



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL APPEAL NO 47 OF 2019**

**DOUGLAS MUTUMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from original Conviction and Sentence in Nanyuki CM Sexual Offence***

***Case No 41 of 2018 – L Mutai, CM)***

**J U D G M E N T**

1. The Appellant herein, **DOUGLAS MUTUMA**, was acquitted after trial of the main charge of **defilement** contrary to **section 8(1) & (2)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged that on 16/06/2018 at [Particulars withheld] area in Laikipia East District within Laikipia County, he intentionally caused his penis to penetrate the vagina of one **PM**, a child aged 10 years. He was however convicted of the alternative charge of **committing an indecent act with a child** contrary to **section 11(1)** of the same Act. It was alleged that at the same time and place he intentionally touched the buttocks, breasts and vagina of **PM**, a child aged 10 years with his penis. On 30/09/2019 he was sentenced to 10 years imprisonment. He has appealed against both conviction and sentence.

2. The Appellant's original grounds of appeal in his petition filed on 28/10/2019 disclosed dissatisfaction with the sentence only. There is not a ground challenging the conviction. However, on 01/11/2021 he tendered an "amended memorandum grounds of appeal" (sic) together with his written submissions, which disclosed the following grounds of appeal –

- (i) In effect, that there was no positive identification of the Appellant as the perpetrator of the offence.
- (ii) That the trial court improperly rejected the Appellant's defence of *alibi*.
- (iii) That there were material conflicts and contradictions between the testimonies of the complainant (PW1) and her mother (PW2) that rendered both of doubtful "*integrity and credibility*."
- (iv) That the sentence was manifestly harsh and excessive.

Learned counsel for the Respondent supported the conviction and sentence.

3. I have read through the record of the trial court in order to evaluate on my own the evidence placed there and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have however, given due allowance for the fact that I did not myself see and hear the witnesses testify. I have also given due consideration to the written submissions of the Appellant and the oral ones of learned counsel.

4. The trial court acquitted the Appellant of the main charge because penetration was not proved beyond reasonable doubt. The complainant's unsworn testimony was that upon lying on the Appellant's bed after both she and he undressed, he put his "*thing for urinating*" between her legs where she urinates through. A medical examination by PW3, a clinical officer, on 29/06/2018 (which was 13 days after the alleged defilement) did not disclose any bruises or lacerations. The vagina produced a clear discharge which was not smelly. Though the hymen was "missing", there was not any recent tear. Laboratory tests did not find any infection or organism. PW3 further stated that it was not clear when the hymen may have been broken.

5. There was thus no proper evidence of penetration, one of the main ingredients of the offence of defilement, and the trial court properly acquitted the Appellant of that charge.

6. As for the alternative charge of committing an indecent act with a child, the trial court believed the testimony of the complainant, and

gave reasons for so believing her: that the Appellant was well known to her as they are neighbours and the Appellant was a frequent visitor at the complainant's home; that at the material time and place the two were together; that they undressed themselves; and that the appellant felt the complainant's vagina with his penis. The trial court found the testimony of the complainant clear and unshaken in cross-examination, and it therefore believed her, notwithstanding that she was the only witness to the crime charged.

7. Under the *proviso* to **section 124** of the *Evidence Act, Cap 80* –

***“...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.”***

The trial court clearly acted under this provision of the law. It was satisfied that the complainant told the truth regarding her encounter with the Appellant, who was well known to her, and recorded in its judgment its reasons for believing her.

8. Upon my own evaluation of the complainant's testimony, I am satisfied that she was telling the truth, and the trial court was entitled to believe her, and it properly convicted the Appellant for committing an indecent act with her. The Appellant's defence was clearly an afterthought and was properly rejected.

9. In the result I find no merit in the appeal against conviction, and I hereby reject it.

10. As for the sentence of ten (10) years imprisonment, the same was lawful and the minimum provided by the law. It was also richly deserved, given the circumstances of the case. There is clearly no merit in the appeal against sentence.

11. The Appellant's appeal is hereby dismissed in its entirety. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2022**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 24<sup>TH</sup> DAY OF FEBRUARY 2022**