



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NANYUKI**  
**CRIMINAL APPEAL NO. 91 OF 2016**

**JOHN KAARIA SIMBA .....APPELLANT**

*versus*

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. C. N. NDEGWA – PRINCIPAL MAGISTRATE dated 15<sup>th</sup> December 2014 in Maralal Principal Magistrate’s Court Criminal Case No. 769 of 2014).*

**JUDGMENT**

1. **GEORGE KAARIA SIMBA** was convicted after trial by the Principal Magistrate at Maralal Court of the **offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act**. On conviction he was sentenced to 20 years imprisonment. He has filed this appeal against his conviction and sentence.
2. As the first appellant court this court is obligated to reach its own decision on the evidence tendered at trial. See the case of **KARIUKI KARANJA V REPUBLIC (1986) KLR 190**.
3. The prosecution called a total of 4 witnesses during the trial.
4. NL stated in evidence that she was 13 years old and was pupil at class six at [Particulars Withheld] Primary School, within Samburu County. She recalled on 21<sup>st</sup> October 2014 at 6 p.m. she had been sent by her mother to the trading centre to buy soap and sugar.
5. She went and entered into a shop at that trading center. Before she could purchase her items the appellant told her that he wanted to send her to his barber shop and also wanted to give her money to buy some item for him. They went out of the shop together and went to the appellant’s barber shop. On entering that barber shop the appellant locked N L. inside and left her there until in the night when he returned and raped her. She continued in her evidence and stated:-  
  

***“He (the appellant) removed my clothes. He removed my ‘skin tight’ and underpants and had sex with me. I cried as he had sex with me. I slept in his house (kinyozi) that night.”***
6. The appellant on the following day again left N L. locked up in his barber shop. It was not until 3 p.m. later that day that N L through the window saw someone she knew passing by, whom she sent to her parents to go tell them that she was locked inside appellants’ home.
7. On being cross examined N L stated that the appellant’s house was behind the barber shop. She further stated that she was taken to hospital by her brother on being rescued.

8. N L's mother testified and stated that she did on 21<sup>st</sup> October 2014 send her daughter, N L, to the shop. N L took too long to return from her errand and her mother began to look for her. The mother since she did not find her made a report to the area chief that she was missing.

10. On being cross examined N L's mother said that N L was missing for 3 days. She further stated that N L was rescued from appellants' home by Harrison and Jason.

11. Doctor Moses Githinji at Maralal District Hospital examined N L. He found in his examination:-

***“There was blood stains on external genitalia. There was laceration on the Labia minora the hymen was freshly broken. There were blood stains on her thighs..... There was blood in the urine.”***

The doctor produced the P3 form of that examination which also reflected that N L's age was estimated to be 13 years.

12. The appellant has raised 4 grounds of appeal as follows:-

***“1. That the learned magistrate fell into error in affirming conviction and sentence of the appellant in failing to hold that the identification by PW 1 was insufficient to support conviction and further potential witnesses were not called to tie the loose ends of the prosecution case.***

***2. That the trial magistrate equally fell into error in convicting the appellant in failing to find that the medical evidence was at variance with PW 1 testimony and did not prove the complainant was defiled and further I was not medically examined to prove my physical contact with PW 1.***

***3. That the trial magistrate erred in law and fact in affirming conviction and sentence without considering that the age of the complainant was not proved beyond reasonable doubt and PW2 was not skilled in dental care to determine the age of the complainant.***

***4. That the learned magistrate fell into error in failing to consider my credible defence that displaced the reliability of the prosecution's case.”***

13. In regard to the first ground appellant submitted that N L cannot be believed in her allegations of rape because she did not scream.

14. N L in her examination in chief stated that she cried when the appellant raped her. In response to cross examination she said:-

***“I was crying loudly as you (the appellant) had sex with me that night.”***

15. It follows from that evidence that N L did indeed cry and did so loudly but as she stated in her evidence no one went to her aid.

16. Appellant also faulted the evidence of N L's mother which he said contradicted N L's evidence.

17. N L stated that she was at appellant's home for one night and was rescued the following day. Her mother in evidence said that N L was missing for 3 days.

18. Whether N L was missing for one day as she stated or for three days as her mother stated the fact remains that she was missing when she was detained by the appellant in his barber shop. If there are inconsistencies in both of those testimonies in my view they are not fundamental to cause appellant prejudice. The evidence in relation to the charge given by the appellant was clear from that testimony of N L. She stated the appellant lured her to his barber shop cum home locked her inside and raped her in the night. In considering discrepancies the Court of Appeal in the of **JOSEPH MAINA MWANGI vs**

**REPUBLIC Criminal Appeal No. 73 of 1993 Tunoi, Lakha and Bosire JJA, held:-**

***“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences.”***

That holding is pertinent to this case.

19. In the first ground the appellant also faulted the prosecution for failing to call witnesses such as the brother to N L, the rangers who rescued N L and the area chief to whom the report of N L’s missing was made.

20. **Section 143** of the Evidence Act provides:-

***“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any act.”***

21. The witnesses the appellant submitted they should have testified would only have testified about the aftermath of the criminal act that the appellant committed against N L. The absence therefore of that evidence did not detract the very cogent and clear evidence of the prosecution.

22. In further response to appellant’s submissions this court as is provided under **section 124** finds that there was no requirement of corroboration of N L’s evidence. The provision thereof provides that in cases of sexual offence the court may receive the evidence of an alleged victim and proceed to convict on that evidence if the court is satisfied the victim was telling the truth. The trial court in its considered judgment stated:-

***“There is no doubt that NL was defiled.”***

The trial court therefore found N L to be truthful witness and accordingly it proceeded to convict the appellant on that evidence.

23. The appellant on the second ground of appeal stated that because N L and her mother did not testify that she had blood in her genitalia the prosecution’s case ought to have failed.

24. N L testified that the appellant raped her. The fact she did not state she was bleeding does not affect the doctor’s clear evidence that on examining N L he found she had blood stains on the genitalia and laceration on the labia minora. He also found that her hymen was freshly broken. The appellant’s submission in view of that evidence is rejected. The results of the medical examination were consistent with rape allegation.

25. N L in evidence under oath stated she was 13 years old. The doctor estimated her age as 13 years and states so in the P3 form. Both N L and the doctor were not cross examined by the appellant on their evidence about N L’s age. Even in his defence the appellant did not state that N L was not 13 years old. It follows that the prosecution proved beyond reasonable doubt that N L was 13 years old.

26. The appellant erred to submit that the trial court’s magistrate did not consider his defence. Far from it, the learned magistrate clearly referred to that defence in his judgment but rejected that defence.

27. Section 8(1)(3) of the Sexual Offences Act provides that a person who rapes a child who is aged between 12 and 15 years of age on conviction shall be sentenced to a period not less than 20 years. The appellant who was convicted of rape of N L who was 13 years old was correctly sentence by the trial court to 20 years imprisonment.

**28. For the above reasons appellant’s appeal against conviction and sentence is dismissed. The trial**

**court's conviction is upheld and the sentence of that court is confirmed.**

**DATED *and* DELIVERED at NANYUKI this 7<sup>TH</sup> day of JUNE 2017.**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Njue /Mariastella

Appellant: George Kaaria Simba

For the State: .....

Language: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**