



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT NYERI.

CRIMINAL APPEAL NO. 84 OF 2014.

JOHNSON GACHAGWA KANYOTU ::::::::::::::::::::::::::::::: APPELLANT.a

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::::::: RESPONDENT.

(An appeal from the original conviction and sentence of Wendy K. Micheni – SPM in Mukurweini CM Criminal Case No. 7 of 2014 delivered on 30th June, 2014.)

J U D G M E N T.

1. The appellant herein Johnson Gachagwa Kanyotu was on 19th May, 2014 charged in the Chief Magistrate’s Court Mukurweni with the offence of defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 15th day of May, 2014 at [particulars withheld] village in Mukurweini Sub County, within Nyeri County, he intentionally caused his penis to penetrate the vagina of H.W.I a child aged 16 years.
2. He was also charged with the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative charge were that on the 15th day of May, 2014 at [particulars withheld] village in Mukurweini Sub County, within Nyeri County intentionally touched the vagina of H.W.I., a child aged 16 years with his penis.
3. PW1, H.W.I. the complainant gave evidence on 28/5/2014 after the magistrate conducted a voire dire examination and ascertained that she was intelligent enough to understand the meaning of taking an oath and giving sworn evidence.
4. She started by stating that on 16/5/2015 at 1.00 p.m. she was taking a milk can to mama G’s home when she came across three smartly dressed men who greeted her in Kiswahili “sasa”. She kept quiet and they bypassed each other. PW1 at the said point in time in her evidence sought the court’s permission to cancel (sic) the case. On being questioned by the learned magistrate, she said that the appellant was her friend but she was pushed by the circumstances and by her mother somehow, to go on with the case. At this juncture, the prosecution indicated that it would go on with the case.
5. PW1, resumed adducing evidence by stating that after by passing the three men, she went to Mama G’s gate. Some of the three men carried her and took her to the appellant’s house where she met the appellant seated on his bed. The three men were told to lock the door from outside by the appellant, she was left with him.

6. On being questioned by the learned magistrate on whether what she told the court was what actually happened or what she fabricated, she said that was the story she created. She was asked by the learned magistrate what the true story was and she recounted that she met the appellant on her way from the dispensary and agreed that she would go to his home. She went home and picked the jerry can and met the appellant by their gate going towards PW1's home. The two went to the appellant's home where they talked for 1 hour and 15 minutes and then she went home. PW1 passed by mama G's and chatted a bit and told her the story she had created about the three men who took her to the appellant's house wherein the appellant had raped her. PW1 said that many people had seen her enter into the compound. She denied having sex with the appellant.
7. The court authorized the prosecutor to cross examine PW1 to test the veracity of her evidence. She admitted that she was examined at Mukurweini hospital on 15th May, 2014 where urinalysis and HIV tests were done. She was also given emergency contraceptive and she was issued with a P3 form. PW1 further stated that the appellant knew that she was a student and the school she goes to. She identified her pantie in court which was torn on the left side. She was referred to her P3 form which read "discharge all over the genitalia – foal (sic) smelling." She further informed the court that on 27th May, 2014 she had to go to hospital to pick some drugs that had been prescribed relating to the case in issue.
8. On being asked why she had gone to hospital if nothing happened, she kept quiet. She further stated that she would go back to hospital in two weeks' time from the date she was in court.
9. On being cross-examined by the appellant's advocate, she said that the contents of her statement to the police were false and that the statement was written by the police. She denied that the appellant committed any of the offences he was charged with. She stated that she used to study at [particulars withheld] Girl's Secondary School but her mother could not afford the fees and that is why she joined [particulars withheld] Mixed Day Secondary School.
10. On being questioned by the magistrate, she indicated that she had not had a boyfriend prior to that time and had not had sexual intercourse before and as far as she knew, she was a virgin.

On being cross re-examined by the prosecutor, she admitted, going to the appellant's house on 15th May, 2014 at 1.00 p.m. and that was the same day she was taken to hospital and had her genitalia examined.

