



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO. 103 OF 2015**

**BONIFACE KARIUKI WAITHERA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Being an appeal from the original conviction by P. T. Nditika, Senior Principal***

***Magistrate, Kandara, in Criminal Case No. 566 of 2014 dated 6<sup>th</sup> May 2015]***

**JUDGMENT**

1. The appellant was adjudged guilty of *defilement* contrary to section 8 (1) and (3) of the **Sexual Offences Act**.
2. The particulars were that on 21<sup>st</sup> December 2014 at K. *[particulars withheld]* in Kandara District Murang'a County, he intentionally caused his penis to penetrate the vagina of LWK *[particulars withheld]* a girl aged 14 years.
3. The appellant is aggrieved by the conviction and sentence. At the hearing of the appeal, the appellant relied on *amended* grounds of appeal filed with *leave* on 6<sup>th</sup> February 2019.
4. There are four *amended* grounds of appeal: Firstly, that the charge was not proved beyond reasonable doubt; secondly, that the medical evidence was obtained in violation of **Article 50 (4)** of the **Constitution**; thirdly, that the appellant was not accorded a fair trial as decreed by **Article 25** of the **Constitution**; and fourthly, that learned trial magistrate erred by failing to call the doctor who initially examined the complainant.
5. At the hearing of the appeal, the appellant relied entirely on the written submissions filed on 6<sup>th</sup> February 2019. He submitted further that the charges were trumped up to cover a grudge between him and the father of the minor (PW3). In a nutshell, he contended that the charge was not proved beyond reasonable doubt.
6. The Republic contests the appeal. The position of the State is that all the ingredients of the offence were proved; and, that there was *no* breach of the **Constitution**.
7. This is a first appeal to the High Court. I have *re-evaluated* all the evidence on record and drawn *independent* conclusions. I remain cognizant that I neither saw nor heard the witnesses. **Njoroge v Republic** [1987] KLR 19, **Okeno v Republic** [1972] EA 32, **Kariuki Karanja v Republic** [1986] KLR 190.
8. The complainant (PW1) was aged 14 years. After a detailed *voire dire* examination, the learned trial magistrate formed the opinion that she understood the *nature* of an oath. The questions posed by the court to the minor and her answers are recorded.
9. The complainant gave sworn testimony. I am satisfied that the trial court complied fully with the procedure of taking the evidence of the minors. **Johnson Muiruri v Republic** [1983] KLR 445.
10. PW1 and the appellant are relatives. On 12th December 2014 at about 6:30 p.m., PW3 instructed the appellant to accompany the complainant home. The two got onto a motorbike. The appellant did not deliver the child home. Instead, he bought her some sweets. It was a ruse: When they reached an avocado tree at Gachanja's place, he made her lie down; removed her trousers and inserted "*something*" into her vagina. She bled and felt pain. The appellant held her mouth and told her not to disclose the incident. He then ran away.
11. When PW3 got home at 7:00 p.m., he found his wife looking for the complainant. When the complainant finally appeared, he noticed some blood stains on a white piece of cloth and her white trousers. The complainant went into the kitchen with her mother. His wife later

told him the child had been defiled.

12. PW3 went to look for the appellant. He and PW5 found the appellant at a bar in Magomano Shopping Centre. They took him to Githumu Police Station where he was detained.

13. PW4 was the complainant's mother. They searched for the complainant along a road. Her other daughters had not seen the complainant. When they finally got the complainant, she disclosed that the appellant defiled her in the bushes. PW4 identified the white bloodstained cloth, trousers and panties worn by the complainant (exhibits 1, 2 and 3). She reported the matter to Githumu Police Station the same evening. She was issued with a *P3 Form* and referred to Kandara Sub-County Hospital.

14. PW2 was Bernard Kiiru, a doctor at the hospital. He is not the one who examined the complainant. The complainant was attended to by his colleague. However, PW2 relied on the treatment notes to fill the *P3 Form* (exhibit 4). He said the complainant was epileptic; and, mentally retarded. At the time of the examination, the clothes had fresh blood stains. She had lacerations on her thighs and vagina. There was blood on the vulva; and, the hymen was broken. A microscopic examination revealed blood cells and spermatozoa. He formed the opinion that the injuries were caused by a penis.

15. PW6 was a police constable Felix Kipkosgey of Githumu Police Station. He recorded the complaint on 21<sup>st</sup> December 2014 at about 8:30 p.m.

16. The appellant gave a brief *unsworn* statement-

*“I stay in Gatiiguru. I am a farmer. I have a grudge with my uncle (PW3). I did [sic] take the child where he had sent me. I did [sic] meet him on 22<sup>nd</sup> December 2014. I did not defile the child. I did not commit the offence. That is all.”*

17. The appellant's claim that he was denied a fair trial is misplaced. The trial was in *public*. The appellant was present and *cross examined* all the six prosecution witnesses. The doctor (PW2) was entitled to rely on the treatment records. PW2 is the *one* who filled the *P3 Form* (exhibit 4). The appellant did not object or apply for the examining doctor to take the stand. The appellant made an *unsworn* statement in his defence.

18. I find that there was no breach of **Articles 25 and 50** of the **Constitution**. The fresh argument that he was confused during the trial is a red herring.

19. I am satisfied from the evidence of PW2; and, exhibits 4 that the minor was *fourteen years old* at the time of the incident.

20. Was *penetration* proved? *Penetration* is defined in section 2 of the Act as follows-

*“penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.*

21. From the evidence of the doctor (PW2) and the mother of the complainant, I entertain *no* doubt whatsoever that the complainant was defiled. She had lacerations on her thighs and vagina. There was blood on the vulva; and, the hymen was broken. There was a bloody discharge. A detailed examination revealed blood cells and spermatozoa.

22. The next key question is whether the appellant perpetrated this heinous crime. The issue is intertwined with *identification* of the appellant. The complainant and appellant were *relatives*. There was no doubt about identification. The appellant *admitted* that on the material day, he was instructed by PW3 to take the complainant home. He was last seen with the complainant before the incident.

23. PW1 was emphatic that it is the appellant who defiled her. She gave this information to her sister and her mother *immediately* after the sexual assault. That evidence was not shaken on cross-examination. Her evidence was corroborated by her mother and the doctor.

24. The appellant's defence was that the charges were fabricated to conceal the grudge between him and PW3. He never elaborated on the nature of the grudge. Like the learned trial magistrate, I find the defence to be a sham.

25. In the end I find that the prosecution proved *all* the elements of the offence beyond *reasonable doubt*. It must follow as a corollary that the conviction was *safe*.

26. The lower court considered the *mitigation*; and, the fact that the appellant was a *first offender*. The court also called for a *pre-sentence* report. The minimum sentence under section 8 (3) of the Act is *twenty years* imprisonment.

27. The upshot is that the conviction and sentence are *upheld*. The appeal is *dismissed*.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A this 21<sup>st</sup> day of February 2019.**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

The appellant.

Ms. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.