



**REPUBLIC OF KENYA**

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

**CRIM. APPEAL NO. 174 OF 2016**

**JEREMIAH MAINA KARIUKI .....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**JUDGMENT**

**A. INTRODUCTION**

1. Jeremiah MainaKariuki (“Appellant”) was presented before the Chief Magistrate’s Court in Thika in Criminal Case No. 4058 of 2015 charged with a single count of defiling CNO, a child aged thirteen (13) years contrary to section 8(1) and (3) of the Sexual Offences Act No. 3 of 2006. The allegations were that he had defiled the minor on 02/08/2015 at [Particulars withheld] village within Gatanga Sub-county of Murang’a County by intentionally causing his penis to penetrate the vagina of CNO.

2. In the alternative, the Appellant faced a charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that on 02/08/2015 at [Particulars withheld] village within Gatanga Sub-county of Murang’a County, he intentionally touched the vagina of CNO, a child aged thirteen (13) years with his penis.

3. The Appellant pleaded not guilty to both the main and the alternative charge and the case was set for hearing. After a fully-fledged trial, the Learned Trial Magistrate convicted the Appellant in the main charge and sentenced him to twenty (20) years imprisonment as the law dictates.

4. The Appellant is aggrieved by both the conviction and sentence and has appealed to this Court.

5. I will, first, set out the standard of review and briefly rehash the facts of the case as it emerged from the lower court.

**THE DUTY OF THE FIRST APPELLATE COURT**

6. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court’s findings as a foil to endorse or reject its findings. See *Okeno v Republic* [1973] E.A. 32; *Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA

## **B. THE EVIDENCE PRESENTED IN THE TRIAL COURT**

7. The evidence, as it emerged from the trial was as follows. On 02/08/2015, CNO was in their kitchen washing dishes. She was alone at the time. Her younger brother, B, was playing nearby and hunting for birds with his friends. The Appellant, who lived right next door to them, came into the kitchen, grabbed her and took her to his one-roomed house. While there, he forcibly removed her skirt and her panties and placed her on his bed. He then proceeded to remove his own trousers and underwear. He then did “bad manners” on CNO

– her euphemism for the sexual act of the Appellant inserting his penis into her vagina.

8. According to the testimony of CNO, the Appellant, then, locked her inside his house as he went outside to wash his clothes.

10. Meanwhile, B and his friends started looking for CNO who, it seemed to them, had vanished into thin air. Indeed, CNO could hear them from her bondage inside the Appellant’s house. Eventually, the Appellant let her go, giving her some Kshs. 50/= in coins presumably as a bribe to buy her silence.

10. When CNO was finally let go and she went back to their house, B and his friends were suspicious. They insisted to know where she was. CNO told them what had happened. B responded by immediately telling a neighbour, borrowing her phone and calling their parents who were attending a meeting of their Chama.

11. Both parents rushed home on hearing the news. There, they found the Appellant already arrested by members of the public – the efforts of the neighbour who Brian had first reported to. Both parents escorted CNO to report to Kirwara Police Station – and then to Kirwara Hospital for medical examination.

12. At the hospital, they found Martha Kimotho, a Clinical Officer. She examined CNO, wrote treatment notes and, later, filled a P3 Form. Both the Treatment Notes and the P3 Form were produced as exhibits in the trial. Ms. Kimotho’s examination revealed a broken hymen and a tear on CNO’s vaginal wall. Ms. Kimotho also noted that the os was open – an indication of recent sexual activity. She concluded that CNO had been defiled and testified as such in the trial.

13. This was the evidence offered at the trial of the Appellant. It was rounded off by the evidence of the Investigating Officer who gave formal testimony about the reporting and the arrest of the Appellant. It is fair to say that at the trial this testimony was met with almost no contestation in the form of cross examination by the Appellant. For example, the Appellant did not, at all, challenge the straightforward testimony of CNO or her brother which formed the core of the Prosecution case.

