



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.147 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. C. Oluoch (Mrs.) - PM delivered on 8th May 2012 in Kiambu CM. CR. Case No.913 of 2011)

STEPHEN GITAU NJOKI.....
APPELLANT

VERSUS

REPUBLIC.....RESPOND
ENT

JUDGMENT

The Appellant Stephen Gitau Njoki was charged with the offence of **defilement** contrary to **Section 8(1), 8(2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 24th day of May 2011 at Kahawa West in Kasarani Division within Nairobi County, the Appellant intentionally and unlawfully committed an act which caused penetration of his male genital organ namely penis into the female genital of J W, a girl aged 3 years. In the alternative, he was charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on 24th day of May 2011 at Kahawa West in Kasarani Division within Nairobi County, the Appellant intentionally and unlawfully committed an indecent act with J W by touching her private part namely vagina. When arraigned in court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted of the main count. He was sentenced to life imprisonment as prescribed by **Sexual Offences Act**.

Aggrieved with the conviction and sentence, the Appellant appealed to this court. The petition of appeal had four grounds challenging the conviction and sentence. The Appellant faulted the trial Magistrate for relying on conflicting medical evidence to convict him. The charge sheet was defective due to variance in the names of the complainant. He was aggrieved that the trial court failed to consider the fact that the prosecution’s evidence that was adduced did not discharge the burden of proof placed on the prosecution. The Appellant urged court to quash the conviction and set-aside the sentence. At the hearing of the appeal, the Appellant presented his written submissions to court in support of his appeal. He urged the court to allow his appeal. Ms. Aluda for the State opposed the appeal. She stated that PW1 M W found the complainant seated on the Appellant’s laps with her dress lifted up. The evidence was corroborated by PW2 APC Luking’a Charles’s testimony. The medical evidence proved there was penetration. She urged the court to dismiss the appeal.

What were the facts of the case? On the 24th of May 2011 at about noon, PW1M W, mother of the

complainant, was at her home preparing lunch. The complainant and her brother S were playing in the neighborhood. PW1 called the complainant and her brother to have lunch. When they did not answer, PW1 searched for them in the neighborhood. PW1 found the complainant seated on the Appellant's laps. The complainant's panty was pulled to her knees. Her dress lifted up. They were sitting by the road side. The complainant's private parts were soiled with a mucous like discharge. PW1 raised alarm. The members of the public responded to her cries for help. PW1 sought the assistance of PW2 APC Luking'a Charles. He was with a colleague, Daniel Kimei. PW2 together with his colleague accompanied PW1 to the crime scene. They saw the discharge on the complainant. PW2 detained the Appellant. PW1 made a report to Kiamumbi Police Station. She took the complainant to Nairobi Women's Hospital on 24th of May 2011. Dr. Thuo examined the complainant. The examination revealed semen on the thighs of the complainant. The vagina was normal. The hymen was absent. There was bleeding from intro-itus. PW5 Dr. Catherine Mwangi produced the medical report on behalf of Dr. Thuo. The complainant was further examined by PW3 Zephania Kamau on the 17th of June 2011. He discovered that there were no injuries on the external genitalia. He produced a P3 form as evidence in court.

PW2 handed over the Appellant to Kiamumbi Police Station. He was arrested. On the 25th of May 2011, PW4 Cpl Beatrice Mwangi was assigned to investigate the case. She proceeded to Nairobi Women's Hospital to record a statement from PW1. On receipt of the report from the hospital, PW4 charged the Appellant. The complainant's immunization card was produced into evidence. It indicated that the complainant was born on 7th October 2009.

The Appellant gave unsworn evidence. He denied committing the offence. He attributed his travails with the family of the complainant to a grudge between himself and the mother of the complainant (PW2). She had therefore framed the offence on him.

This being a first appellate court, it has a duty to re-evaluate and re-consider the evidence adduced before the trial magistrate's court to make its own independent determination noting that it never saw any of the witnesses as they testified. **(See Njoroge Vs Republic (1987) KLR 19)**. The court raised one issue for determination;

Did the prosecution prove its case on the charge of defilement to the required standard of proof beyond reasonable doubt?

To prove the offence of defilement, there are ingredients that have to be satisfied. The ingredients include; the age of the complainant, identification of the assailant and proof of penetration. Penetration is defined under **Section 2 of the Sexual Offences Act;**

“To mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

In the instant case, PW1 on that material day saw the complainant sitting on the Appellant's laps. Her dress was lifted. Her panty had been pulled down. The complainant's vagina was soiled. There was mucus like discharge. PW1 took the complainant to Nairobi Women's Hospital. She was examined by Dr. Thuo. The examination revealed there was bleeding of the intro-itus. This proved partial penetration of the genital organs of the complainant. There were also spermatozoa. According to the above definition, penetration was proved. The hymen was absent. This established that there was penetration. The testimony of PW3 did not contradict the medical report produced by PW5 on behalf of Dr. Thuo as evidence. The complainant was admitted at Nairobi Women's Hospital for treatment from 24th to 27th of May 2011. The medical evidence corroborated the evidence of PW1.

As regards identification, it was PW1's evidence that he looked for the complainant and her brother within the neighborhood. PW1 found the complainant on the Appellant's lap by the roadside. The complainant's dress was lifted and her panty was pulled down. Her vagina was soiled with a mucous like discharge. PW1 recognized the Appellant as the man who used to sell bananas in the neighborhood.

The Appellant was apprehended while on the act. He was literally caught red-handed. The identity of the perpetrator of the offence was therefore not in doubt.

The age of the complainant is not in contention. It was established by the immunization card which was produced as an exhibit in court. It indicated the date of birth of the complainant as 7th October 2005.

From the analysis of the evidence, the court holds that the prosecution proved its case to the required standard beyond any reasonable doubt the charge of defilement contrary to **Section 8(1)** of the **Sexual Offences Act**. Regarding the allegation of existence of a grudge, the Appellant never raised it when he was cross-examined by PW1. This assertion is an afterthought. His defence did not shake the prosecution case. The appeal lacks merit and is hereby dismissed. The conviction of the Appellant is upheld. The sentence was legal. It too is upheld. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF JULY 2015

L. KIMARU

JUDGE