



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO 468 OF 2013

(Appeal from original Conviction and Sentence in Kigumo Criminal Case No 505 of 2012 - B Khaemba, RM)

TIMOTHY MWANIA KIOKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant **Timothy Mwanja Kioko** was convicted after trial of **defilement of a girl** contrary to **section 8(1) & (3)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged in the particulars of the offence that on the 13/03/2012 at Maragwa Township in Murang'a County, he intentionally caused his penis to penetrate the vagina of **J N M**, a girl aged 15 years. He was sentenced to serve 15 years imprisonment. He appealed against both conviction and sentence.

2. The Appellant filed his appeal in person and was unrepresented at the hearing thereof. In his amended grounds of appeal tendered at the hearing on 20/04/2016 he has complained -

(i) That the judgment of the trial court was lopsided in favour of the prosecution in that it ignored contradictions and inconsistencies in the prosecution case.

(ii) That the trial court did not properly assess the evidence tendered by the prosecution.

(iii) That the testimony of the complainant was uncorroborated, and that it should not have been relied upon.

(iv) That the charge against him was not proved beyond reasonable doubt as required by law.

The Appellant also tendered written submissions which he relied fully upon. I have read and considered those submissions.

3. Learned prosecution counsel supported the conviction and sentence. He submitted that the complainant's age (15 years) was proved beyond reasonable doubt by the testimony of her mother (PW2) and production of her baptismal card; that the testimony was clear, credible and unshaken in cross-examination and was fully corroborated by that of her mother (PW2), father (PW4) and PW6, an independent witness; that the offence was proved beyond reasonable doubt; and that the sentence handed down to the Appellant was lawful. In his view there was no merit in the appeal.

4. I have carefully read the record of the trial court in order to evaluate the evidence and arrive at my own

conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

5. The age of the complainant, 15 years, was proved beyond reasonable doubt by production of her baptismal card (Exhibit 2) in addition to her mother's testimony. She was born on 18th December 1996. As at the date of the alleged offence, 13/03/2012, she was 15 years old. She testified under oath after a *voire dire* examination. The trial court was satisfied that she was possessed of sufficient intellect and understood the nature of the oath and the duty to tell the truth.

6. The Complainant's testimony was straight forward. On the evening of 13/03/2012 at about 6.00 p.m. she was walking towards her home from her mother's place of business. The Appellant, whom apparently she had not known before, came upon her; he was riding a motor cycle. He offered her a lift, which she accepted. The Appellant took her straight to his house, locked the door, undressed her and himself and had sexual intercourse with her. He the locked her in the house and went away, apparently coming back later.

7. The following morning her father (PW4) received information that the Complainant had been seen by some children riding a motor cycle with the Appellant the previous evening. PW4 knew the Appellant by appearance as, he stated, he was the only Mkamba operating a *boda boda* in the township. He called PW6 and together they proceeded to the house of the Appellant which was pointed out to them. PW4 knocked on the door and the Appellant opened; inside the house there was also the Complainant sitting down. As he was very angry PW4 just took away his daughter and apparently did not confront the Appellant. He took her home and left her with her mother and went to work. Later in the evening he took the Complainant to **Maragwa Police Station** and reported the matter. They were referred to **Maragwa District Hospital** where she was examined and treated.

8. The testimony of the complainant's mother (PW2) was that when her father brought her home she was crying and not talking to anyone. Her husband told her where he had found the child and then went to work. She (PW2) also went to work. Later when she came home the Complainant told her how she had been given a lift on a motor bike by a man she had known before. That man took her to his house and locked the door and had sex with her. She asked her if the man had used any protection and she said he had not. PW2 then left the matter in the hands of her husband (PW4).

9. PW6 (Duncan Muchoki Njuki) fully corroborated the testimony of PW4 whom he had accompanied to the house of the Appellant where they found both the Appellant and the Complainant.

