IN THE COURT OF APPEAL AT NAIROBI

(CORAM: GITHINJI, KARANJA & MURGOR , JJ.A)

CRIMINAL APPEAL NO. 83 OF 2011

BETWEEN

KAGAI KANGETHE …………………………………..……APPELLANT AND

REPUBLIC …...RESPONDENT

(An appeal from the judgment of the High Court of Kenya at

*Nairobi (**Njagi & Warsame, JJ**.) delivered 21st February, 2013*

in

H.C. Cr. A. NO. 178 OF 2011)

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JUDGMENT OF THE COURT

The appellant who says that he is 70 years of age was convicted by the Resident Magistrate, Githunguri Court of the offence of defilement of a girl aged 13 years contrary to ***section 8(3)*** of the ***Sexual Offences Act*** and sentenced to 20 years imprisonment. Having convicted the appellant on the main offence, the trial magistrate did not make any finding on the alternative charge of indecent act with a female child contrary to **section 11(1)** of the ***Sexual Offences Act***. The appellant's first appeal against the conviction and sentence to the High Court was dismissed.

The victim of the offence was a girl aged 13 years **(child**). Her evidence was briefly as follows:

On 24th September, 2010 she went to the appellant's house accompanied by **J K**, to borrow a panga to cut nappier grass. When she borrowed a panga, the appellant told her to enter into the house. When she entered into the house the appellant closed the door, removed her trouser and pant, removed his trouser, lifted her up, placed her on the chest and defiled her. As he was defiling her, the child's Aunt, ***E W (Esther)*** called the appellant from outside. The appellant rushed to his bedroom telling Esther that he was wearing shoes to go to the market. At that juncture, the child opened the door and went out while carrying her pant and trouser. She found Esther outside who told her to go and cut grass. She did so and thereafter went home. Later, Esther went to her home and told her to go hospital. She went to hospital and later recorded a statement at the police station.

The second witness was ***S M K (Samuel)***, a brother to the child and the husband of Esther. He testified that his wife rang him on the material day at around 4.00 p.m. and informed him that his sister had been defiled and that when he returned home at 6.00 p.m. he questioned the victim who told him that the appellant had defiled her.

The third witness, E W, according to her evidence, went to the appellant's house on the material day at 9.30 a.m. to collect nappier grass and

called the appellant from outside. The appellant answered that he was putting on his shoes. He then saw the victim come from the house but did not talk to her. The appellant then got out of the house and showed Esther the nappier grass which she cut. She later accompanied the appellant to the road and went back to her home. When her husband came home at about 1.30 p.m., she told him that she had seen the child coming out of the appellant's house. The child was taken to a health centre where she was treated. Esther and her husband took the child to her mother and explained what had happened. Samuel asked the child what had happened but the victim declined to tell the truth whereupon Samuel beat her and she agreed to tell the truth.

The victim was examined on the same day at 5.00 p.m. by **Nancy Njuguna**, a clinical officer at Githiga Health Centre. She had no injuries in the genitalia and was not bleeding. However, she had no hymen and had whitish vaginal discharge. There was evidence of infection as the victim had pus cells. The clinical officer concluded that the victim had been defiled.

The appellant made an unsworn statement of defence at the trial. He stated that the child went to his home and asked for a file. He offered her food and left after she ate. The appellant then went to the shopping centre and when he returned home he found people who assaulted him using sticks.

The two courts below made a finding of fact that the child was defiled and that she was defiled by the appellant. In addition, the two courts below

made a finding that the medical report conclusively proved that the child had been defiled.

In the first and second grounds of appeal which are the main grounds of appeal, the appellant faults the High Court for the failure to evaluate afresh the evidence as a whole particularly as it relates to the credibility of the material witnesses.

The appellant submitted among other things, that the child could have been defiled elsewhere before she went to his house.

The appeal is opposed by ***Miss Oundo,*** the learned State Counsel. The predecessor of this Court said in **Okeno v Republic**:

> ***"It is not the function of the first appellate court merely to scrutinize the evidence to see if there was evidence to support the lower court's findings and conclusions.***
>
> ***It must make its own findings and draw its own conclusions".***

There was credible evidence that the child went to the house of the appellant on the material day to borrow a panga to cut nappier grass. The appellant admitted that the child went to his house. However, he has throughout persistently denied that he defiled the child. He denied so soon after he was arrested by the members of public and has denied committing the offence in the two courts below and in this Court. The High Court as first appellate court was required to subject the whole evidence to a fresh and exhaustive examination

and make its own finding as to whether there was credible evidence to support the charge.

There was some glaring piece of evidence which the High Court should have re-evaluated to assist reach a decision whether or not the entire prosecution case was credible.

Firstly, the manner in which defilement was committed as described by the child when the appellant could have easily used his bed.

Secondly, the material discrepancy in the evidence of the child and Esther.

According to the evidence of the child, she left the house of the appellant while carrying her pants and trouser and that she met Esther outside the house who told her to go and cut grass. The evidence of Esther is that she did not talk to the child. If the child left the house while carrying her pants and trouser, it is unlikely that Esther could have failed to see them and give such testimony. She did not in her evidence say that the child was carrying her pants and trouser.

Thirdly, the High Court should have also evaluated the evidence relating to the conduct of the child and Esther. The evidence shows that after she saw the child come out of the appellant's house she went about her chores normally. She even accompanied the appellant to the market after she had cut nappier grass. Her conduct was inconsistent with anything unusual having happened between the child and the appellant.

On her part, the child did not complain of defilement to Esther or to anybody else. She denied that anything had happened when she was questioned by Samuel. According to the evidence of Esther, it is only when the child was beaten by Samuel that she implicated the appellant.

Lastly, the High Court ought to have evaluated the evidence relating to the fact of defilement. Although the child claimed to have been defiled there was no tell-tale evidence of defilement. She was examined three hours later. She had no injuries in the genitalia. She was not bleeding or complaining of any pain. The Clinical Officer noted that there was no hymen. However, the Clinical Officer did not give an opinion as to whether or not the child lost the hymen in the previous three hours or sometime before. While the medical report was conclusive of the fact of defilement, taking into account the surrounding circumstances, it was not conclusive that the child was defiled in the previous three hours or recently. Thus, the medical evidence did not irresistibly point at the appellant as the person who could have defiled the child to the exclusion of anybody else.

From the foregoing, we are satisfied that the High Court failed to perform its duty as a first appellate court, in that, it merely scrutinized the material evidence without subjecting it to a fresh exhaustive examination. We are further satisfied that, had the Judge discharged her duty in accordance with the law, she inevitably could have come to a different conclusion.

For those reasons, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 10th day of October, 2014.

E. M. GITHINJI

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR