he would cook in the morning. He then took a condom, wore it, and had sex with then in turns.

PW2's version of the same night is different. She and PW1 went to her home where they stayed with her kid brother. That the appellant went

to PW2's home, was sent for rice by CWM's mother while he was away fetching the rice, both PW1, PW2 and the baby left for PW1's home. On the way they met the appellant who told them to turn back instructing PW1 to wait outside the gate with the baby while he went in to deliver the rice.

They then left together for the shopping Centre where the appellant bought cigarettes and they all parted ways. The 2 went to PW1's home together, fed the baby and left after the baby had slept. They were going back to PW2's home but as they locked the door, they saw both their mother's and for some strange reason, unexplained reason ran away to the shamba. The appellant appeared from somewhere, chased them, got hold of them and told them not to go back. That he would report he had not seen them.

That is not the only difference in the evidence.

PW2 says they waited somewhere till midnight when they proceeded to appellant's house. PW1 said they met with appellant at the tea collection Centre and went home with him. PW2 says on reaching appellant's house, PW1 went in first while she waited at the gate. PW1 said they all went inside the house together.

PW2 says, she waited for long, got worried, and called out, and that is when the door was opened for her and she went in. PW2 said the appellant had cooked ugali and eggs which they sat down to eat. PW1 said they found the appellant had not even cooked.

PW2 said as they were still eating the appellant called PW1 to the bed and told her he wanted her and had Kshs.50. PW1 came and told the appellant would pay her Kshs.150/-.

PW2 said she finished eating and they went to the bed where appellant was already sleeping and PW1 woke him up, and then had sex with her.

The whole story up to the point where the appellant is alleged to have had sex with the two complainant's does not add up.

How were they discovered?

PW1 said that while the appellant was cooking tea for them, they were talking. She says "Charity's mum came and we tried hiding but she got hold of us and she started screaming".

PW2 said

".....he left and locked us inside. By 7.00am he was not back and my mother came to check on him and she found a padlock at the door. She then left though she heard noises from inside..... he came back and my mother saw him, and she saw us and the door was locked. My mother came for us and held us and that time Wanjau disappeared. My mother called for help".

According to PW1, the 'screaming' of PW2's mother brought along one M and the village elder who found the appellant and told him he would be taken to the police station.

According to PW2 the appellant disappeared even before her mother call for help was responded to by the village elder and one Mathenge.

Pw1 said he was found there and disappeared when he was told he would have to go to the police station.

It is noteworthy that the said Mathenge who allegedly heard the screams of CWM's mother and came to help did not testify. The Mathenge who testified as PW5 appears to be different. He was told by his wife that some 2 children were missing and they were being looked for. i.e. PW1 and her brother. He, and the mother of CWM went to house of appellant but did not find the children, he then rang the village elder PW4. They looked for the children found them in the home of PW3 but they ran away.

According to the village elder PW4, he received the call at 10.00pm. He joined PW5, and states;

"We found the children coming from Joseph Wanjau's homestead and they ran away".

Look at that. According to PW5 the children were coming from the house of PW3 when they ran away. According to PW4 they were coming from the house of the appellant. In addition, the testimony of PW5 about missing children relates to the children of PW3 i.e. PW1 and her young brother. It is also noteworthy that PW4 and PW5 testified that the appellant joined them in the search for the children until between 2.00am and 3.00am. It contradicts the evidence of the children.

PW5's testimony is that he received a call from mother of CWM that she had found the children in the house where the appellant was employed. He went there and found her struggling with the appellant. This testimony is not corroborated by that of the complainants who say that the mother of CWM found them, and held them while screaming. There is nowhere in their testimony that they say anything about the mother of CWM 'struggling' with the appellant.

The doctor's testimony is simply that the two complainants' hymens were broken. According to him that was sufficient proof of sexual penetration, there were no injuries. The issue would be whether the prosecution established that the appellant had sexual intercourse with the complainants on any day between May and 23rd June 2016, or even on the night of 23rd June 2016. Even in the light of the proviso to section

124 of the Evidence Act I found the evidence of the complainants' not capable of belief.

The circumstances of this case are made worse by the obvious drastic change in the testimony of PW5. The record will bear me witness that when PW3 testified for the first time, the prosecution sought to stand her down because she was digressing. What she said was not expunged from that record and it seems to throw some light to the confusion in the case for the prosecution. She told the court that her children PW1 and her son were missing. She looked for them and was told they were playing at the appellant's home. She went there but did not find them.

As she left, a boy called her and told her she was being called by one M. She went and found M with the mother of CWM. It is this lady who told her that their children usually went to fetch water for a certain man employed at "Kwa Lucy". This man was sent for. He came. It was the appellant. He was tasked whether he had given the PW3's daughter Kshs.20/-. He told them that she had asked for the money. It is then that M called the village elders.

This evidence of PW3 points to totally different scenario where everything appears to have happened in one day and because it was alleged that the children were fetching water for the appellant for a fee.

It is noteworthy that it is upon being stepped down to testify another day the story changed completely.

The appellant took plea on the 25th June 2013. Judgment was delivered on the 15th December 2013, a period of 3 ½ years. Citing article 25 (c), together with Article 50 (1) (2) (3) of the Constitution he expressed the view that that this was in violation of the rights and fundamental freedoms which shall not be limited, and specifically the right to a fair trial. The record speaks for itself. The appellant was in remand custody all this time. Three and a half years is a long time waiting in custody for a trial to come to an end. To make matters worse, at the end of his case and during sentencing the magistrate did not take into consideration the period already spent in remand custody. In my view it is good practice to periodically review bond terms as the same is discretionary and should not be the sole basis for keeping an accused person in custody. Pre Bail and Bail review reports are one way of the court ensuring that an accused person does not languish in custody simply because of his limited financial / economic status. Bond terms should never be cast in stone.

Conclusion

I have considered all the submissions and authorities cited. I have carefully analysed in detail the evidence placed before the last trial magistrate. I am persuaded that had the trial magistrate analyzed the evidence he would have found as I do, that there was no evidence at all that the appellant was found in bed with the two complainants, each of them without their inner wear. He would have found that there was no evidence that the appellant had sexual intercourse with the complainants on the night of 23rd June 2016 or at all. He would have found that the glaring contradictions and inconsistencies in the case for the prosecution rendered the evidence unreliable and could not found a conviction for such serious offences. He would have found that the testimonies of the complainants could not be relied on the strength of the proviso to section 124 of the Evidence Act.

In my humble view, I find therefore that the appeal has merit. The same is allowed. Each of the convictions is quashed, and each of the sentences set aside. The appellant is to be set at *liberty unless otherwise legally held*.

Dated, delivered and signed in open court at Nyeri this 4th April, 2018.

Mumbua T. Matheka

Judge

In the presence of:

Court assistant Atelu

Njue for state

Appellant present