14. Put on his defence, the Appellant was similarly parsimonious in his defence. I will reproduce in its entirety his statement of defence:

I am Jeremiah Maina Kariuki. I reside at [Particulars withheld]. I am a farmer. The day I was arrested, the child said that she was in my house. I was taken to the A.P. but the child’s father gave out money. I was taken to hospital and the doctor clarified that I had nothing and I was not involved. That is all.

## **C. ANALYSIS**

15. The Learned Trial Magistrate, upon the conclusion of the case, considered the evidence before him under three headings which form the elements of the charged offence of defilement. These are:

a. Age of the victim;

b. Proof of penetration; and

c. Positive identification of the Accused as the assailant who unlawfully caused the penetration.

16. In his judgment the Learned Trial Magistrate first considered the age of the victim. The Learned Trial Magistrate concluded that CNO was thirteen years old a conclusion culled from her testimony during voir dire as well as the Treatment Notes and P3 Form produced as Exhibits in the case. The Learned Magistrate may well have added the testimony of the CNO's mother as another source for his conclusion. I find no reason to fault this finding by the Learned Trial Magistrate.

17. Next, the Learned Trial Magistrate analysed the element of penetration as defined in the Sexual Offences Act. On this point the Learned Trial Magistrate concluded that the medical evidence was conclusive that there was penetration of CNO's genitalia. I would add that the viva voce evidence of CNO also directly went to this point. CNO testified straightforwardly how the Appellant removed her skirt and panties, then his trousers and underwear and then inserted his penis into her vagina and did "bad manners" to her. The Treatment Notes taken on the same day of the assault indicate the Clinical Officer found a tear in the vaginal wall and the os was open – indications that CNO had had sexual activity recently.

18. Finally, the Learned Trial Magistrate tackled the core question: was there evidence that it was the Appellant who caused the penetration? On this one, the Learned Trial Magistrate re-hashed the evidence briefly reproduced above and concluded that the evidence was unmistakable that the Appellant caused the penetration. He believed the testimony of the Prosecution witnesses. In particular, the Learned Magistrate was impressed by the evidence of CNO as truthful. Conversely, he disbelieved the story by the Appellant, terming it a "mere denial meant at misleading the Court to believe that the offence is a fabrication, that the father of the child gave out some money." The Learned Trial Magistrate found the evidence of the other Prosecution witnesses as corroborating that of CNO.

19. On my part, I find no reason whatsoever to impugn these findings by the Learned Trial Magistrate. On the contrary, I find support for them from the evidence presented at trial. The Prosecution witnesses gave straightforward and credible testimonies. Their evidence was consistent and mutually corroborative. They remained unchallenged after the opportunity to cross-examine. Indeed, as I pointed out above, the Appellant did little by way of confronting the witnesses to challenge their stories.

20. The only substantive challenge the Appellant attempted was in his defence where he floated a theory that CNO's father was intent on framing him. He did not explain the motive for any such machinations on the part of CNO's father. The Learned Trial Magistrate was right to reject the story, tested against the inherent probabilities, as so improbable that it cannot reasonably possibly be true.

21. On appeal, the Appellant attacked his conviction on three points:

a. First, he argues that in her testimony, Ms. Mary Kimotho – the Clinical Officer who treated CNO after the attack – did not specify that she was talking about CNO.

b. Second, he argues that the medical evidence did not link him to the offence.

c. Third, the Appellant argues that the fact no evidence was found in his room despite the Investigating Officer have visited it proves his innocence.

22. I will deal with each of the grounds briefly below.

23. The first issue is whether the testimony of Ms. Kimotho was fatally non-specific. The Appellant cited the testimony in extenso and then concluded that the Court should observe that the witness did not specify or identify the child that she examined as the victim in the case. The section of the testimony of Ms. Kimotho that the Appellant cited is as follows:

On 2nd August, 2015, I was at work at Kirwara. A young child was brought for treatment. The child was brought to me and we interviewed the child. It was a case of suspected defilement. I examined the child and there was a tear in her vagina and her hymen had been broken. A laboratory test was conducted and we conducted a pregnancy and HIV test. I filled a P3 Form. I concluded that the child was defiled.

