



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 203 OF 2014

MICHAEL KIPKEMOI KOSKEI.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Sentence of the Chief Magistrate's Court at Nakuru Hon. R. Amwayi - Resident Magistrate delivered on the 15th August, 2014 in CMCR Case No. 168 of 2013)

JUDGEMENT

The Appellant **MICHAEL KIPKEMOI KOSKEI** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts.

The appellant had been arraigned before the trial court on 20/8/2013 facing a charge **of DEFILMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(4) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

“On the 15th day of August, 2013 at [particulars withheld] Village in Njoro District within Nakuru County unlawfully and intentionally committed an act by inserting a male organ (penis) into a female genital organ (vagina) of L C a child aged less than 18 years and above 15 years of age which [act] caused penetration”.

The appellant faced an alternative charge of **COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT 2006**.

The appellant pleaded ‘**Not Guilty**’ to all the charges and his trial commenced on 11/11/2013. The prosecution led by **INSPECTOR OCHIENG** called a total of three (3) witnesses in support of their case.

The complainant **L C** testified as **PW1**. She told the court that on 15/8/2013 at about 3.00pm she set off from [particulars withheld] to [particulars withheld] in order to visit her cousin ‘**J C**’. The complainant alighted at [particulars withheld] and as she walked along the road she met the appellant. He grabbed her and held her mouth pulling her along with him. The appellant then forced the complainant to board a motor bike which took them to a place near his home.

The appellant then pulled the child into his house. He ordered her to undress but when she refused he forcibly stripped her. The appellant removed his own clothes, lowered his trousers and proceeded to defile the child.

The next morning the appellant took the complainant to his parent's home. His parents were not there. The appellant ordered the child to accompany him to the shamba. The complainant pretended that she was going for a short call then took the opportunity to run away. She ran to a nearby homestead and reported what had befallen her.

The lady took the child to Njoro Police Station where the incident was reported. The complainant was also taken to Njoro Health Centre where she received treatment. The complainant later led the police to the appellant's house from where he was arrested. He was later charged with the offence of Defilement.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He opted to give a sworn defence in which he denied the charge.

On 15/8/2014 the learned trial magistrate delivered his judgement in which the appellant was convicted on the main count of Defilement and was thereafter sentenced to twenty (20) years imprisonment. Being aggrieved by both the conviction and sentence the appellant filed this appeal.

MR. OBUTU learned counsel argued the appeal on behalf of the appellant. **MR. MOTENDE** learned State Counsel acting for the respondent state opposed the appeal.

This being a first appeal this court is obliged to re-examine and re-evaluate the prosecution case and to draw its own conclusions on the same. **[see AJODE Vs REPUBLIC [2004] KLR 82].**

In this case the complainant gave her age as 15 years. **PW3 PC PAUL NGURE** who was the investigating officer told the court that he caused an age-assessment examination to be conducted upon the complainant. He produced the report as an exhibit **P.exb 3**. It indicated that upon assessment the complainant was found to be above 15 years old but younger than 18 years. Thus the complainant fell within the age bracket provided for by Section 8(4) of the Sexual Offences Act *ie* between 16-18 years.

PW2 JACOB CHELIMO a clinical officer attached to Njoro Health Centre told the court that he examined the complainant on 19/8/2013. He noted no injuries on her external genitalia but **PW2** did note that the child has a freshly perforated hymen and also had a foul smelling discharge. These are all factors associated with penetration. **PW2** filled and signed the P3 form which was produced as an exhibit **P. Exb 1**. The fact of defilement was therefore proved.

The complainant has identified the appellant as the man who defiled her. Given that the appellant accosted the girl at about 6.00pm when it was still light and given that according to her narration the complainant spent the whole night in the company of the accused and she further told the court that even the next morning the appellant took her to his parents home, there would be no reason to fault her identification of the appellant. The circumstances provided her with ample time and opportunity to see and identify her assailant.

However one key aspect of this case remains troubling **PW3** the arresting officer insisted that when the police went to arrest the appellant they recovered a jungle green skirt belonging to the complainant inside his house. The skirt was produced as an exhibit during the trial **P.exb 2**. In her evidence the complainant herself made no mention of this jungle green skirt. She only spoke of a skirt but did not mention the colour. She did not identify the skirt produced in court as hers as it was never shown to the complainant. Neither did the child mention having left any item of her clothing inside the appellant's house.

The complainant was a girl over 15 years of age. I doubt that she would have merely forgotten to mention such a crucial piece of information in her testimony before court. Further I find it curious that this skirt only materialized when the investigating officer came to testify. The skirt appears not to have been available when the complainant gave her evidence.

The complainant also told the court that the appellant tore her under pant. This torn under pant was never produced as an exhibit. If this matter was properly investigated as it ought to have been then this vital exhibit also would have been presented as an exhibit in court.

From the evidence on record, it would appear that the investigating officer **PW3** had greater details of what occurred on the material day than the complainant herself. **PW3** told the court that apart from leaving behind her green skirt (which the complainant never identified); the complainant also took from the clothes line an item of clothing belonging to the appellant's mother. Again the complainant made no mention of having run away with any of the appellant's mother's clothing. If this truly occurred then I have no doubt that the complainant would have mentioned in her evidence. **PW3** further states that the complainant having left her own skirt behind came to the station wearing a bigger skirt. Once again the complainant herself made no mention of this. This '**bigger skirt**' was never shown to the complainant to identify it and neither was the same produced as an exhibit in court.

All in all this court is left with a nagging feeling that the evidence of the investigating officer was largely fabricated and embellished in order to bolster the prosecution case. His evidence raises questions inconsistencies and anomalies which the court cannot simply gloss over and ignore. The testimony of **PW3** raises grave doubts regarding the veracity of himself as a witness and the prosecution case as a whole. In light of these inconsistencies, I find that the appellant's conviction was unsafe. The trial court failed to note or resolve these anomalies. The benefit of these doubts ought to have been awarded to the appellant.

For the above reasons I quash the appellant's conviction and I set aside the twenty (20) year sentence. This appeal succeeds. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Nakuru this 20th day of March, 2017.

Mr. Obutu for Appellant

Mr. Motende for State.

Maureen A. Odero

Judge