



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KARANJA, MUSINGA & KANTAI, J.J.A.)

CRIMINAL APPEAL NO. 84A OF 2011

BETWEEN

PETER WAWERU GITHUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence of the High Court of Kenya at Nakuru (Anyara Emukule, J.) dated 9th December, 2011 in HC. CR.A. No. 222 of 2010)

JUDGMENT OF THE COURT

This is a second appeal from the conviction of the appellant, **Peter Waweru Githua**, by the Magistrates' court at Naivasha, a conviction that was confirmed on first appeal by the High Court of Kenya at Nakuru (**Anyara Emukule, J.**) in a Judgment delivered on 9th December, 2011. Our jurisdiction in an appeal like this one is limited by **Section 361(1) (a) Criminal Procedure Code** to consider only issues of law (if we find any) but not matters of fact which have been tried and retried by the two courts – See the case of **Stephen M'Riungu v Republic [1982-88] 1 KAR, 360** where this jurisdiction is discussed.

We visit the facts of the case purely to establish whether the two courts carried out their mandate as required by law and, if they did so, to establish whether there are issues of law arising in this appeal.

The charge facing the appellant was the offence of Incest by a Male contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**, particulars being that on 21st November, 2009 at a place named in the charge sheet, he intentionally and unlawfully did cause his genital organ, namely, penis to penetrate the genital organ, namely, vagina of JMW, his daughter aged 8 years. The alternative charge was one of Indecent Act to a child contrary to **Section 11(2)** of the said **Act**, particulars being that on the said date and at the said place he allowed his penis to come into contact with the vagina of the said girl.

The prosecution case was brief and straightforward.

JMW (PW2) was at home playing with her younger sister. She testified that her father, the appellant, sent the younger sister on some errand and when she was left alone with the appellant he ordered her to climb on his bed, removed both his and her clothes and proceeded to defile her after which he sent her to the shops to buy soap.

AL (PW3) the mother of PW2 returned home in the evening and was surprised to find her bed disturbed. When she questioned the two girls PW2 readily informed her that she had been defiled by her father (the appellant) on the bed that he shared with PW3.

A report was made to **Mai Mahiu Police Station** where PW2 and PW3 were received leading to arrest of the appellant by **PC Joshua Keter**.

Dr. Waigwa Wainaina examined JMW on 24th November, 2009 and confirmed that she was 8 years old. He found bruises in her private parts and her hymen was broken; she had white discharge on her private parts and those findings made the doctor to conclude that the child had been defiled.

Investigations were conducted by **PC Ephantus Mulwa** of that police station.

On this evidence the trial Magistrate found that a case had been made out for the appellant to answer. In defence the appellant, a loader by occupation, stated that on the material day he left home in the morning and went to work. On the way home in the evening he passed by his mother's house where he was served supper but while eating, his wife (PW3) accompanied by police pounced on him and he was arrested. He denied committing the offence.

The trial Magistrate evaluated the prosecution evidence and the defence offered by the appellant and, finding that the case had been proved to the required standard convicted the appellant and, after considering mitigation offered, sentenced him to serve 20 years imprisonment.

As we have seen, a first appeal was dismissed and the appellant preferred this appeal.

In the homemade Memorandum of Appeal the appellant faults the Judge for not finding that the charge sheet was defective because it did not disclose the relationship between the appellant and the complainant; that the Judge did not adequately re-evaluate the case as required; that the offence was not proved beyond reasonable doubt; that the Judge should have gone beyond the grounds of appeal raised and rely on the record, and, finally, that the defence was erroneously dismissed.

When the appeal came up for hearing before us through "Go-to Meeting" platform in view of the current COVID-19 situation, the appellant appeared in person while **Miss Chelangat**, learned **Prosecution Counsel**, appeared for the Republic.

The appellant told us that the evidence was inconsistent; that the doctor did not say that PW2 was defiled by her father; that his wife told lies, and, why, in any event, was he not medically examined? For all that he asked us to allow the appeal.

In opposing the appeal, Miss Chelangat submitted that conviction was supported by evidence and was safe and the sentence was lawful. According to counsel, all grounds of appeal raised factual issues which we had no jurisdiction to entertain. On the complaint that the charge sheet was defective, counsel submitted that the charge sheet stated the provision of law contravened and went on to disclose that the complainant was the appellant's daughter. Counsel went on to submit that the High Court had re-evaluated the evidence. For all these we should dismiss the appeal.

Whether or not the charge sheet was defective is a matter of fact. We have perused the Petition of Appeal filed at the High Court at Nakuru (Criminal Appeal No. 222 of 2010) and note that the appellant did not raise the issue of competence of the charge sheet that had been filed before the trial court. The charge sheet clearly stated the offence with which the appellant was charged, the Section of the law contravened and the detailed particulars stated that the appellant had defiled his 8 year old daughter. There is no merit in this complaint.

We have looked at the Judgment of the High Court and noted that the Judge, on first appeal, re-evaluated the case as he was required to do and came to the conclusion that the appeal had no merit.

There is also no merit in the complaint that the appellant's defence was not considered but was ignored. All the appellant said was that he was arrested at his mother's house while having dinner. The appellant did not raise this issue in the course of the trial and we agree with learned State Counsel that it was raised in the unsworn defence as an afterthought.

The appellant defiled his own daughter during the day and there is no issue about identification of the defiler. The child (PW2) informed her mother (PW3) as soon as the mother arrived home that evening of the happenings that had occurred during the day.

Considering all we have said we find that this appeal has no merit and we dismiss it in its entirety.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. KARANJA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR