



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 157 OF 2009

RICHARD WAHOME CHEGE.....APPELLANT

Versus

REPUBLICRESPONDENT

(arising from the judgment of Hon. D.A. Orimba Senior Resident

Magistrate Kangema in Criminal Case No.126 of 2009)

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 year 2006 the particulars of which were that on 13th March 2009 at Murang'a West District within Central Province unlawfully had carnal knowledge of T.W. a girl under the age of eleven years.
2. He faced an alternative charge of indecent act with a child contrary to section 11(1) of Sexual Offences Act No. 3 of 2006 the particulars of which were that on 14th October 2008 at Murang'a District within Central province intentionally and unlawfully did indecent act to N.W.J by touching her private parts.
3. He pleaded not guilty and was tried convicted and sentenced to life imprisonment and being aggrieved by the said conviction and sentence filed this appeal and in his memorandum of appeal raised the following grounds.

1. The learned Senior Resident Magistrate erred in presiding over a case that did not indicate the language that was being used in the proceedings and that the appellant may have been greatly prejudiced.

2. The learned Senior Resident Magistrate erred in law and fact in not finding that the unsworn evidence of the complainant was not corroborated by an independent witness.

3. The learned Senior Resident Magistrate erred in law and fact in not finding that the appellants' semen was not subjected to medical examination to establish a nexus between the complainants discharge and the semen

4. The learned Senior Resident Magistrate erred in law and fact in relying on evidence of the complainants' mother, which amounted to hearsay.

5. The learned Senior Resident Magistrate erred in law and fact in not finding that the people and/or witness that answered to the distress call by the complainant were not called to testify meaning that their evidence would have been adverse to the

complainants' testimony.

6. The learned Senior Resident Magistrate erred in Law and fact in not finding that the duration from the date of the alleged defilement to the date that the complainant went to hospital was inordinately long and suspect.

7. The learned Senior Resident Magistrate erred in law and fact in not finding the ingredient of penetration was not ably demonstrated and/or explained.

8. The learned Senior Resident Magistrate erred in law and fact in arriving at a decision that was against the weight of evidence adduced.

9. The learned Senior Resident Magistrate erred in law and fact in arriving at a sentence that was harsh and manifestly excessive.

4. At the hearing hereof Mr. T.M. Njoroge submitted that that the language used by the court is not indicated from the time when the appellant took plea and therefore the same was prejudiced.
5. The evidence of the complainant is not corroborated and the magistrate did not warn himself of the danger of conviction on the same.
6. That one vital witness called Mama Waithera was never called as a witness and neither were the three women who came to the rescue of the complainant called. It was therefore submitted that the said evidence was therefore adverse to the prosecution case.
7. It was further submitted that there was contradiction between P.W.1 and P.W.2 in that P.W.1 stated that P.W.2 was informed by Mama Waithera whereas P.W.2 testified that she came to the information when she noticed that P.W.1 had difficulties in walking.
8. Miss Maundu opposed the appeal and submitted that the language of the court was indicated as English – Kiswahili – Kikuyu and that the appellant was able to cross examine the witnesses and therefore the same was not prejudiced.
9. It was submitted that the evidence of the complainant was corroborated by P.W.3 who stated that her hymen was broken and there were bruises in her vulva and that the appellant's defence was dismissed since he alleged that the complainant's mother (P.W.2) was his lover for four months but he did not even know her name.
10. This being a first appeal the court is required to reevaluate the evidence tendered before the trial court and to come at its own conclusion though taking into account the fact that he did not have the privilege of seeing and hearing the witnesses.
11. P.W.1 testified that she was on her way to school when she met the appellant who held her hand and led her behind the church which was under construction and defiled her. The appellant warned her not to tell anybody and threatened to kill her if she ever told anybody. That she saw blood coming from her private part after the appellant had left her.
12. P.W.1 confirmed under cross examination that she raised alarm and three women came to her rescue and the appellant ran away when he saw the three (3) ladies coming.
13. P.W.2 testified that sometimes in the month of March 2009 she saw the complainant walking with some difficulties and when she demanded an explanation she reported how the appellant defiled her on 13th March 2009 she took the complainant to hospital and reported the matter to the police.
14. P.W.3 Danson Maina the clinical officer at Kangema sub district hospital who examined the complainant testified that she was 10 years old and that her hymen was broken and there was blood coming out from virgina consistent with penetration.
15. P.W.5 Meshack Mwangi Thuo the assistant chief of K sub location testified that on 25th May 2009 he received a phone call that there was someone being beaten by members of the public he rushed there and was informed that he was suspected of defiling a young girl who was on her way from school.
16. When put on his defence the appellant stated that he is a farmer and that on 22nd March 2009 he woke up at 7.30 am and milked the cows and thereafter took them for grazing. That he did not defile the complainant and that the mother of the complainant was his lover.
17. From the evidence adduced before the trial court and the submissions by the counsels herein the

issue for determination by the court are as follows:

- a. Did failure to record the language used prejudiced the appellant.*
- b. Was the age of the complainant proved.*
- c. Was the prosecution case against the appellant proved beyond reasonable doubt.*

18.As regards the language the record shows interpretation - English/Kiswahili/Kikuyu. I further agree with the submissions by Miss Maundu for the state that the appellant was able to cross examine all the prosecution witnesses and was also able to testify in his defence I therefore find that the appellant was not prejudiced whatsoever by failure by the trial court to indicate the language used during the proceedings.

19.The age of the complainant was confirmed by P.W.3 a clinical officer and that the evidence on record to my mind was enough to sustain a conviction.

20.In the final analysis I find that the conviction of the appellant was safe and therefore dismiss the appeal herein.

Dated and delivered at Nyeri this 6th day of June 2013.

J. WAKIAGA

JUDGE

Mr. Njue for the State.

Mr. Githinji for Mr. T.M. Njoroge for the appellant.

Court: Judgment read in open court in the presence of the above named.

J. WAKIAGA

JUDGE