



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
CRIMINAL APPEAL NO. 24 OF 2016

JOHNSON NG'ANG'A MWAGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Gatundu

Chief Magistrate's Court Criminal Case No. 743 of 2013

by M/s. Kinyanjui Ag. S R M on 29/04/14)

J U D G M E N T

1. **Johnson Ng'ang'a Mwago**, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)(3)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **31st** day of **March, 2013** at **[particulars withheld] Village, Gatundu North District** within **Kiambu County** did an act which causes penetration with genital organ namely penis into the genital organ namely vagina of **M W** a child aged **12 years**.

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.

Particulars of the offence were that on the **31st** day of **March, 2013** at **[particulars withheld] Village, Gatundu North District** within **Kiambu County** intentionally touched the breast and vagina of **M W** a child aged **12 years** with his hands

3. Having denied the charge he was subjected to full trial, found guilty, convicted and sentenced to **twenty (20) years imprisonment**.

4. Aggrieved by the conviction and sentence, he now appeals on grounds that:

- The case was not proved to the required standard.
- The production of the medical report under **Section 77(1)** and **33** of the **Evidence Act** was not safe therefore contravened **Article 50(4)** of the **Constitution**.
- PW1 never confirmed to PW4 the identity of the person referred to as **Johnson** who was

alleged to have brought her new clothes.

5. Brief facts of the case were that on the **31st** day of **March, 2013** the Appellant cooked for PW1 **M W**, the Complainant, eggs and then inserted his finger into her private parts. He went and bought for her bread and juice, a dress, a biker and shoes. Afterwards he took her to his house removed her pants and penetrated her genitalia with his genital organ. She bled from her private parts as a result. He told her not to tell anyone what had happened. She later informed her grandmother and mother. She was taken to hospital for treatment. On examination she had a broken hymen. The case was reported to the police who investigated and charged the Appellant.

6. When put on his defence the Appellant denied having committed the offence. He testified that when he was arrested by the police who alleged that he bought clothes for the Complainant and demanded **Kshs. 50,000/=** from him to settle the case. He declined to give the money and he was charged.

7. At the hearing of the Appeal the Appellant relied upon written submissions.

8. The State through **Ms. Maundu** opposed the Appeal. She submitted that the age of the Complainant was proved. An immunization card was issued to her was adduced in evidence.

9. This being the 1st Appellant Court, I am duty bound to analyze and re-evaluate evidence which was before the trial Court and come to my own conclusion without overlooking the conclusion reached by the trial Court. I must do this bearing in mind that I had no opportunity of hearing and seeing witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

10. To prove the case to the required standard, the Prosecution was duty bound to prove:

- Age of the victim.
- The act of penetration of the victim's genitalia.
- Whether the Appellant was the perpetrator of the act that caused penetration.

11. In the case of **Stephen Mulili vs. Republic (2014) eKLR** the Court of Appeal was satisfied with evidence of the Complainant, the diagnostic HIV Testing and Counselling Patient/Client Card, the General Outpatient Record and P3 form exhibits as proof of the Complainant's age.

12. In this case the Prosecution adduced evidence of the child health card (Immunization Card). Per the entry on the card **M W**, the Complainant herein was born on the **31st March, 2001**. The Medical Examination Report (P3) indicated her age as **12 years**. PW2 the mother of the Complainant stated that she was born in **2001**. From evidence adduced, the Prosecution proved the age of the Complainant beyond any reasonable doubt.

13. The Complainant was seen at the **Igegania Sub-District Hospital** on the **15th July, 2013** per the outpatient record card issued to her and adduced in evidence. She was examined on the stated date and found to have no hymen, there was no bleeding and she had a small bruise on the perineum.

The fact that the Complainant had no hymen may be evidence of her genitalia having been penetrated.

14. In her testimony the Complainant stated that the Appellant had penetrative sexual intercourse with her three times. He would take her out and buy her items. She stated that he bought her a dress, biker and shoes. And after he defiled her he remained with her new clothes. PW4 her grandmother stated that previously she saw the Complainant in a new dress, shoes and a biker. When she learnt that she had been bought clothes by **John** she was disturbed. Therefore she reported the matter to the police.

15. The learned trial Magistrate analyzed evidence adduced and reached a finding that the evidence

adduced by the Complainant was corroborated by that of PW3 who produced the P3 in evidence that confirmed the fact that her hymen was broken. He appreciated that the Complainant stated that she had been drugged and was mentally retarded. He concluded by stating thus:

“PW1 clearly said it was accused who defiled her. I am cautious of the fact that she is mentally challenged. However there is sufficient corroborative evidence. She never implicated anyone else and she said she knew accused well and accused said she knew her well. I see no reason for her to frame him and I accept her evidence.”

16. According to evidence adduced, the Complainant was defiled on the **31st March, 2013**. She was seen in hospital by the clinician on the **15th July, 2013**. Her hymen was broken with a small bruise at the area around the genitalia. The age of injury was approximated as three (3) days at the point of filling the P3 form. The P3 form having been filled on the **17th July, 2013** meant that the Complainant was defiled on the **15th July, 2013** the same day she sought treatment at the Sub-County Hospital. The question that remains unanswered is if the Appellant defiled the Complainant on the **31st day of March, 2013**, then who defiled her on the **15th July, 2013**?

17. On examination it was noted that the Complainant was mentally retarded. The learned Magistrate cautioned himself in respect of that fact. He appreciated the fact that the Complainant was mentally challenged but stated that the Complainant did not accuse any other person for having committed the offence.

18. **Section 107** of the **Evidence Act** provides thus:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

19. In the case of **Republic vs. David Ruo Mjambura & 4 Others (2001) eKLR** it was stated that:

“The cardinal principle of law is that in a criminal case the legal onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the prosecution throughout to prove the guilt of an accused.”

The Prosecution failed to tender evidence of who sexually violated the Complainant on the **15th July, 2013**. The Investigation Officer testified that PW3 informed him that the Appellant defiled the Complainant on the **31st March, 2013**.

A report was made and his colleague **Mary** was investigating the case. And, that a P3 form had been filled. That the Appellant had been arrested by an Administration Police Officer from **Kanyoni**. Then, on the **15th July, 2013** the Appellant had purchased for her clothes.

20. No evidence was adduced by **Mary** to confirm the allegation. No P3 was produced or even identified to prove that it was issued on the **31st March, 2013**. No evidence was adduced of the arrest of the Appellant by an Administration Police Officer, and if so why he was released.

21. Some items namely a biker, pant, dress and a pair of slippers were identified by PW3 the grandmother of the Complainant as what she saw the Complainant wearing that aroused suspicion in her mind. The Complainant never identified the items. In her testimony she said that the Appellant retained what he purchased for her.

22. In a nutshell, the Prosecution who were duty bound to prove the case against the Appellant to the required standard failed to do so. In the premises, the Appeal has merit, I allow it by quashing the conviction and setting aside the sentence meted out. The Appellant shall be set free unless otherwise lawfully held.

23. It is so ordered.

Dated, Signed and Delivered at Kiambu this 13th day of June, 2017.

L. N. MUTENDE

JUDGE