



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO: 48 OF 2016

[From Conviction and Sentence in Criminal Case No: 1395 of 2012 of The Chief Magistrate's Court at Thika]

SAMUEL KIONGERA GICHERU.....APPELLANT

-V E R S U S-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This is the judgment in **Criminal Appeal No. 48** of 2016. The Appellant, **SAMUEL KIONGERA GICHERU** was charged for **Defilement** of a child contrary to **Section 8 (1) (2)** of Sexual Offences Act **No. 3 of 2006**.

2. The particulars of the offence were that on the **20th day of March, 2012** within **Kiambu County** willfully and unlawfully caused his penis to penetrate the vagina of **F W** a child of **11** years.

3. **Alternative Count:**

Committing indecent act with a child contrary to **Section 11 (1)** of the Sexual Offences Act **No. 3 of 2006**.

4. Particulars were that on **20th March, 2012** within **Kiambu County** unlawfully and intentionally touched the vagina of **F W**, a child aged **11** years.

5. The appellant pleaded **NOT GUILTY**.

After a full trial, the trial magistrate found the appellant, guilty on main count convicted him and sentenced him to a life imprisonment as by law established.

6. The appellant being aggrieved and dissatisfied has now appealed against both the conviction and the sentence.

7. **His Grounds of Appeal is listed as here below:**

1. **THAT** the evidence relied upon by the trial magistrate not sufficiently trustworthy to have been acted upon as a basis for any conviction.

2. **THAT** the case for prosecution was not proved beyond reasonable doubt as required by law.

3. **THAT** my defence statement was not properly considered contrary to **Section 169** of the Criminal Penal Code (**CPC**)

8. The appellant also filed **additional amended grounds of appeal**. They are:

1. **THAT** the trial record does not show the record of the plea.

2. **THAT** the trial magistrate failed to provide the appellant with witness statements – this being an error of law and fact as per **Article 50 (2) (c), (j)** of constitution 2010.

3. **THAT** the trial magistrate erred in matter of law and fact by failing to find that the penile penetration on the complainant's genital was not proved to the requisite threshold since no DNA tests were conducted on the spermatozoa alleged on her.

4. **THAT** the learned trial magistrate erred in matters of law and fact by failing to note that there existed sufficient evidence of a grudge between the accused person (appellant) and the complainant to justify a framed case.

9. **SUBMISSIONS**

By the appellant.

1. In Defilement, three elements are important:

(i) Penetration of the complainant's genitalia.

(ii) The complainant's age.

(iii) Positive identification.

I submit that the prosecution failed to spell out all the above mentioned elements of the offence, thereof failing to prove beyond reasonable doubt, **See Elizabeth Waithiege Nigatimu -Vs- e KLR.**

2. Failure to record a plea.

I submit that this is an incurable omission.

3. Violation of any constitutional rights under **Articles 50 (2) (c), (j)** of constitution 2010.

I submit that since I was not furnished with witness statements, it was in violation of my constitutional rights under **Article 50 (2) (c) & (j)**

Three prosecution witness statements **Wario, Boru** and **PC Omuga**, were not furnished to me.

4. Evidence of grudge between me, appellant, and the complainant.

I submit that there existed a grudge between the complainant and the appellant.

By the prosecution, learned Counsel Madam Ngalyuke.

The appeal is opposed because:

1. There was sufficient evidence tendered by **PW1**

2. There was also sufficient medical evidence by **PW4** to prove that there was defilement.

3. The appellant was well known to the victim since he used to live with the victim's mother.
4. There was no mistake as to the appellant, it was an issue of recognition more than identification. Although the victim did not tell the mother the day it occurred, she nevertheless told her teacher.
5. It was clear it was the appellee who defiled the victim on **23rd March, 2012**.
6. There is consistency between the evidence of **PW1, PW2 and PW3**.
7. Therefore the possibility of the grudge is ruled out throughout the proceedings, no witness had a grudge.
8. The trial court found the victim to have been a reliable witness.
9. We therefore urge the court to dismiss the appeal and uphold the conviction and confirm the life sentence.
10. **FIRST APPELLATE COURT:**

The First appellate court is to read the proceedings of the trial court and re-evaluate the same and come to an independent conclusion, bearing in mind that, it neither saw nor heard the witnesses Viva Voce, and so give an allowance only for that fact, **See Okeno Vs Republic [1972] E.A. page 32.**

11 **A Question for determination**

The word **PLEA OF NOT GUILTY** is nowhere recorded in the court proceedings. Does this therefore render the trial of the lower court as a nullity?

12. **The Proceedings: Analysis**

The close perusal of the proceedings herein disclose the words: the plea entered: **not guilty**, both typed and un-typed.

This is a court of record. However, it appears a fully fledged trial was conducted to its logical conclusion as a consequence of that full trial the accused was found guilty on main count and convicted to life imprisonment.

As the result thereof he brings this appeal against both conviction and sentence. He has raised several grounds of appeal but this particular ground most daunting and curiously shocking and requires a comprehensive response on the issue.

However, further perusal of the handwritten proceedings indicated **folio 1** is curiously missing. The typed script begins at **folio 2** of the handwritten script.

It follows, therefore the missing first page is the one that contains the missing words: **Not guilty**. It is speculative to surmise who is behind the missing page. It could also have detached inadvertently as a secretary shuffled papers.

It could have been surreptitiously removed for the interest of the appellant. This is however, in the realm of speculation.

13. **FINDINGS**

The full trial proceeded on and a judgment was delivered accordingly. The offence of defilement was properly proved. And Section **382** of the **Criminal Penal Code** gives a hedge against such anomalies.

Accordingly, for the above reasons, the appeal has no merit, this court upholds both the conviction and the sentence. Therefore, this appeal is hereby dismissed.

Right of appeal - **14** days.

JUDGMENT WRITTEN AND SIGNED BY:

C. B. NAGILLAH

JUDGE

JUDGMENT DELIVERED, DATED AND COUNTERSIGNED IN KIAMBU BY:

THIS 10TH DAY OF MAY 2017

JOEL NGUGI

JUDGE

In the Presence of:

.....**the Appellant**

.....**for Respondent**

.....**for Court Assistant**