



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 126 OF 2013

J M APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. S.K Mutai (Ag. PM) delivered on 31/5/2013 in Mutomo Senior Resident Magistrate's Court Sexual Offence No. 8 of 2013)

(Before Hon. B. Thurairaja Jaden J)

J U D G M E N T

1. The Appellant, **J M**, was charged with the offence of defilement contrary to **section 8 (1)** as read with **section 8 (4)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that “on the 16th day of January 2013 at about 8.00 p.m. at **[particulars withheld] Guest Lodge, Kitui District** within **Kitui County**, intentionally caused his penis to penetrate the vagina of **J N S**, a child aged 16 years.”

2. In the alternative the Appellant was charged with the offence 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 offence were that “on the 16th day of January 2013 at about 8.00 p.m. at **[particulars withheld] Guest Lodge, Kitui District** within **Kitui County**, intentionally, touched the vagina of **J N S** a child aged 16 years.”

3. When the Appellant was arraigned in court, he pleaded not guilty. After a full trial, the Appellant was convicted and sentenced to serve 15 years imprisonment.
4. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-

- **That the charge sheet was defective.**
- **That the arrest took place two months after the alleged offence.**
- **That the complainant's evidence was uncorroborated.**
- **That the prosecution evidence was contradictory.**
- **That the evidence was cooked up due to a grudge.**
- **That the complainant's age was not ascertained.**

- **That the medical evidence was not conclusive.**
- **That the scene of crime was not visited.**
- **That the agreements made between the parties were not produced as exhibits.**
- **That the burden of proof was shifted to the Appellant.**
- **That the Appellant's rights to a fair trial as provided under Act 50 Clause (2) (c) (1) and (h) were violated as he was not given adequate time to prepare his defence.**
- **That the evidence relied upon by the trial court was obtained in a manner that violated his fundamental freedoms as provided in the bill of rights.**

5. During the hearing of the appeal, the Appellant relied on his grounds of appeal. The Appeal was opposed by the State. The learned counsel for the State submitted that the prosecution evidence was sufficient and that the defence was a mere denial.
6. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32.**
7. Before re-evaluating the evidence I will first give a summary of the evidence that was adduced before the lower court.
8. The case for the prosecution was that on the material day, the complainant, PW1 **J N S**, a sixteen year old girl was being escorted back to school by the Appellant who was her step father. They arrived in **Kitui Town** at about 6.30 p.m. The Appellant then took the complainant to a hotel room. After the complainant showered, she lay on the bed. The Appellant also showered then went to the bed, removed the complainant's pants, lay on top of her and defiled her. The complainant felt a lot of pain and screamed but nobody went to her rescue. That the Appellant defiled her three times in the course of the night then in the morning the Appellant took the complainant to school after shopping for her. The Appellant also paid her school fees.
9. When the schools closed for midterm, the complainant informed her mother PW2 **S M** what had befallen her on opening day. In the meantime the mother had questioned the Appellant on where he had spent the night on the day he had escorted the daughter to school because that night his number could not be reached. That the following day on 17/1/13 the Appellant telephoned her and informed her (PW2) that he had slept at his aunt's place and had paid the daughter's school fees. That when the Appellant came home and was asked where he had slept he refused to talk.
10. After learning about her daughter's ordeal, the mother (PW2) informed the village elder and the area chief about the matter. A report was made to the police and the complainant issued with a P3 form and referred to hospital for treatment. A medical examination carried out by the Clinical Officer, PW3 **Daniel Mulwa** confirmed that there was penetration and the hymen was missing.
11. During the course of investigations the Appellant wrote a letter of apology to PW2 (complainant's mother) who she lived with but the case ended up in court.
12. In his defence, the Appellant gave sworn evidence. No witnesses were called. The Appellant stated that the alleged offence was not reported to the police until after a period of two months. That his wife (PW2) had threatened her. That on the day he took the complainant to school, they left **Mutomo** at about 2.00 p.m. and arrived in **Kitui** at about 6.00 p.m. That he shopped for the complainant then they slept at his uncle's place. That the following day he shopped for the complainant and took her to school. That the Appellant then returned to **Mutomo** and passed through his workshop then went home. That this wife asked why he had switched off his phone and he explained where he had slept but the wife quarreled him and called in a witchdoctor. That the wife started threatening him using 'sms', and the Appellant reported the matter to the police and the wife was questioned. That the wife threatened to fix him. That the chief summoned the Appellant and he was taken to the police station and arrested and charged. The Appellant denied having defiled the complainant.
13. The trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubt and convicted the Appellant.
14. The complainant was a 16 year old girl who knew what she was talking about. The complainant's evidence is that the Appellant defiled her three times in the course of the night in question. Immediately she arrived home, the complainant informed her mother what had befallen her. The complainant was forthright in her evidence and even admitted during cross examination that she