24. The Appellant's point is that Ms. Kimotho only referred to "the child" in her testimony. Hence, the Appellant argues, it is not clear that she was referring to CNO. This is a clever technical argument but it is ultimately unavailing to the Appellant. The context and circumstances are quite clear that Ms. Kimotho was referring to CNO in her testimony. The P3 Form she explicitly refers to is the P3 Form she filled after examining CNO. The form specifically mentions CNO. It was admitted to evidence and formed the basis of Ms. Kimotho's testimony. Ms. Kimotho also refers to her Treatment Notes which were also admitted into evidence. The Treatment Notes were the basis for filling the P3 Form, and they explicitly refer to CNO as the victim of sexual assault who was examined by Ms. Kimotho on 02/08/2015. There is, therefore, no reasonable doubt at all that the testimony of Ms. Kimotho was in reference to CNO.

25. Secondly, the Appellant is dismayed that there was no direct linkage between the medical evidence and his culpability. In this regard, his argument is three-pronged. One, he says that all the medical evidence appears to have done is to show that CNO might have been defiled but it does not say who defiled her. Two, the Appellant argues that nothing became of the tests done on him. Three, the Appellant submits that evidence of a perforated hymen does not necessarily mean that CNO was defiled as in today's world, hymen can be perforated by means other than penetration by a sexual organ. For example, he argues, hymen can be broken by friction cause by riding a bicycle.

26. Again, these arguments are unavailing for the Appellant. It is true that the medical reports did not directly link the assault to the Appellant as would happen, for example, where spermatozoa is found in a victim's body which, upon DNA testing, is found to belong to the assailant. However, the linkage between the assault and the Appellant is provided by the oral testimonies of the other witnesses. Indeed, the most important linkage is in the treatment notes which were written on the day of the assault. In remarkable detail and consistency, the Treatment Notes mirror the evidence provided by CNO in Court. CNO then completes the linkage by identifying the Appellant as her assailant. Her testimony is, then, supported by that of the other Prosecution witnesses.

27. The Appellant is surely right that a perforated hymen is not conclusive of a sexual assault. However, here, there was more than a perforated hymen: there was the tear in the vaginal wall and the os was open – all indication of recent sexual activity.

28. Lastly, the Appellant argues that the fact that the Investigating Officer did not find any incriminating evidence in his residence is proof of his innocence. In particular, the Appellant argues that there should have been blood from the breaking of the hymen which would have been found on his bed or some other physical evidence to link him to the crime.

29. There is no requirement in law that only physical evidence found in an Accused Person's residence can link him to a charged offence. It is also true that the absence of blood proves that there was no sexual assault on a minor. As the Appellant himself proffered, it is possible that the minor's hymen had been perforated in ways other than sexual activity. It is also possible that the minor could have been defiled previously. What matters, however, is whether there is proof beyond reasonable doubt that the Appellant defiled CNO in the particular instance charged. That proof can take many forms and is not limited to physical evidence found at the home of the Appellant. As I analysed above, in this case there was sufficient other evidence to establish that CNO was defiled and that it was the Appellant who defiled CNO.

30. Having reached these conclusions, it follows that the appeal herein must fail. It is, consequently, dismissed. The conviction is hereby affirmed.

31. As for sentence, the Appellant was imprisoned for twenty years. This is the minimum allowable by

the law upon conviction for an offence contrary to section 8(1)(3) of the Sexual Offences Act. Therefore, no appeal against sentence is possible here.

**D. DISPOSITION AND ORDERS**

32. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

- a. For the reasons stated above, the appeal is dismissed and the convictions are hereby affirmed.
- b. The sentence imposed by the Trial Court of twenty years' imprisonment is affirmed.

33. Orders accordingly

**Dated and delivered at Kiambu this 3rd day of March, 2017.**

**JOEL NGUGI**

**JUDGE**