



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NANYUKI**  
**CRIMINAL APPEAL NO 44 OF 2017**

**(From original Conviction and Sentence in Nanyuki CM Sexual Offence Case No 48 of 2016 – W J Gichimu, PM)**

**PS.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

1. The Appellant herein, **PS**, was convicted after trial of **defilement of a child** contrary to **section 8(1) & (2)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged in the particulars of the offence that on 17/10/2016 in *Laikipia County*, he intentionally caused his penis to penetrate the vagina of one **KL**, a child aged 1½ years. On 28/04/2017 the Appellant was sentenced to life imprisonment.
2. The Appellant has appealed against both conviction and sentence. He was represented by counsel in this appeal. At his trial he was not defended by counsel.
3. In an amended petition of appeal dated 3<sup>rd</sup> and filed on 4<sup>th</sup> March 2020 by his counsel, the following grounds of appeal are set out –
  - i. That the prosecution witnesses gave “*untrustworthy*” evidence which the trial court should not have relied upon.
  - ii. That there were unresolved inconsistencies in the evidence presented by the prosecution witnesses.
  - iii. That penetration was not proved beyond reasonable doubt.
  - iv. That the identity of the perpetrator was not proved beyond reasonable doubt.
  - v. That the trial court erred by not finding that the charge was fabricated on account of an existing grudge between the complainant’s mother and the Appellant.
  - vi. That the trial court did not properly consider the Appellant’s defence.
  - vii. That the charge was not proved to the required standard.
  - viii. That the sentence was “harsh and excessive.”
4. Learned prosecution counsel supported the conviction and sentence.
5. I have read through the record of the trial court in order to evaluate the evidence placed before that court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have, however, borne in mind that I did not see and hear the witnesses testify, and I have given due allowance for that fact.
6. I have also considered the submissions of the learned counsels appearing.
7. The prosecution called five (5) witnesses. The complainant herself was too young to testify. PW1 (JL) was the complainant’s mother. She testified that she lived with the Appellant as lovers (they were not married), together with her two (2) children – one of whom was the

complainant. They had lived together for about 5 months when the incident giving rise to the charge occurred. He was not the father of the children. He was working a night watchman.

8. PW1 further testified that on the material day (17/10/2016) the Appellant came home from work at about 8 am. He then went out to the shops. PW1 was left making breakfast. When he came back they had breakfast together. The Appellant then called the older child and told her to go out to play.

9. PW1 also testified that the Appellant then accused her of unfaithfulness, which she denied. PW1 then went outside to wash her utensils, leaving the Appellant with the younger child (complainant) in the one-room house. The child was in the bed that PW1 shared with the two children. The Appellant normally slept on a mattress on the floor.

10. While cleaning the utensils outside PW1 heard the child scream and call out, "mum!" The Appellant then beat the child to shut her up. PW1 feared to go check what was happening as the Appellant used to beat her too.

11. m Subsequently PW1 took the utensils back into the house. She found the Appellant in bed with the child, both covered up.

12. PW1 then went out "to shop". When she came back she found the Appellant asleep. She took the child out to bask in the sun. The child was unable to sit on the ground and lay down instead. PW1 then noted blood on the child's trouser. She removed it and noted that the child was bleeding from her private parts. PW1 then ran to the police station with the child and reported the matter. They were both then referred to hospital. The Appellant was subsequently arrested at the house while sleeping.

13. PW1 further testified that the child had bruises on her vagina and was crying while touching her private parts. She was walking with difficulty. At one point the child said, "Baba hurt me."

14. Finally PW1 stated that she had no differences with the Appellant, save that he would confront her anytime he saw her with another man.

15. In cross-examination PW1 stated that when the Appellant came back to breakfast she asked him if he was drunk, and that he replied that he had taken some beer. She denied that she had falsely accused the Appellant of defiling the child, and that she had borne him no grudge.

16. PW2 (DR BRIAN MULEMBU) was the doctor who examined and treated the child about 2 hours after the alleged defilement. He also completed and signed her medical examination report (P3). The doctor noted that the child had a swollen upper lip and was easily agitated. Her underpants were blood-stained and her *labia majora* and *minora* were swollen.

17. Further examination of the child revealed that her hymen was broken, and there was a tear on the side wall of her vagina. There was also a bloody discharge from the vagina, though there was no obvious venereal disease noted. A high vaginal swab did not reveal any spermatozoa. The doctor concluded that the child had been penetrated. The P3 was produced in evidence as **Exhibit P1**. It has all the observations of the doctor. Similar observations are also contained in the **Post Rape Care Form (PRC)** produced in evidence as **Exhibit P2**.

18. Nothing arose in cross-examination of PW2 by the Appellant.

19. PW3 (PC SAMUEL KOECH) and PW4 (CPL ANN WAENI KITOU) received PW1 and the child at the police station and took down PW1's statement. They also arrested the Appellant at his house. They found him asleep.

