



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 294 OF 2014**

**GEOFFREY NJUGUNA KARIUKI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....PROSECUTOR**

*Appeal against both conviction and sentence of Resident Magistrate, Nakuru Hon. R. Amwayi*

*in Criminal Case No.3994 of 2014 Nakuru delivered on 16th December, 2014*

**JUDGMENT**

**INTRODUCTION**

1. The appellant was charged with the offence of **defilement of a girl contrary to section 8(1) as read with section 8(2) of the sexual offences Act No.3 of 2006**. Particulars are that on the 10th day of March 2014 at Rhonda Estate within Nakuru County accused willfully and unlawfully committed an act of inserting his male genital organ namely penis to the female genital organ namely vagina of **ROM** a child aged 6 years which caused penetration.

2. Alternative charge is the offence of **indecent act with a child contrary to section 11 (1) of the sexual offences Act No.3 of 2006**. Particulars are that particulars are that on the 10th day of March 2014 at Rhonda estate within Nakuru county accused intentionally and unlawfully committed an indecent act with a child of 6 years namely **RM** by touching her female genital organ namely vagina with his male genital organ namely penis.

3. The prosecution availed 5 witnesses and appellant gave sworn evidence.

The trial magistrate found that the prosecution had proved the case against the appellant to the requirement of beyond reasonable doubt. He was convicted and sentence to life imprisonment.

4. The appellant being aggrieved by the above determination filed this appeal on the following grounds:-

**i. That the appellant pleaded not guilty.**

**ii. That the learned trial magistrate erred in law by failing to note that life sentence is excessively harsh and not in the conformity to support the decision of FRANCIS KARIOKO MURUATETU.**

**iii. That the learned trial magistrate failed to conform to the provisions of Section 214 of the CPC.**

**iv. That the learned trial magistrate erred in law and facts by relying on evidence of single identifying witness but failed to adhere to the provisions of Section 124 of the Evidence Act.**

**v. That the learned trial magistrate erred in law and facts by failing to consider the appellant's defence which was reliable.**

**vi. That the learned trial magistrate erred in law and facts by failing to scrutinize the issue of grudge between the appellant and the victim's mother as per the provisions of Section 169 (1) of the CPC by disregarding the appellant's defence.**

5. The appellant relied on the above ground at the hearing of the appeal.

6. In oral response, the state submitted that contrary to the ground that medical reports were not produced, the P3 and PRC forms were produced and the doctor testified as PW4 and confirmed that the child had tears in the vagina and anal opening which is a sign of penetration. Further that there was sign of broken heymen.

7. On age, the state counsel submitted that the child was 6 years as confirmed by clinical card produced. She stated that independent age assessment was also done and the child found to be between 5 to 6 years. She submitted that the complainant's evidence was credible as she described the incident vividly before the court. Further, the underwear of the child was recovered and produced by the investigating officer and the appellant was arrested upon identification by the complainant whom she knew the appellant as he was her neighbor and she knew him by name. She further submitted that the appellant raised issue of grudge between him and the child's family but failed to produce any document to prove it existed; and he confirmed his wife was away at the time of the offence. She urged court to dismiss the appeal.

8. In a rejoinder, the appellant submitted that the child's mother was his tenant and had lived in his plot for one month. He submitted that the complainant's mother wanted him to pay for her rent but he refused, as they had not agreed that he would pay rent for her. He stated that the complainant's mother confirmed in her testimony that she was the appellant's tenant.9. The appellant further submitted that the doctor testified that the child's heymen was intact; that the doctor said there was premier tear, which she did not elaborate. He denied having committed the offence.

### **ANALYSIS AND DETERMINATION**

10. This being the first appellate court, I have a duty to reevaluate evidence on record and arrived at an independent determination. This I do with the knowledge that unlike the trial court, I never got opportunity to take evidence first hand and observe demeanor of witnesses. For this I give due allowance.

11. PW2 a child aged 6 years old testified that the appellant who was their landlord called her to his house on 10th March 2014. She said while in the house he gave her githeri thereafter he removed her pant and remove his trouser and had carnal knowledge of her. Her mother PW1 learnt in the evening when bathing the child that she had been defiled. The child was examined by PW3 who confirmed that she had first degree partial tear between her vagina and her anus and hymen. was broken.

12. What need to be proved in offence of defilement is age, penetration and identification.

13. There is no dispute that the child and the mother knew the appellant, as he was their landlord. The appellant confirmed that fact. There is therefore no doubt as to the child's identification of the appellant. This evidence was further collaborated by the fact that the child's pant remained in the appellant house and was collected by the child who was accompanied by her mother.

14. In respect to penetration, the doctor confirmed that the child's heymen was broken and she had first degree partial tear. The same pant was produced in court as exhibit. There is therefore no doubt that the child's private organ namely vagina was penetrated.

15. On age, PW4 a doctor examined the child and found that her age was between 5 and half to 6 years.

16. In his submissions, the appellant said the child's mother wanted him to pay rent for her. He said the doctor said the child's heymen was intact.

17. Contrary to the appellant's submissions, the doctor's evidence on record indicate that the child was defiled. No other explanation was given for the tear between her vagina and anus and broken heymen.

18. From the foregoing, I find that all the ingredients for the offence of defilement were proved beyond reasonable doubt. The appeal on conviction is therefore dismissed.

19. In respect to sentence, I note that the appellant was sentenced to life imprisonment. This sentence was imposed before the decision in **Muruatetu** case, which found that it was unconstitutional for a statute to take away the discretion of a judicial officer. The **Sexual Offences Act** provided for mandatory life imprisonment. In view of the determination in **Muruatetu case**, I am inclined to reduce sentence imposed to 20 years imprisonment.

### **20. FINAL ORDERS**

1. Appeal on conviction dismissed

2. Sentence reduced from life imprisonment to 20 years imprisonment.

**Judgment dated, signed and delivered via zoom at Nakuru**

**This 30th day of April 2020.**

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola - Court Assistant

Appellant in person

Rita Counsel for the State