



REPUBLIC OF KENYA

IN HIGH COURT OF KENYA AT MERU

HCRA 158 OF 2011

SAMUEL KARIITHI KANYI APPELLANT

VRS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant is Samuel Kariithi Kanyi. He was charged with the offence of defilement contrary to Section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. He is alleged to have defiled a child aged 8 years. In the alternative, he faced a charge of indecent act contrary to Section 4 (1) of the Sexual Offences Act. He was found guilty and convicted on the main charge and was sentenced to serve life imprisonment. Being aggrieved by both conviction and sentence, he filed this appeal. He cited the following grounds:

- 1. That the trial magistrate erred by relying on evidence of identification by recognition;**
- 2. The court erred by not finding that his Constitutional rights were infringed when the police held him for over 24 hours before he was arraigned before the court;**
- 3. That the court erred by relying on inconclusive medical evidence;**
- 4. That the Prosecution evidence was riddled with inconsistencies and contradictions.**
- 5. That the trial court failed to consider his defence.**

He urged the court to allow the appeal, quash the conviction and set aside the sentence.

When the appeal came up for hearing, the Appellant relied on the grounds and only added that he was framed.

The appeal was opposed and Learned Counsel for the State, Mr. Mulochi submitted that there was sufficient evidence to found a conviction; that the offence was committed in broad daylight and the complainant identified the Appellant to her parents and that the evidence of the mother (PW2) and that of the Doctor confirmed evidence of penetration of PW1. Mr. Mulochi also observed that the complainant's age was not ascertained but left it to the court to decide.

This is the first appellate court and this court has a duty to evaluate and analyze the evidence afresh in order to arrive at its own determination. Before analyzing the evidence, I must review the case before the trial court.

The Prosecution called a total of four witnesses in support of their case while the Appellant testified on oath.

PW1, V. K. did not testify on oath because after a *voire dire* examination, the court was of the view that PW1 did not understand the consequences of the oath. PW1 told the court that she was 10 years old and that on 15/9/2009, about 4.30 p.m., her mother sent her to her aunt's home. On her way back home, she met accused who carried her, put her on the grass, removed her pant and removed his genital organ and defiled her. He continued to defile her despite her screams and when he finished, he left. She went home and told her mother who informed her father and immediately they went to the scene and PW1 also went and pointed out the Appellant at a canteen. She told the court that she had met the accused earlier on her way to her aunt's place and the second time was when she was returning home and that is when he defiled her; that the appellant is a person she used to see in the area.

J M (PW2) is PW1's mother. She testified that she sent her daughter (PW1) to her aunt's place and she returned while crying and reported that she had been defiled. PW2 examined PW1 and found her to be bleeding from her private parts. PW1's father was called and they went to the scene and in search of the assailant whom they found at a canteen and later she was taken to hospital. PW2 said that PW1 identified Appellant at the canteen on the same evening.

PW3 PC Sarah Wairimu of Laare Police Station testified on behalf of PC Lesuit who recalled having arrested the Appellant at police station where he was taken by members of the public. The complainant was examined by Dr. Murungi Salesius (PW4) on 15/9/2009. Upon examination, he found that PW1's clothes were blood stained; her private parts were swollen and bruises on the vagina, hymen was perforated and there was bleeding in the vagina. He formed the opinion that she was defiled and also treated her. He produced the treatment notes and P3 form in evidence.

In his unsworn defence, the Appellant said he was framed by Ntocienge because of the work he does; that they met at a beer drinking place where they clashed over a woman and he vowed to fix him; after a month he came with the cow, asked for food for his bull but the Appellant asked why he did not have his own food. As he waited to release his cow, his jumped on him as if to gore him. He told him to leave. He entered a shop to get his *miraa* and on coming back found he had left. He came back there later when he found people waiting for him; they beat him up and took him to Laare Police Station. He said they had never disagreed with Ntociange before.