20. PW5 (CPL HILDA NJERU) was the formal investigating officer. She produced the complainant's birth certificate in evidence as **Exhibit P3**.

21. In his own defence the Appellant gave sworn evidence and called one witness. He testified that on the material day (17/10/2016) he came home from work at 7 am, woke up PW1 and asked her to prepare breakfast. He then went to the shops to buy cigarettes. He came back and he and PW1 took breakfast together. He then went to town with his friend and neighbour, **JAMES LOLOL**. They came back and he went to sleep. PW1 was then washing clothes outside. Later, at about noon, he was woken up by the police who arrested him. He was taken to hospital together with the child and PW1. He denied that he had defiled the child and was surprised at the accusation.

22. DW2 (JOSEPH LORO) stated that the Appellant was a fellow watchman and neighbour. On the material day both left work together and went to their respective houses. He then heard the Appellant and his wife arguing. He went to sleep. Later police came and arrested the Appellant. He did not know anything about the alleged offence. In cross-examination he stated that in the course of their argument the Appellant had accused his wife of not spending the night at home, and that she had denied the accusation.

23. That then is the totality of the evidence laid before the trial court. That evidence establishes beyond reasonable doubt (by way of the child's birth certificate) that the child was well below eleven (11 years) in age.

24. The testimonies of the child's mother (PW1) and the doctor (PW2) also established beyond reasonable doubt that on the morning of the material day the child was defiled. The observations of the child by her mother and the medical evidence given by PW2 established that the child had been penetrated and suffered major injuries in the process, requiring her hospitalization for treatment for five days. She had both external and internal injuries in her vagina, clearly indicative of penetration. I am satisfied beyond reasonable doubt that the child was indeed defiled at her own home in the morning of the day of the incident.

25. The main issue therefore is, who defiled the child? The only other eye-witness to the defilement (apart from the perpetrator) was the victim who was too young to testify. So, in effect, there was no independent eye-witness to the defilement. However, there was clear

circumstantial evidence of who the defiler was.

26. The child was defiled after the mother (PW1) went out to wash her utensils, leaving the child with the Appellant in the one-room house. As she cleaned PW1 heard the child scream and call out, "Mum", but she was too terrified of the Appellant to go back in and check what was happening. She feared she would be beaten as he often assaulted her and the child. When she took back in her clean utensils she found the Appellant and the child covered on the bed. Still afraid she decided to go to the shops to buy vegetables. When she came back she found the Appellant sound asleep. That was when she was able to take the child out and noted that she had been defiled. She then ran to the police station and reported the matter, and the Appellant was found, still asleep at about 12 noon, and arrested.

27. The evidence is indicative of the fact that between the time PW1 went out to clean her utensils and when she took in the utensils and found the Appellant and the child covered in bed, only a moderate amount of time had lapsed. The period between when she went out to shop for vegetables and when she came back and found the Appellant asleep may have been longer. The evidence however is clear that all this time the child was with the Appellant and not with any other man or boy. This was the period within which the child was defiled. The Appellant's own testimony placed him at his home at the material time when the child was defiled. There is not even the slightest whiff of any other man or boy who might have been about and with the opportunity to defile the child. The child was throughout in the house, and in bed, with the Appellant. All the circumstances therefore inescapably point to the Appellant as the defiler of the child. Those circumstances are incapable of explanation upon any other hypothesis but the guilt of the Appellant.

28. The trial court properly rejected the Appellant's defence. His sworn testimony and that of his witness did not in any way cast any doubt upon the very strong case that the prosecution had laid against him. There were no inconsistencies or contradictions in the testimonies of the prosecution witnesses sufficient to raise any reasonable doubt about the guilt of the Appellant.

29. I find that the Appellant was convicted upon good and sound circumstantial evidence. His conviction is safe. There is no merit in the appeal against conviction. The same is hereby dismissed.

30. As for the sentence, the life imprisonment that the Appellant received was then lawful and mandatory. However, with the change of the law regarding statutory mandatory sentences brought about by the decision of the *Supreme Court of Kenya* in the famous *Muruatetu cases*, this court can now lawfully look afresh at the sentence.

31. That the Appellant deserved a very severe sentence cannot be in doubt given the circumstances of this case, including the age of the child that he defiled (1½ years) and the very serious injuries he inflicted upon her in the process. That notwithstanding, I respectfully agree with the Appellant's learned counsel that life imprisonment is manifestly harsh and excessive in the circumstances. I will therefore set aside that sentence and substitute therefor imprisonment for twenty-five (25) years from the date when the Appellant was sentenced by the trial court. To that limited extent only does the appeal against sentence succeed. It is so ordered. The appeal against conviction has already been dismissed.

**DATED AND SIGNED AT NANYUKI THIS 24<sup>TH</sup> DAY OF FEBRUARY 2021**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 25<sup>TH</sup> DAY OF FEBRUARY 2021**