



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 515 of 2007

(From original conviction and sentence in Criminal Case No. 424 of 2007 of the Chief Magistrate's Court at Kibera)

DAVID JAIRO.....1<sup>ST</sup> APPELLANT  
ANN ACHIENG.....2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The 1<sup>st</sup> Appellant was convicted in the Chief Magistrate Court, Kibera, of defilement contrary to **Section 8(1) (3)** of the **Sexual offences Act No. 3 of 2006**, and an alternative charge of indecent act with a child contrary to **Section 11** of the **Sexual Offences Act**. He was found guilty on count 1 and accordingly sentenced to twenty (20) years imprisonment. The 2<sup>nd</sup> Appellant was also found guilty of child prostitution contrary to **Section 15(a)** of the **Sexual Offences Act**. She was sentenced to imprisonment for 14 years. Each Appellant filed a separate appeal against conviction and sentence and the two appeals were consolidated during the hearing of this appeal.

The 1<sup>st</sup> Appellant raised 7 amended grounds of appeal -

- “ 1. THAT the particulars of the charge of defilement contrary to Section 8(1) (3) of the Sexual Offence Act No. 3 of 2006 did not include (or omitted) the word “unlawfully” thereby rendering the charge sheet defective for it does not specify any unlawful act or any contravention of the said Act.***
- 2. THAT the learned trial Magistrate erred in both law and fact by relying on uncorroborated, contradictory and inconsistent evidence of PW2, PW3 PW4 and PW5 on exactly what date the offence is alleged to have been committed, was it on 30/12/2006, 31/12/2006 and 1/1/2007 and when was she actually taken to Nairobi Women’s Hospital for treatment?***
- 3. THAT the learned trial Magistrate misdirected herself by relying on the evidence of PW5 that PW2 had a bruised vaginal opening described as introital bruising, notwithstanding the fact that the said Doctor, PW5 did not give the exact age of the said injuries and***
- 4. THAT the learned trial Magistrate erred in law and facts by failing to put into consideration the evidence of the doctor, PW5 that no Spermatozoa was ever seen on the complainant, PW2 nor on her vaginal swab examination.***

5. ***THAT the prosecution side failed to avail in court vital witnesses such as the chief, to whom the first report is purported to have been made, the Administration Police Officer from the Chief's Camp who it is alleged they effected the arrest. The father to PW2, medical report and staff from Rianna's Hospital at Kangemi, the neighbour one by name of M. W., thereby denying the court the chance and opportunity to arrive at a fair and impartial decision as provided for under Section 150 of the Criminal Procedure Code.***

6. ***THAT the learned trial magistrate failed to observe and note it, as strange and unbelievable, for one to be detained and defiled for two (2) days in a densely populated area like Kangemi and fail to raise an alarm or "at least sos" and scream for help, thereby raising doubt on the single witness evidence.***

7. ***THAT the whole trial was illegal, null and void as my constitutional rights as enshrined under Section 72(3) (b) of the Constitution were infringed by my prolonged detention on police custody for more than 24 hours, from 31/12/2006 to 18/1/2007."***

The first four grounds can be considered fairly together. The answers to the issues raised therein are straight forward. For a start, **Section 8(1)** of the **Sexual Offences Act**, states as follows-

***"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

It is worth noting that this section does not include the word "**unlawfully**". The charge is therefore properly framed and does not bear any defect as alleged by the Appellant. The introduction by the appellant of the word "unlawfully" into the charge would imply that there are instances in which defilement may be lawful. That is a fallacy. By definition, "**defilement**" denotes an act which causes penetration with a child. At no time can such an act be lawful. Consequently, the charge was not defective for the omission of the word "**unlawful**", which word is not included in the definition of the offence of defilement. Therefore the first ground of appeal has no merit.

With regard to grounds 3 and 4, the offence of defilement is constituted by an act which causes penetration with a child. Such penetration does not require completion of the sexual act by ejaculation. If the later we to be the law, many offenders would escape liability by wearing condoms which would prevent detection of any spermatozoa. This ground also lacks merit.

The complainant did not conduct herself like a person who had been defiled. If she was locked up in the 1<sup>st</sup> Appellant's room against her will, it is surprising that she did not raise an alarm at least to alert the neighbours that she was in distress. She is alleged to have been in that room until the next day. Again, she did not complain even to the 2<sup>nd</sup> Appellant. When her mother found her the following day at the door of the 2<sup>nd</sup> Appellant's room, she did not complain immediately. It was not until some officers came from the chief's camp that she spoke about her whereabouts the previous day. This is not compatible with the conduct of a child who had been defiled. Her silence throughout the afternoon of the incident and the night raises more questions than answers. This leads one to pose the question - what is the truth about this incident?

A person cannot be convicted of a criminal offence on the basis of speculation. Hard evidence is required in order to sustain a conviction. On the basis of the evidence before the court, it is the word of the complainant (PW2) against that of the 1<sup>st</sup> Appellant. Whereas the latter conceded that PW2 slept the night in his room, he denied having defiled her. Such an incident calls for corroboration. The proviso to **Section 124** of the **Evidence Act** is to the effect that-

***"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."***

In the instant case, there is no other witness to the alleged defilement except the victim herself. The trial court could have convicted the 1<sup>st</sup> Appellant if, for reasons to be recorded, the court was satisfied that the alleged victim was telling the truth. However, that was not done. We have therefore to look for corroboration from the medical evidence.

Unfortunately, the medical evidence on record does not help matters.

Although the victim's mother (PW3) stated that she took her daughter to Lianna's Hospital and Nairobi Women's Hospital, it is significant that she did not specify the date(s) when she did so. However, Doctor Muhombe (PW5) testified that the complainant alleged to have been raped on 30<sup>th</sup> December, 2006 at 2pm. She further told the Doctor that she had been lured into a house by the 2<sup>nd</sup> Appellant and then a man she knew as Jairo (1<sup>st</sup> Appellant) came in and raped her repeatedly the whole night. When the Doctor - examined her, she found tears on the hymen at ? 5 7? and 11? o'clock positions. She then continued

***“I did investigations and no spermatozoa was seen. I tested the urine and no spermatozoa were seen...”***

Even though the Doctor formed the opinion that the complainant had been raped, she did not give the approximate time when the tears on the hymen had been inflicted. The approximate age of those tears would have assisted in determining whether they were inflicted approximately at the time when the complainant said she had been defiled. In the absence of such evidence, it is not possible to say conclusively and with certainty that the tears were inflicted by the 1<sup>st</sup> Appellant. The approximate time of the infliction of those tears holds the key as to whether the complainant was defiled at the time when she says she was, but that question was never posed. That is a serious gap in the prosecution case and it creates a doubt which goes to the benefit of the 1<sup>st</sup> Appellant.

Regarding the case against the 2<sup>nd</sup> Appellant, it is noteworthy that she is charged with child prostitution. Unfortunately the charge against her was defective. The particulars thereof read as follows-

***“Ann Achieng on the 30<sup>th</sup> day of December, 2006 at Kangemi in Nairobi within Nairobi area, knowingly permitted F. A. a child of 13 years to remain in the house of David Jairo for the purpose of causing the said F. A. to be sexually abused by David Ayuma.”***

From this charge, there is confusion as to whether the complainant was subjected to the alleged prostitution for the purpose of being sexually abused by David Jairo or David Ayuma. Since the charge speaks of David Ayuma, why was he not charged? In the Circumstances, one need not belabour the point because the charge sheet speaks for itself. It is defective as earlier said.

By reason and wholly on account of the foregoing, I find that the case against both Appellants has not been proved to the required standard in order to sustain their convictions. The appeals by the two appellants are therefore allowed. Their convictions are accordingly quashed and the respective sentences set aside. They are hereby set a liberty forthwith unless they are otherwise lawfully held.

**DATED and DELIVERED at NAIROBI this 13<sup>th</sup> Day of July, 2012**

**L. NJAGI  
JUDGE**