10. The investigating officer, PC Richard Lobong (PW5) testified that on 14/03/2012 he was at Maragwa Police Station when the Complainant and her father reported that she had been defiled. The report was booked and the Complainant was issued a P3 form and escorted to Maragwa District Hospital where she was examined and treated; subsequently the P3 was filled. PW5 further testified that on 24/04/2012 at about 4.40 p.m. the Appellant came to the police station with the Complainant's father (PW4), her mother (PW2) and another man, with the intention of reconciling. As reconciliation was not permitted by law in such a case he arrested the Appellant and placed him in the cells. He then charged him with the offence before the court.

11. The medical evidence produced by PW3, a clinical officer, showed that the Complainant had no lacerations or tears on her labia. But she had a white discharge from her vagina. Her hymen had been broken, and a vaginal swab showed no spermatozoa. Pregnancy and HIV tests were negative. In cross-examination he stated that the Complainant had not been defiled. He was not the medic who examined the Complainant when she came to hospital on 14/03/2012. He only filled the P3 from the treatment card.

12. The Appellant gave an unsworn statement in his defence. He did not call any witness. His statement was to the effect that there was a previous grudge between him and the Complainant's father on account of the Appellant having given him on 10/04/2012 only KShs 200/00 towards a fundraiser instead of the minimum KShs 1,000/00 that he demanded. The Appellant also stated that at PW4's request he had given him a set of seats which he had refused to give back to the Appellant, as a result of which they fought,

and after which PW4 went to the police station. When the Appellant followed him there PW4 bribed PW5 with KShs 500/00. The two then falsely accused him of having defiled PW4's daughter, and he was then arrested and charged.

13. That was the totality of the evidence placed before the trial court. The medical evidence was not of any assistant to the prosecution case. It only disclosed that the Complainant was probably not a virgin on the date of the alleged defilement. That left the testimony of PW1 and the other witnesses.

14. It will be noted that the defilement was reported to the police on 14/03/2012 upon which the Complainant was issued with a P3 form and escorted to hospital for examination and treatment. The Appellant in his unsworn statement alleged that he was falsely accused by PW4 and PW5 on 10/04/2012 of having defiled PW4's daughter. He did not cross-examine them upon that allegation.

15. The testimonies of PW2 and PW4 did not place them at Maragwa Police Station on 10/04/2012; nor did the testimony of PW5 (the investigating officer) so place them. PW5's testimony was that in the afternoon of 24/04/2012 he was at the police station when the Appellant came in accompanied by PW4, PW2 and another man with the intention of reconciling over the alleged defilement of the Complainant. As reconciliation was not possible under the law he arrested the Appellant and later charged him with the offence before court. The story of the Appellant was clearly false, and the trial court rightly rejected his defence.

16. Upon my own evaluation of the evidence, I am satisfied beyond reasonable doubt that on the evening of 13/03/2012 the Appellant abducted the Complainant under pretext that he was giving her a ride to her home on his motor cycle. Instead he took her to his house where he locked her in and had sexual intercourse with her. She appeared not to have been a virgin. He held her in his house overnight.

17. The following morning her father (PW4) and PW6 found the Complainant in the Appellant's house; the Appellant was also there. The Complainant was obviously distressed as noted by her mother (PW2) when her father brought her home. There cannot be any doubt at all that the Appellant was the man who abducted the Complainant and took her to his house where he had sexual intercourse with her. He was found with her in the house the following morning. The Appellant's attempt at seeking reconciliation, as testified to by PW5, was further proof of his guilt. None of the witnesses was shaken in cross-examination.

18. I am satisfied that the Appellant was convicted upon good and sound evidence. The charge against him was proved beyond reasonable doubt. There is no merit in the appeal against conviction.

19. I have already held the age of the Complainant was established beyond reasonable doubt by her baptismal card and her mother's testimony. That age as at the time of commission of the offence was 15 years. Having apparently decided that a custodial sentence was deserved, the hands of the trial court were tied, and it had to impose the minimum term of imprisonment provided under section 8(3) of the Act. That minimum term is 15 years. The sentence meted out to the Appellant was therefore lawful.

20. In the event, I find no merit in this appeal in its entirety. The same is hereby dismissed. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 15TH DAY OF SEPTEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 16TH DAY OF SEPTEMBER 2016