came to know that her mother and the Appellant had differences and that her mother told her to come to court and testify against the complainant. The complainant however maintained her evidence that the Appellant defiled her. The complainant further explained that she feared telling the teachers or her friends what had happened to her.

15. The complainant's mother (PW2) gave evidence that pegged the complainant's age as 16 years. The mother's evidence corroborates the complainant's evidence that the father escorted the complainant to school on the material day. The mother's evidence also shows that the Appellant slept out that night and failed to explain to her where he had slept that night and had switched off his phone.

1. The Clinical Officer (PW3) gave evidence that corroborated the complainant's evidence on the question of defilement. His evidence was that there was penetration and the hymen was missing. The Clinical Officer produced a P3 form which reflects the complainant's age as sixteen years. Is a Clinical Officer a competent witness to give medical evidence? The answer is found in the Court of Appeal's dictum in the case of **Kavoi Kiilu –vs- Republic (2010) e KLR** the **Court of Appeal** state as follows:-

“Under section 2 of the Clinical Offences Act (Training, Registration and Licensing Act Cap 260 (LOK) a clinical officer means:-

“a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act.....”

Section 7(4) of the Act states:-

“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”

The Act goes further to provide that such officers may engage in private practice “in the practice of medicine, dentistry or health work for a fee.” It follows that the clinical officer did testify in this case on his area of competence.”

16. The chief, PW4 **Robert Kusinga** and the village elder PW5 **Philip Mwanzia** gave evidence that they were informed of the matter and interviewed all the parties concerned and the Appellant apologized to the complainant's mother in writing. Although the Investigating Officer, PW6 **PC Japheth Kidiavai** produced the said letter of apology/agreement as an exhibit, this was evidence that incriminated the Appellant and was improperly admitted as there was no lawfully obtained confession from the Appellant. I will therefore treat the said letter as expunged from the record and will not take the same into consideration in weighing the evidence herein. The Investigating Officer (PW5) also produced a school register which reflected that the complainant reported to school on 17/1/13. Once again this was unprocedural as the register ought to have been produced by the school.

17. The defence by the Appellant does not deny having escorted the complainant in school but denies the offence. Although the Appellant in his defence stated that they spent the night in question at the uncle's place, this is not believable in view of the complainant's strong and corroborated evidence that they spent the night in a lodging room. Although the Appellant blames this case on the differences between him and the complainant's mother, the complainant was a big girl of 16 years who knew what she was talking about. Discussing the events in question with the mother is normal and does not dilute the complainant's evidence in any way. The trial magistrate who had the advantage of seeing the witnesses testify and observed their demeanour believed the complainant, hence the conviction.

18. The proviso to **section 124** of the **Evidence Act Cap 80 Laws of Kenya** stipulates as follows:-

Provided that where in a Criminal case involving a sexual offence the only

evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

19.The Appellant was charged with the offence of defilement contrary to **section 8 (1)** as read with **section 8 (4)** of the **Sexual Offences Act**. I have considered the said provisions of the law and I have seen no defects in the charge sheet. Although the Appellant in his submissions stated that the offence that was disclosed by the facts was that of incest and not defilement, the evidence on record supports the offence of defilement. Although the complainant called the Appellant her step father and the mother referred to the Appellant as her husband, their evidence did not reveal any details of the marital union. I have also seen no merits in the contention that the Appellant’s rights to a fair trial were violated. A perusal of the lower court record reflects no application by the defence to be supplied with statements. The proceedings are regular. The plea was taken on 18/3/13 and the case fixed for hearing on 26/3/13 and was given other subsequent hearing dates up to 13/5/13. The Appellant therefore had sufficient time to prepare for the trial.

20.Having re-evaluated the evidence, I am satisfied that the conviction is based on sound evidence. The sentence is within the law. Consequently, I find no merits in the appeal and dismiss the same. The conviction and sentence are upheld.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Kitui this 12th day of June 2014.

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B. THURANIRA JADEN

JUDGE