



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 45 OF 2015

JAMES PAM KINYAGAAPPELLANT

-VERSUS—

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by **Hon. T.W. CHERERE** - ChiefMagistrate dated 2nd October 2014 in Nanyuki Chief Magistrate’s **Court Criminal Case No. 492 of 2014**)

JUDGMENT

1. **JAMES PAM KINYAGA**, appellant herein, was charged before Nanyuki Chief Magistrate’s court, on **count one**, with the offence of intentionally and unlawfully marrying, JM, the complainant who was aged 13 years, contrary to Section 119 (1) (h) of the children’s Act; and an **count two** with the offence of defilement of JM contrary to Section 8(1) (3) of the Sexual Offences Act Cap 62A; and in alternative count he was charged with the offence of indecent act with a child Contrary to section 11 (1) of Cap 62A.

2. After trial he was convicted on the offence of defilement and was sentenced to 20 years imprisonment. He has filed his appeal against his conviction and sentence.

3. This is the first appellant court. I wish to remind myself the duty of the first appellant court set out in the case **OKENO – V- Republic [1972]** thus: -

“An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination² and to the appellant court’s own decision on the evidence. The first appellant court must itself weigh conflicting evidence and draw its own conclusions. ³It is not the function of a first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions’; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses⁴.”

4. Appellant faulted his conviction on insufficient evidence, and termed the trial court’s sentence as harsh.

5. The prosecution’s evidence was to the effect that JM went to the headmaster (P W 3) of [particulars withheld] Primary School on 13th March, 214. She informed P W 3 that she was running away from an

early marriage. Since P W 3 estimates she was 13 years old he admitted her to standard 3. P W 3 informed the various stake-holders that JM had been admitted in the school from a forced early marriage. When the school closed P W 3 said he handed over JM to her father.

6. When the school opened on 6th May, 2014 JM did not report back to school. P W 3 got information that JM had been married off presumably during the school holidays.

7. P W 4 was police officer from Doldol Police station. He received information that JM had failed to report to school for the second term and he got information that she had been married off. On carrying out investigation he found JM at the home of appellant. JM informed P W 4 that appellant was her husband.

8. From the above evidence it seems that there were two separate occasions that JM was said to have been married off. The first was before she joined [particulars withheld] Primary School for the second term.

9. The prosecution did not lead evidence to show whether on both occasions JM was married to the appellant.

10. P W 4 said that he found both J M and appellant at appellant's home when he escorted them to the police station.

11. JM, who was P W 1, gave contradictory evidence. Although she said that before appellant's arrest they were living together as husband and wife; She later said that she was living at appellant's gran mother's home while appellant as living at his mother's home. It is important to note that no evidence was adduced by the prosecution to prove the offence of defilement while JM testified. There was no specific question whether appellant had defiled her. The Learned trial Magistrate was in error in my view when she stated In her judgment:

“P W 1 JM the complainant has identified accused as the one that married and defiled her.”

12. There was no evidence that appellant defiled JM. The prosecution failed to bring out that evidence. The only evidence prosecution adduced was that JM was married to appellant. It does not follow that because JM was married to appellant she had sexual contact with him. The doubt that arises on whether appellant had sexual contact with JM is made that more poignant by the testimony of JM where she said that she resided with appellant's grandmother while appellant resided with his mother. There was an omission on the part of prosecution in failing to specifically lead evidence on defilement if any. The court should not have been left to presume that appellant defiled JM.

13. The Learned Justice John Mativo in the case **NYERI HIGH COURT CRIMINAL CASE NO. 23 OF 2015 STEPHEN KAMIRIKIMARUA & ANOTHER – V- REPUBLIC**, on finding that the prosecution had failed to meet the required standard of proof went further to say:-

*The prosecution never adduced sufficient evidence to support the conviction. In fact the evidence tendered did not meet the required test in law. The legal burden of proof in criminal cases never leaves the prosecution's backyard. Viscount Sankey L.C. in the celebrated case of **Woolmington vs DPP**⁷ in a subtle and masterly fashion stated the law on legal burden of proof of in criminal matters, that:*

“Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilty subject to what I have already said as to the defence of insanity and subject also to any statutory exception... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

The ingredients of the offences facing the accused were never proved at all. In my view whatever is

thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his guilt must be proved beyond reasonable doubt. Perhaps the most eloquent statement of reason for this is to be found in the opinion of **Brennan J** in the United States Supreme Court decision in **ReWinship**⁸ where the court stated:

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction.... Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law no be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

14. Although the clinical officer (P W 2) confirmed that on examination he found that JM’S hymen had been perforated and that there was sings of regular sexual intercourse, the prosecution needed to adduce evidence to show that appellant was the same person who married JM before she began attending school as well as after she went on school holiday after first term.

15. But even if prosecution adduced evidence that appellant married JM on both occasion prosecution failed to lead evidence which showed, beyond doubt, that appellant defiled Jm. prosecution produced no such evidence. Furthermore even at his arrest appellant was not residing with JM according to JM.

16. In view of that inconsistent evidence the defence offered by the appellant was plausible, In a few sentences he stated:

“I am a farmer. I was arrested at home and charged. I do not know why I was charged. I was framed and charged with an offence that I know nothing about.”

17. There is therefore merit in appellant’s appeal. The prosecution failed to meet its standard of proof. In that regard the appellant’s conviction is hereby quashed and his sentence is hereby set aside. **I order the appellant to be set free unless otherwise lawfully held.**

Dated and Delivered at Nanyuki this 7th APRIL 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Njue

For state

For Appellant

Appellant

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE