



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA)

CRIMINAL APPEAL NO. 46 OF 2014

BETWEEN

JOHN LUYI LIKHANGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kakamega, (Chitembwe, J.) dated 27<sup>th</sup> March 2014 in High Court Criminal Appeal No. 123 of 2008)*

JUDGMENT OF THE COURT

1. The appellant was charged with the offence of defilement of a six year old girl, **J. A**, contrary to **section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**. The offence was alleged to have been committed on 7<sup>th</sup> September, 2007.
2. After a full trial, the appellant was convicted of the said offence and sentenced to life imprisonment as by law provided. The appellant's appeal to the High Court at Kakamega was unsuccessful and so he preferred a second appeal to this Court.
3. The jurisdiction of this Court on a second appeal is well circumscribed by **section 361 (1)** of the **Criminal Procedure Code**. In such an appeal the Court is restricted to points of law only; unless it is shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong. See **DZOMBO MATAZA V REPUBLIC [2014] eKLR**.
4. The appellant, who was unrepresented, relied on his memorandum of appeal. The grounds therein may be summarized as hereunder:
  - i. **The trial court and the first appellate court erred in law in convicting/upholding the appellant's conviction when the appellant had not been subjected to any medical examination.**
  - ii. **The evidence tendered by the complainant was uncorroborated and was unreliable.**
  - iii. **The trial court erred in law in rejecting the appellant's statement of defence.**
5. The facts that gave rise to the appellant's conviction and sentence were fairly simple and straight

forward. On 7<sup>th</sup> September, 2007, **J. A.**, the complainant, who was then six years old, together with her younger sister, PW 2, went to a kiosk with the appellant. The appellant, who was known to both PW 1 and PW 2, had called the young girls from their home to accompany him to the kiosk. On their way back the appellant took the complainant, PW 1, to a nearby thicket and defiled her. PW 2 was standing by as the appellant defiled her helpless sister.

6. Meanwhile, the complainant's mother, PW 3, who was at the material time looking for the whereabouts of her young daughters, heard a child crying from a nearby thicket. Upon checking, she realized that it was PW 1 who was crying. The young girls told their mother what had happened. In particular, they reported that the appellant had defiled PW 1. When she examined the complainant's vagina she noticed that there were spermatozoa. There was also spermatozoa on her thighs. The complainant's underpant was also missing. The underpant was later recovered at the spot where PW 1 had been defiled.

7. PW 3 took PW 1 for medical examination and treatment at Kakamega General Hospital. It was confirmed by a Clinical Officer, PW 3 that indeed the complainant had been defiled.

8. The appellant was arrested from his home by PW 4, a village elder. He was thereafter handed over to the police.

9. In his statement of defence, the appellant stated that on the material day he was asked by the complainant's mother to accompany her two young girls to a nearby kiosk to buy some items, which he did. Thereafter he asked the girls to return to their home and he went away. He denied having defiled PW 1. At the hearing of the appeal, the appellant, who appeared in person, urged us to allow the appeal based on the grounds set out in his memorandum of appeal.

10. Mr. **Sirtuy**, learned Principal Prosecution Counsel, urged this Court to dismiss the appeal, saying that there was overwhelming evidence that it was the appellant who defiled the complainant. He submitted that the complainant's evidence was well corroborated by that of PW 2 and PW 3.

11. As regards sentence, Mr. Sirtuy stated that the trial court passed the prescribed mandatory sentence for anyone convicted of defiling a child aged eleven years or less, that is, imprisonment for life.

12. We have carefully considered the evidence on record and weighed it against the grounds of appeal advanced by the appellant. Regarding the evidence adduced by the complainant, this was a child of tender age but was able to narrate very clearly what was done to her. She knew the appellant as he was their neighbor. She testified as to how she was defiled by the appellant in the presence of her younger sister, PW 2. This was evidence of recognition which is much more reliable than evidence of identification of a stranger, as held in **ANJONONI & OTHERS V REPUBLIC [1981] KLR 594**.

13. PW 2 corroborated the evidence of PW 1 in every material aspect. None of these children would have had any reason of framing up the appellant. The appellant himself conceded that he went to the kiosk with the two girls and bought some household items. That in itself confirms that he was with PW 1 and PW 2 around the time the offence was committed. There was no evidence of any other man who was with the complainant at the material time.

14. If the evidence of PW 1 required any corroboration, which was not necessary in view of the proviso to **section 124** of the **Evidence Act**, then the evidence of PW 2 who was at the scene and witnessed everything was sufficient.

15. We agree that the appellant was not subjected to any medical examination to confirm that the spermatozoa that were found in the complainant's vagina and on her thighs were his. That notwithstanding, there was sufficient evidence that the complainant had been defiled and that the appellant, must have been the one who did it.

16. As regards sentence that was handed down by the trial court, we agree with Mr. Sirtuy that **section 8 (2)** of the **Sexual Offences Act** prescribes life imprisonment as a mandatory sentence for the offence of

defiling a child aged eleven years and under. The trial court had no discretion on the issue.

17. In view of the foregoing, we find no merit in this appeal and hereby dismiss it in its entirety.

**DATED AT KISUMU THIS 3rd DAY OF July, 2015**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**