11. PW2, the mother to PW1 gave evidence of how she received a call from one Mama G telling her that PW1 wanted to talk to her. PW1 started telling her how she was accosted by 3 men who removed her shoes and carried her to Gachagwa's (appellant's) house and placed her on the bed. PW2 told her that the story was long and told her to go home. PW2 found PW1 seated next to the sofa set where she studies, looking sad. She asked PW1 what happened and she told her that after the men locked the door to the appellant's house, the appellant was seated on one of the beds where there was a kitchen knife with a black handle. He ordered her to go to him and she went and sat on his bed. When she attempted to scream, he threatened to kill her with the knife. He told her he was not scared of her dad. That she struggled but he overpowered her and raped her for around 50 minutes to one hour. That she escaped from the appellant's house and went to Mama G's place and narrated the story to her. PW2 and PW1 then went to Mukurweini police station to report and then went to Mukurweini hospital.
12. On cross-examination, PW2 stated that PW1 was born on 21st September, 1997. She was admitted to [particulars withheld] Girls' High School after primary school where she studied for two terms but decided to take her to a day school as [particulars withheld] Girls' High School was a high cost school. PW2 stated that PW1 had never attended [particulars withheld] Girls' Secondary School.
13. PW3, Dr. Kimathi Paul produced the P3 form in respect to PW1. He stated that PW1's maroon dress had dry multiple white stains, the hymen was broken, there was a foul discharge over the

external genitalia, her stripped underwear was torn on multiple sides. The HIV and urinalysis tests were normal. PW1 was given post explosive propraxis emergency contraceptive.

14. On being cross examined by the appellant's counsel, PW3 indicated that the history given was that PW1 was hijacked by three men who took her to another house where she was raped for about one hour. From PW3's examination, the hymen was broken, she was not a virgin at the time of examination.
15. PW4, the investigating officer received a report on 15/5/2014 from PW1 and PW2 on how PW1 was forcefully grabbed by three men who took her to the appellant's house where she found him seated on the bed. The 3 men locked her in the house where the appellant told her that he was not scared of her father. That he would have gone for her even if the three men had not gone for her. He investigated the case and charged the appellant. He produced exhibits including a birth certificate for PW1.
16. The appellant gave unsworn evidence and said he has a family and two children. He admitted meeting PW1 along the way on 15/5/2014. That PW1 asked him to escort her to Mama G's home, which he did and left her at mama G's gate after which he went home. He was arrested 2 days later and told that he had slept with PW1 on Thursday of that week.
17. After analyzing the evidence, the magistrate believed that the complainant went to the appellant's house voluntarily and had consensual sex and she later tried to cover it up. She noted that the appellant is much older than the complainant as he is a family man with two children. The appellant knew that the complainant was a school girl.
18. The learned magistrate found the appellant guilty of defilement contrary to section 11 (1) (4) of the Sexual Offences Act No. 4 of 2006 and sentenced him to serve a sentence of 15 years.
19. The appellant raised 5 grounds of appeal namely;
 - i. ***That the learned magistrate erred in both law and fact while convicting him on reliance to (sic) the advanced (sic) revolved on a hidden grudge between him and PW2 who was my class teacher in the year 2002.***
 - ii. ***That the learned magistrate erred in law and fact while being impressed with his mode of arrest whilst no evidence that (sic) was adduced from his physical arrest.***
 - iii. ***That the learned magistrate erred in law and fact while convicting him on reliance to the prosecution witnesses advanced evidence that was riddled with lots of doubts and inconsistency thus contravening section 163 (1) (c) of the Evidence Act Cap 80 Laws of Kenya.***
 - iv. ***That the learned magistrate erred in law and fact while convicting him on charges that weren't proved to meet the needs of justice.***
 - v. ***That the learned magistrate erred in law and fact while rejecting his unsworn defence that wasn't challenged by the prosecution side as per law requisite (sic).***
20. At the time of the hearing of this appeal, the appellant was represented by Mr. Kiminda learned counsel, who argued grounds (iii) and (iv) only, of the above grounds of appeal. With regard to ground No. (iii), he submitted that PW1's evidence was inconsistent and that she stated that the case was not true but was pushed by circumstances to incriminate the appellant. The person who pushed her was her mother. PW1 said that she fabricated the story.

Mr. Kiminda submitted that PW1 also gave another version of the story, that she was taken to the appellant's house by three men, who locked the house and left her in the appellant's house. On being questioned by the court, she said that she made up the story.

21. On being asked by the court to tell the true version, PW1 said that she took milk from Mama G's house and spoke to the appellant for 1 hour and 15 minutes. When pushed further she said she did not have sex with the appellant on that day. The 3rd version was that given by the appellant. Mr. Kiminda submitted that with the 3 versions, PW1 cannot be believed for lack of consistency.
22. With regard to ground No. (iv) of the appellant's grounds of appeal, Mr. Kiminda submitted that the court came with a very curious finding that adolescents are allowed to be inconsistent when they are going through puberty and experimenting with relationships and sexuality. He submitted that that finding has no basis in law. The finding by the learned magistrate that the appellant and PW1 had sex in the appellant's house was erroneous. He further submitted that if there was penetration, the doctor could have found some lacerations.
23. Mr. Kiminda prayed that the appeal be allowed, the conviction quashed and the sentence set aside.
24. Ms. Maundu, learned state counsel conceded the appeal in that PW1 recanted her testimony and that the magistrate erred by convicting the appellant after dismissing the versions given in court.
25. Having considered the evidence adduced at the lower court, one thing that stands out like a sore thumb is the extent that the complainant went to, in order to cover up for the appellant. She was so desperate to lie for the sake of the appellant that she even lied about the school that she went to as [particulars withheld] Girls' High School whereas her mother stated that PW1 was admitted to [particulars withheld] Girls' High School but had to change schools as it was a high cost school. This court notes that no one ever forgets the school that she/he attended and more so a prestigious national School such as [particulars withheld] Girls' High School.
26. Although PW1 undertook to give sworn evidence she went against the oath and it is apparent that the magistrate had to coax information out of her. PW1 gave inconsistent accounts of how the appellant committed the offence. This court finds the story about her being abducted by three men and taken to the appellant's house as being concocted and ridiculous.
27. The duty of the first appellate court was explained in the case of **Okeno vs. Republic [1972] EA 32** where it was held:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions.

It is not a function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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 witnesses.”

28. This court has carefully analyzed the prosecution's evidence whose star witness was PW1. As earlier observed in this judgment, this court has formed the impression that she was an incorrigible liar who cannot pass muster. It was therefore erroneous for the trial magistrate to base a conviction on such inconsistent evidence. Other evidence called cannot stand on its own since PW1 denied having been defiled.
29. The medical evidence called did not indicate that PW1's hymen was freshly torn. The foul smelling discharge from PW1 cannot conclusively be said to have been as a result of her having had sex with the appellant as the said discharge was not subjected to medical analysis to establish if spermatozoa was present. The white spots on her red dress were also not subjected to analysis to determine if they were caused by semen from the appellant. Such evidence, if it would have

been called might have connected the appellant to the commission of the offence of defilement notwithstanding PW1's denial that she had sex with the appellant.

30. This court notes that the learned magistrate erroneously convicted and sentenced the appellant for the offence of defilement under section 11 (1) (4) of the Sexual Offences Act instead of under section 8 (1) (4) of the Sexual Offences Act.

Having found that PW1's evidence was inconsistent, this court will not invoke the provisions of section 382 of the CPC to cure the error on the part of the magistrate.

31. The upshot of the foregoing is that this appeal is allowed, the conviction quashed and the sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED and SIGNED at Kakamega on this 29th day of September 2015.

NJOKI MWANGI.

JUDGE.

DELIVERED, DATED and COUNTERSIGNED at **NYERI** on this 7th day of October 2015.

J. MATIVO.

JUDGE.

In the presence of:-

..... **for the Appellant.**

..... **for the Respondent.**

..... **Court Assistant.**