



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO: 44 OF 2016

[From Original Conviction and Sentence in Criminal Case No. 180 of 2006 of The Chief Magistrate's Court at Gatundu]

JOSEPH KIARIE KARANJA.....APPELLANT

-V E R S U S-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This is the judgment of a **Criminal Appeal No: 44 of 2016**. The Appellant is **JOSEPH KIARIE KARANJA**. He was initially charged for Defilement of a girl contrary to **Section 145 (1)** of the **Penal Code**. That was **Count (I)**.

The particulars thereof were that on the **1st** day of **March, 2006** village in **Thika** District within **Central Province**, had unlawful carnal knowledge of **L W M** a girl under the age of **sixteen** years.

2. **Count (II)** he was also charged of indecent assault on Female contrary to **Section 144 (1)** of the **Penal Code**.

Particulars thereof being that on the **1st** day of **March, 2006** in **Thika** District within **Central Province**, unlawfully and indecently assaulted **L W M** by touching her private parts.

3. **Count (III)** he was also charged with attempted defilement of a girl contrary to **Section 145 (2)** of the **Penal code**.

Particulars thereof were that on the **1st** day of **March, 2006** in **Thika** District within **Central Province**, attempted to have carnal knowledge of **C W** by touching her private parts and inserting your private part on her.

4. **Count (IV)** he was also charged with Defilement of a girl contrary to **Section 145 (1)** of the **Penal Code**.

Particulars thereof were that on the **1st** day of **March, 2006** in **Thika** District within **Central Province** in **Thika** had carnal knowledge of **M W Ka** girl under the age of sixteen.

He pleaded **NOT GUILTY**.

The **1st** trial was terminated and a re-trial was ordered accordingly. In the said re-trial the accused was tried for **Count I** and **Count II** respectively. He duly convicted for both **counts, I & II**. He was sentenced to serve life sentence in each **Count I & II**, the sentence to run concurrently. It was on **18.02.2013**.

The appellant being aggrieved and dissatisfied has appealed. He is unrepresented.

5. GROUND OF APPEAL ARE:

1. That his trial being a retrial, his fundamental right was violated in that I was detained in police custody for over three weeks and the trial itself took over two whole years.
2. That I was not accorded a fair and impartial re-trial in that **Section 200** of the **Criminal penal Code** was infringed as the second trial magistrate denied me the right to have the witness recalled before terminating the case.
3. That the learned trial magistrate erred in both law and fact in basing the conviction on inconclusive evidence was adduced by the

prosecution.

4. That the learned trial magistrate further erred in law and fact in rejecting any defence which had withstood the case for the prosecution.

Further Amended Grounds of Appeal by the Appellant

5. That there is no clear conviction in relation to **Count II** and **III**.

6. That the learned trial magistrate erred in matter of law and fact by pronouncing a life sentence which was not provided for when the crime was charged in contravention of **Article 50 (2) (n) & (p)** of the constitution 2010.

7. That the learned trial magistrate erred in matters and fact by failing to comply with the provisions of **Section 200 (3) of Criminal Penal Code**.

8. That the trial magistrate erred in matters of law and fact by basing my conviction on the testimony of **PW7** which is non-existent and contradictory to the rest of the evidence.

6. SUBMISSIONS

By the prosecution,

I oppose the appeal.

1. The trial was fair.

2. The trial was pursuant to the court order for re-trial.

3. The rights of the accused were not infringed upon all through the proceedings.

4. There were witnesses who linked up the accused to the offence, in particular, **PW1 & PW2** narrated the incidents.

5. The court correctly convicted the appellant correctly relying solely on evidence of **PW1 & PW2**.

6. It is trite law that if the court believes the evidence of a victim of sexual offence, it can go ahead and convict and that is what the court did here.

7. Therefore, it follows, that there was no need to call the doctor. Neither, was there a need to call an investigation Officer, his absence is not fatal.

8. In the court proceedings, on 5th **March, 2012**, the appellant sought to **PW5** recalled. The order of the court when the application for recall was made was not a trial court, so the court asked the matter of recall to be raised in court No. **1** was the trial court. Therefore, that issue of recall was never raised, presumed or abandoned.

9. That in summary our position is that the conviction was proper. The court is urged to uphold the conviction and the sentence.

By the Appellant

1. That there is unclear conviction in relation to **Count II & III** respectively. A life sentence for attempted defilement is unfair, excessive and illogical. So was there any unambiguous conviction in either **Count 2** or **3**. Can my convictions stand where there is no clear conviction?

2. That there is contravention of **Article 50 (2) (p), (q)** of the constitution of Kenya **2010**. I submit that since the prescribed sentence for the offence charged changed from **14 years** imprisonment to a **life sentence** from the time the offence was allegedly committed to the time of the original conviction and subsequent a trial and resentence goes against my rights under **Article 50 (2) (p) (q)** of constitution **2010**.

3. That there is a contravention of **Section 200** of the **Criminal Penal Code**. I submit it was not in the interest of justice to order a retrial. This is because I had already suffered sufficient prejudice by undergoing a retrial, having also remained in prison long enough to have received correction and rehabilitation.

4. That this conviction is based on non-existent testimony. I submit that the testimony of **PW7** is non-existent in court record.

7. FIRST APPELLATE COURT

The first appellate court's duty is to read, re-evaluate the evidence of the witnesses and come to its own independent conclusion, knowing

very well, that it did not see nor hear the witnesses Viva Voce, and thus make an allowance to its conclusion from the said proceedings, **See Okeno -Vs- Republic [1972] E.A. page 32.**

8. Questions for Determinations

1. Whether the appellant had unlawful carnal knowledge of the minor herein?
2. Whether the appellant indecently and unlawfully assaulted the minor herein?
3. Whether the minor know, the appellant, through recognition/ identification?
4. Whether failure to produce clinical notes and P3 form was fatal to the prosecution's case?

9. Court Proceedings: Analysis

In the proceedings, the **(4) four minor's, PW1- L W M, PW2- C W, PW3 – M W, and PW4 – M W all under age**, were headed to the coffee plantation in **[Particulars Withheld]** village and sexually assaulted by the accused person – the appellant **JOSEPH KIARIE KARANJA**. The accused was known to the children as he had been employed to burn charcoal in the home of **J M M**, the father of **L W M**. The three girls' evidence corroborated **PW1's** testimony as they were sexually assaulted in turns.

However, **PW7 – J M** evidence buttressed the testimony of them all as he witnessed the episode from a reasonable distance. The trial magistrate said **PW1** knows the accused very well and issue of mistaken identity does not arise. Her evidence was clear, consistent and cogent. I believed her.

On **PW7**, the trial magistrate said his testimony is the core evidence upon which this case is hinged. He was with the minor when he was sent to buy a cake but instead followed them and hid where he could see all that was happening. His evidence was clear, consistent and cogent.

On that evidence alone one would find that this case is water tight. It is an open and sheet case. He was convicted on **Count I & Count II**. The non-availability of clinical notes, notwithstanding. The case was retrial. The accused had been convicted by the predecessor but the file original file burnt and the appeal court ordered of retrieval.

10. FINDINGS

For the above reasons, there is no merit in this appeal. This court upholds both the conviction and sentence. Therefore, the 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**