



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 48 OF 2016

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. S. O. 73 of 2015 of the Chief Magistrate's Court at Naivasha before R. Kitagwa – RM)

JOHN MAKORI KIMANGA.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTOR

J U D G M E N T

1. The Appellant, **John Makori Kimanga** was tried and convicted for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. In that on the 5th day of December, 2015 at xxxx village in Naivasha Sub-County, within Nakuru County, he intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely vagina of **E.A.N.**, a girl aged 15 years. The Appellant was sentenced to serve 20 years imprisonment.
2. Aggrieved with the outcome, he lodged an appeal to this court raising four grounds in his amended grounds of appeal. Grounds 2 and 4 are similar, raising the complaint that the case was poorly investigated and the prosecution evidence at trial inadequate.
3. Ground 3 concerns alleged non-compliance with Section 214 of the Criminal Procedure Code. The written submissions however challenge the evidence tendered with regard to age, penetration and ultimately the weight of the evidence against the Appellant.
4. The prosecution opposed the appeal reiterating the evidence adduced at the trial.
5. The duty of the first appellate court remains as stated in **Pandya -Vs- Republic [1957] EA 336** as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”
6. The prosecution case was that the complainant **E.A.N.** was aged about 15 years in 2015. She resided at xxxx with her parents and siblings, including a younger sister **N.W.M. (PW2)** in the material period. Having completed her primary school education in 2015, she was staying with an aunt in the same neighbourhood and was helping her take care of her young child.
7. On 5th December, 2015 while the complainant was attending to the baby, the Appellant who lived in the same compound burst in. He wielded a knife and threatened the complainant not to call for help. He gagged her mouth with a piece of cloth, having pushed her on to a seat. He had sexual intercourse with her. But by coincidence **PW2** came knocking, forcing the Appellant to hide under the bed.
8. When complainant opened the door to let in **PW2**, she narrated to her what had happened. **PW2** also peeped under the bed and saw the Appellant in hiding. The Appellant then got out and uttered defiant words to the girls before leaving. The girls waited until their mother **S. N. (PW3)** came home from work. They reported the events of the day to her. The incident was reported to Karati Police Post. The complainant was referred to the District Hospital for examination and treatment. The Appellant was subsequently arrested from his house.
9. In his unsworn defence statement, the Appellant stated that he was also a parent. That the complainant’s aunt was his neighbour. That

while the complainant was caring for the aunt's child on the material date, he had requested her to also take care of his 1 ½ year old child as he went out to fetch water. That on return, his child was asleep and as he sat with the complainant, two sisters of hers came and questioned his presence. That the girls threatened to report the matter to their parent. He was arrested from his house.

10. The complainant and her mother (**PW3**) stated that the former was 15 years old in the material period. This was also confirmed through the production of the child immunization card (**Exhibit 3**). The minor's age was also estimated to be 15 years by the medical officer who examined **PW1** after the incident and completed the P3 form tendered at the trial.

11. Further, regarding penetration, **PW1** gave consistent evidence, which is corroborated materially by **PW2's** testimony and also the medical evidence. For his part, the Appellant admitted that he was in the house of **PW1's** aunt when her sisters, including **PW2** came visiting. They were all neighbours and known to each other. Both the **PRC** and **P3 forms (Exhibit 1 and 2)** confirm penetration of the complainant. The evidence against the Appellant was overwhelming and completely displaced his defence.

12. There was no plausible reason for **PW1** and **PW2** to invent such a sordid story, if indeed all that the Appellant had done is enter the house of the complainant's aunt. Besides, **PW1** denied that the Appellant had asked her to care for his child on the material date. The Appellant's defence was properly dismissed.

13. As to the relevance of Section 214 of the Criminal Procedure Code to this case, at no time were the charges amended. Thus the Appellant's complaint on that score is without basis. The appeal before me has no merit and is accordingly dismissed.

Delivered and signed at Naivasha, this 3rd day of **May, 2018**.

In the presence of:-

Mr. Koima for the DPP

Appellant - Present

C/C – Japheth and Kamau

C. MEOLI

JUDGE