



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 54 OF 2017**

**JOSEPH NJERU KIMATHI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in Kyuso Principal Magistrate's Court Criminal Case No. 260 of 2013 by Hon. John Aringo (RM) on 27/10/16)*

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

1. **Joseph Njeru Kimathi**, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **1<sup>st</sup> day of July, 2010** at **[particulars withheld]** in **Mumoni District** within **Kitui County**, intentionally caused his penis to penetrate the vagina of **M K** a child aged **8 years**.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **1<sup>st</sup> day of July, 2010** at **[particulars withheld]** in **Mumoni District** within **Kitui County**, intentionally touched the vagina of **M K** a child aged **8 years**.
3. Aggrieved, he appeals on grounds that: The trial Magistrate relied on identification by the Complainant without considering that PW1 was his cousin and there was enmity between them; Evidence established that the Complainant was defiled but there was nothing to prove that he was the perpetrator of the offence; Crucial witnesses were not called to prove the allegations; Neither spermatozoa nor blood were seen by the Doctor; and his alibi strong defence was rejected.
4. Facts of the case were that on the **1<sup>st</sup> July, 2010**, the Complainant, a child aged **8 years** was in bed when the Appellant, her cousin, opened the door and violated her sexually. The matter was reported to the police who caused her to be taken to hospital for examination. Subsequently investigations were carried out that culminated into the arrest of the Appellant who was charged.
5. Upon being put on his defence the Appellant stated that on the material date he woke up, had a bath, wore his uniform and went to school. They were told to pay the fee balance. His mother had no money therefore told him to go and harvest green grams and while there he was arrested following allegations that he had defiled the Complainant. He alleged that he was accused falsely by the Complainant's mother because of a land dispute.
6. I have duly taken into consideration submissions filed by the Appellant. The State did not file submissions in response to the Appeal.
7. This being the first Appeal, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32)**.
8. This being a case of defilement the State was duty bound to prove elements of defilement thus:
  - (i) That the victim was a minor.
  - (ii) There was an act of penetration.
  - (iii) The Appellant was the perpetrator of the act of penetration.
9. The Complainant was examined by PW3, **M R** who filled a P3 form in her regard. It was his testimony that she was a child aged 8 years. Throughout the trial the age of the Complainant was not in issue. Therefore, she was of the apparent age of 8 years.

10. The Complainant was examined by PW3 who found her having sustained multiple bruises on both the labia minora and majora. Her hymen was broken and both walls of the labia had tenderness. The bruises noted were fresh and concluded that it was a case of defilement. This was evidence of penetration of her genital organs.

11. The Complainant identified the Appellant as the perpetrator of the act, an allegation that is vehemently denied by the Appellant Who argues that the allegation came up because of a grudge. The Complainant was a child aged eight (8) years.

12. In her testimony the Complainant stated that the Appellant went to her bed at **2.00 a.m.** and inserted his penis into her vagina. She tried to scream but he blocked her mouth with his hand. Later on when her mother returned from **Kamayangi** and was informed by **Kathini** that is when she (Complainant) was taken to the police station.

13. In the case of **Kibageny vs. Republic (1958) EA 92** the Court stated that:

**““a child of tender years” meant a child under the age of 14 years.”**

14. **Section 124** of the **Evidence Act** provides thus:

**“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**

**Provided that 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.”**

15. The learned trial Magistrate having heard the testimony of the Complainant was satisfied that she was telling the truth therefore convicted the Appellant.

16. Although the Complainant narrated vividly how her assailant removed her clothes prior to penetrating her genital organs, she failed to explain how she identified the individual. The act happened at **2.00 a.m.**, she did not tell the Court whether there was a source of light that enabled her to see.

17. It was stated by PW2 **D K K** her mother that the children were at home with their grandmother who was not called as a witness to testify to the fact of the occurrence of the incident.

18. In the case of **Bukenya vs. Uganda (1972) EA 549** the Court stated thus:

**“... There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent .... While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”**

19. Evidence adduced falls short of proving the fact of the perpetrator of the act having been the Appellant. Evidence of **K** and the Complainant's grandmother would have been crucial. Failure to call them to testify introduced a doubt in the Prosecution's case. It was therefore unsafe for the learned Magistrate to convict based on evidence of the Complainant perse. Accordingly, the Appeal is allowed, the conviction is quashed and sentence imposed set aside. The Appellant shall be set at liberty unless otherwise lawfully held.

20. It is so ordered.

**Dated, Signed and Delivered at Kitui this 30<sup>th</sup> day of April, 2019.**

**L. N. MUTENDE**

**JUDGE**