



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 48 OF 2015

SAMUEL MWANGI KINYATIAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by **Hon. F W MACHARIA PRINCIPAL MAGISTRATE** dated 7th January 2015 in Nanyuki Chief Magistrate's Court **Criminal Case No. 1266 of 2012**)

JUDGMENT

1. **SAMUEL MWANGI KINYATI** is the appellant in this appeal. He appeals against conviction and sentence of the offence of defilement of a child of 5 years **Contrary to Section 8 of the Sexual Offences Act**. He was sentenced by the lower court to life imprisonment.
2. The appeal was opposed by Learned Counsel Mr. Tanui Principal prosecution Counsel, who having summarised the evidence submitted that prosecution proved its case.
3. This is the first appellant court. The duty of this court was stated in the case **KIFAMUNTE – V- UGANDA [199] 2 EA Page 127**, to be:

*“On first appeal, an appellant was entitled to have the appellant Court’s own consideration and views on the evidence as a whole. The first appellant Court had a duty to reconsider the materials before the trial Judge and then make up its own mind while carefully weighing and considering the judgment appealed from where the question arose whether one witness was to be believed over another and that question turned on demanour, the appellant court was obliged to be guided by the impressions made on the trial Judge who saw the witnesses: **pandya v Republic [1957]EA 336, Okeno v R [1972] EA 32, Bitwire v Uganda Supreme Court criminal appeal Number 23 of 1985** followed.”*

4. The prosecutor’s case was that JN a child of 5 years on 5th November, 2012 was playing at the back of her grandparent’s home. P W 1, M W the grandmother in her evidence stated that JN liked playing behind the house writing in the sand. On this occasion it seems she was engage in that playfulness. It was then her neighbour who she knew as Sammy (**the appellant**) called her towards the bush. He called her promising to give her a sweet. When she went he defiled her. JN narrated that harrowing incident just as a child would. She said

“He pricked me with a thorn... He pricked me at my anus... He removed my pants. He removed his pants. I was lying down on my stomach. Accused also was lying down. He touched me at the back.... He was lying close to me. He removed his trousers. The thorn was red. It looked like a stick. I screamed... The thorn was coming from the front part of this body.”

5. From that narration JN described her defilement through her anus by a penis which she, in childlike manner, described as a thorn coming from the front part of appellant's body. After defiling her appellant dressed her and dressed himself. She went home and found her grandfather.
6. When she informed her father what the appellant had done the grandfather sent her to her grandmother.
7. When she went to her grandmother (P W 1) the grandmother saw that she was shivering/ shaking. On examining her the grandmother found her under pant was full of feces. The feces was from the back to the front of the pants. She called **P W 3 Teresa Wanjiru**, a village elder. P W 3 said that she too examined JN and saw that feces was all over her anus. P W 3 advised that JN be taken to hospital. JN was taken to hospital after reporting the matter at the police station.
8. The P3 form was produced by **P W 5 RONALD MUTAI**, the clinical officer. The physical examination revealed that JN was defiled. The injuries noted in the P3 are:

“Bruises of the labia minora, vagina, bruises and bleeding on the anal orifice.”

9. Appellant on being put on his defence stated in unsworn statement that on the day in question he had been hired by a “certain” woman to look after her cattle. When he was driving the cattle out of a farm the husband of that woman attacked him from behind by cutting his legs. That he was taken to hospital by police and he had no knowledge of the offence he was charged with.
10. The appellant by the grounds of appeal he presented in this appeal criticized the prosecution's case for being contradictory; faulted the prosecution for not producing the clothes JN was wearing on the day in question; faulted the medical evidence of JN and also stated that he too ought to have been examined, and finally stated the offence of defilement was not proved.
11. Appellant failed to elaborate and show where the contradiction was in the prosecution's evidence. To the contrary my examination of that evidence revealed very consistent credible evidence which in my view established that JN was defiled and that it was the appellant who committed that offence. P W 1 grandmother of JN even said that after the matter was taken up by the police appellant sent his mother to the home of JN requesting that the matter be settled out of court. Appellant did not cross examine her on that evidence and it must therefore be taken that he did not dispute that evidence.
12. The fact the clothes which JN was wearing were not produced does not in any way reduce the weight of the prosecution's case. It suffices that prosecution led evidence of the defilement by the appellant who JN knew very well and referred to him as Sammy. Prosecution also produced medical evidence which conclusively proved JN was defiled. The fact appellant was not medically examined does not in any way affect prosecution's case. It follows therefore the evidence produced by prosecution proved the charge of defilement as required by law.
13. Appellant erred in submitting that the evidence of JN required corroboration of another witness, presumably. Firstly I need to state JN's evidence was corroborated by the medical evidence. Secondly under the provisions of **Section 124 of the Evidence Act Cap 80** no corroboration is required in criminal cases involving Sexual Offences, such as this one.
14. I am in agreement with Learned Counsel Mr. Tanui that there is no merit in this appeal.

15. Before concluding this appeal I need to state that the Learned Magistrate who concluded this case, because it was heard by three Magistrates, and wrote the judgment noted that appellant was charged with the offence of defilement **Contrary to Section 8 (1) (3)** . She therefore stated in her judgment :

“The correct framing of the charge sheet ought to have been “as read with Section 8 (2) of the Sexual Offences Act and the charge sheet is amended as such.”

16. Section 8(1) (2) and (3) provide as follows:

8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A Person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

17. Looking at those provision the correct section the appellant should indeed have been charged was Section 8 (1) (2) of the Sexual Offences Act. Did appellant get prejudiced by that amendment of the the charge sheet when he was not given a chance to take fresh plea? I find that he was not. He was aware of the age of JN since her age was the subjected of the evidence adduced by the prosecution. The amendment did not introduce any new matter. In this regard I am supported by a decision of :

JOSPHAT KARANJA MUNA – VS- REPUBLIC (2009)e KLR. The court of Appeal sitting in Nyeri said as follows;

“On non-compliance with Section 214 of the Criminal Procedure Code we observed that as far as the Appellant is concerned the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant... That the spirit of Section 214 is to afford an accused person opportunity to recall and cross examine witnessed where the amendments would introduce fresh element or ingredient into the offence with which an accused person was charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of the name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non compliance with the precisions of Section 214 of the Criminal Procedure Code resulted into injustice to the Appellant.”

18. In the end I find there is no merit in appellant’s appeal and the same is hereby dismissed.

Dated and Delivered at Nanyuki this 9TH February, 2016

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant Kiruja

Mr. Tanui for the state

For Appellant:

Court

Judgment delivered in open court

MARY KASANGO

JUDGE