I have carefully considered both the evidence of the prosecution, the defence, the grounds of appeal and the submissions by the Learned State Counsel. There is no doubt that the complainant was defiled. After she reported her ordeal to her mother (PW2) who in turn called the father, PW1 was taken to the hospital on the same day and examined by Dr. Muriungi who found the complainant injured on her private parts with perforation of the hymen and was bleeding from her private parts. He formed the opinion that she had been defiled. There was overwhelming evidence to support PW1's testimony that she was indeed defiled. The only question is who committed that act?

The offence was committed during the day. PW1 was sent to her aunt's place about 4.30 p.m.. She told the court that on her way to her aunt's place she met the Appellant on the footpath she had used. She did not know him by name but used to see him in the area. It is on her return home that he accosted and defiled her. It is the complaint who led the parents to arrest the Appellant on the same evening because by 8.30 p.m. PW3 said that the Appellant was taken to the police station. I am aware that the complainant gave unworn evidence but she was cross examined on it and remained consistent in what she told the court. Her statement was corroborated by that of PW2, her mother that she too used to see the Appellant in the area. He was not therefore a stranger to them. I am satisfied that since this offence took place during the evening hours, and PW1 was able to see the assailant and not only identified but recognized him as a person she used to see around. During the act she came into close contact with him and identified him to her parents soon thereafter. I have no doubt that he was properly identified as the assailant.

The Appellant alleged that his Constitutional rights were infringed by the police when he was held for

more than 24 hours before he was arraigned before the court. The Appellant did not explain to the court when he was arrested and when he was arraigned in court. In any event, he should have raised the complaint at the earliest opportunity possible when he was first arraigned in court so that the police against whom the complaint is made could be given a chance to explain. Raising the complaint at this stage is late in the day. Besides, the failure on the part of the police cannot prejudice this case because that is a different complaint altogether whereby if the police are found to have violated the complainant's rights, then the Appellant has a right of redress in the civil courts which he can pursue. The said ground is not tenable.

Whether the trial court considered the Appellant's defence, I do find that it did. In the last paragraph of the Judgment, the court found that the defence was not credible. I have also considered the defence. The Appellant made allegations against a man by name Ntociange. The court has no idea who Ntociange was and how he is connected with this case. I do not believe that the complainant, a child, colluded with the said person to fix the Appellant for no good reason. In any event, PW1 was actually defiled. The defence was totally misplaced, an afterthought and unbelievable.

Though the Appellant complains that the medical evidence was inconclusive, he did not substantiate that allegation because it is PW4 who examined the complainant and treated her soon after the occurrence of the offence. He produced the treatment notes, and the P3 form. There could have been no better evidence than that of PW4. That ground is baseless and must fail.

The complainant told the court that she was 10 years old at the time of her testimony. Her mother did not tell the court how old the complainant was nor did the prosecution adduce any evidence in support of the charge, that PW1 was 8 years when she was defiled. In an offence of defilement, the two ingredients that must be proved are penetration and the age of the complainant. There is overwhelming evidence of the first ingredient of penetration. However, there was totally no evidence to support the age of PW1. The Prosecution should have produced the birth certificate or birth notification or an age assessment by a radiologist or dentist. PW4 only estimated the age, most likely as given from the history of the patient. I find that one of the ingredients of the charge was therefore not proved. The age of the complainant is crucial because it determines the sentence to be meted upon conviction. The offence of defilement was not proved to the required standard and I hereby quash the conviction.

However, from the evidence adduced herein, I am satisfied that the complainant was involved in a sexual act with the Appellant. Even if the age was not ascertained the court which took PW1's evidence ascertained that she was a child. The act was unlawful and intentional. For the above reasons, I will quash the conviction on the offence of defilement but instead find him guilty of the offence of rape contrary to Section 3 (1) of the Sexual Offences Act as read with Section 186 of the Criminal Procedure Code which gives this court discretion to convict an accused for an offence with which the accused was not charged under the Sexual Offences Act. I sentence the Appellant to life imprisonment.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF JUNE, 2015

R. P. V. WENDOH

JUDGE

PRESENT:

Mr. Mulochi for State

Appellant in person

Faith, Court Assistant