



**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO.235 OF 2009**

**GIDRAPH GATHENYA KIMONDO.....APPELLANT**

**versus**

**REPUBLIC .....RESPONDENT**

*(arising from the judgment of Hon. L.W. Gitari Chief*

*Magistrate Nyeri in Criminal Case No. 863 of 2007)*

**JUDGMENT**

1. The Appellant was charged with the offence of defilement contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on the 4th day of March 2007 at [particulars withheld] location in Nyeri District within Central Province unlawfully committed an act which caused penetration to F.W.G. a child under the age of eleven years.
2. He faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act no. 3 of 2006 the particulars of which were that on the 4th day of March 2007 at [particulars withheld] sub location in Nyeri District within Central Province indecently committed an act with a child namely F.W.G. By touching her sexual organs with his genital organs an act which she would have not otherwise allowed.
3. On count II he face a charge of defilement the particulars of which were that on the 4th day of March 2007 at [particulars withheld] sub location in Nyeri District within Central Province unlawfully committed an act which caused penetration to M.W.N a child under the age of eleven years.
4. He faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act no. 3 of 2006 the particulars of which were that on the 4th day of March 2007 at [particulars withheld] sub location in Nyeri District within Central Province indecently committed an act with a child namely M.W.N. by touching her sexual organs with his genital organs an act which she would have not otherwise allowed.
5. He pleaded not guilty, was tried convicted on the two alternative charges and sentenced to ten years imprisonment on each charge to run consecutively. Being aggrieved by the said conviction and sentence the appellant filed this appeal.

**SUBMISSIONS**

6. On behalf of the appellant it was submitted that his constitutional right was violated in that he was arrested on 10th March 2007 and taken to court on 14th March 2007 after the 24 hours provided for under section 72(3)(b) of the then Constitution and since no explanation was offered on the authority of ALBNUS MWANZIA MUTUA v R. CIVIL APPEAL NO. 120 OF 2004 he ought to be acquitted.

7. It was further submitted that P.W.1, P.W.2 and P.W.4 evidence was not credible to warrant any conviction and that P.W.2 stated that her mum told her what to say. It was therefore submitted that the appellant had been framed up by the complainant's mother. It was submitted that the appellant defence was dismissed by the trial court while the same was consistent and unshakable.
8. On behalf of the state it was submitted that the appellant was arrested on the night of 12th March 2007 taken to Gakindu police station then Mukurweini police station and therefore 24 hours lapsed at the night of 13th March 2007 and the appellant was taken to court on 14th March 2007. There was therefore no violation of his constitutional rights. It was submitted that P.W.2, P.W.3 and P.W.4 corroborated each other on what happened on the material day and they were not contradictory to each other.
9. It was further submitted that the complainant knew the appellant well with P.W.2 identifying him as father of Gathenya P.W.3 baba Kimandu and P.W.4 baba Waiganjo. It was submitted that the alibi defence was a sham it was therefore submitted that the offence was proved and the appeal ought to be dismissed.
10. This being a first appeal, we are required to reevaluate the evidence tendered before the trial court and to come to our own conclusion though taking into account the fact that unlike the trial court, did not have the advantage of seeing and hearing witnesses.
11. P.W.1 Dr. Munyua examined the two complainant and for F.W. examination confirmed that she was mentally retarded with no bruises to the genitalia neither was there tenderness though there was partial tear of the hymen on the upper side. For MW. aged eight years she too had no bruises to the genitalia. Under cross examination he confirmed that there was no sign of sex since there was no evidence of penetration.
12. P.W.2 M.W. testified that they were going for prayers and when they reached the gate of Nguruini school they met the appellant who she called father of Gathenya who started touching her everywhere down including her private parts having removed her underpants. He promised to buy them cake know as Kangumu and sweets. Under cross examination she stated that the appellant inserted his three fingers into her private parts.
13. P.W.3 L.W testified that she met P.W. 1 who told her that she had been touched by the appellant whom she had seen at the same place. He then sent them for his phone. He thereafter bought them "ngumu".
14. P.W.4 FW stated that the appellant told her that he would give her sweet if she put her legs apart. He thereafter inserted his penis inside and touched her private part P.W.5 Naomi Muthoni P.W.4's grandmother stated that she had told her what had happened to her . P.W.6 Joseph Ngure Gichohi stated that on 9th March 2007 on his way to school he met a girl who told him that she was afraid of someone who "had done bad things" to her in the forest, when he called P.W.2 she confirmed that she had been assaulted and subsequently the matter was reported to the police. P.W.7 pc John Chege rearrested the appellant after he had been arrested by the assistant chief.
15. When put on his defence the appellant gave sworn defence and stated that on 4th March 2007 he was at home since his father was sick and was feeding him. In the evening he went for family meeting at 3.00 p.m with his sister which meeting ended at 6.00 pm. He got to his home at 10.00 pm. The following day he went to the bank and withdrew Kshs. 43,350/ when he was subsequently arrested and charged. He stated that there have been land dispute between the grand mother of FW who is his aunt. He was proceeding with the case in respect of the said dispute. He further stated that he had a grudge with P.W.6 in respect of some trees which he had sold.
16. D.W.2 Stephen Kariuki The vice chairman of the appellant's clan confirmed that on 4th March 2007 there was a meeting attended by the appellant from 3.00 pm to 6.00 pm. DW3 Susan Wanjiru confirmed having recorded the minutes of the clan meeting.
17. Having reassess the evidence tendered before the trial court I have identified the following issues for determination.

***a. Did the prosecutor prove its case against the appellant on the alternative charge beyond reasonable doubt.***

***b. Was the appellant's constitutional right to be taken to court within 24 hours violated.***

***c. Was the appellant's defence considered.***

18. On the issue of violation of the appellant's constitutional rights, the court records shows that the appellant was arrested on 12th in the evening and taken to court on the 14th March 2008 noting that 24 hours expired in the evening of 13th March 2008. I find that his right to be taken to court within 24 hours were not violated since the delay of few hours was not inordinate and the appellant did not suffer any prejudiced.
19. On the issue of prosecution case against the appellant the evidence of PW2 (MW) was that she met the appellant at the gate of Ngurweini school and he started touching her removing her underpants. Under cross examination she stated that it was 2.00 pm and that she was together with Chiku and Waigumo. It is noted that Chiku was never called as a witness and neither was the court told how far Chiiku was at the time when the appellant was touching P.W.2. There is also the issue which has not been answered and that is when the appellant left P.W.2 to follow P.W.4 FW in the forest where she was fetching firewood.
20. D.W 6 under cross examination confirmed that the appellant defence that there was a grudge between him and the same and therefore in dismissing the appellants' defence as a sham without analysing the same the trial court fell into error.
21. I therefore find that there are doubts in the prosecution case the benefit which should have been given to the appellant and would therefore allow the appeal herein, quash the conviction and set aside the sentence. The appellant should therefore be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Nyeri this 15th day of October 2014.

J. WAKIAGA

JUDGE

Court: Judgment read in open court in the presence of the appellant in person Mr. Njue for the state.

J. WAKIAGA

JUDGE