**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 130 OF 2017**

**PETER MUGO NJERU.....APPELLANT**

**=VRS=**

**THE REPUBLIC.....RESPONDENT**

**{Being an appeal against Conviction by Hon. L. M. Wachira (Mrs.) – SPM Gatundu dated and delivered on the 23rd day of May 2017 in the original Gatundu Senior Principal Magistrate's Court Sexual Offence No. 32 of 2016}**

**JUDGEMENT**

1. The appellant was charged with defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act the particulars being that on 7th September 2016 at Gatundu South Sub-county within Kiambu County he intentionally and unlawfully did an act which caused penetration of his genital organ, namely penis, into the genital organ, namely vagina, of JNW a child aged 13 years old.

2. The appellant was also charged with an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act where it was alleged that on 7th September 2016 at Gatundu South Sub-county, within Kiambu County he intentionally and unlawfully touched the vagina of JNW a child aged 13 years old with his hands.

3. Briefly the facts of the case were that on the material day the complainant who was then 13 years old and who was living with one D, her benefactor, was left home alone with the appellant who was the benefactor's farmhand. When she went out to collect firewood he pulled her and took her to his house, put her on the bed, removed her inner wear and after removing his clothes had sexual intercourse with her. In court she described what he did to her as sexual intercourse. After about five minutes some men who were going to the home to collect avocados arrived. He locked her in the house and went to attend to them. The complainant alleges to have peeped through the window and called one of the men to open for her and when he asked her what had happened she told him that the appellant had raped her. The man advised her to inform D, her benefactor. She was however threatened with death by the appellant and so she did not tell anyone about it. According to her mother AWN (Pw2) D nevertheless noticed something odd about the complainant and sometimes in November 2016 she (D) told her (Pw2) to ask the complainant what the problem was. It was when Pw2 spoke to the complainant that she opened up and narrated what the appellant had done to her. It nevertheless took Pw2 time to get money to take the complainant to hospital and when she eventually did, she took the complainant to Karatu Hospital. They were not attended to as they were required to report the matter to the police first. They therefore went to Gatundu Police Station and lodged a complaint after which the complainant was examined at Gatundu Level 4 Hospital. The appellant was then arrested and charged with this offence. Treatment notes, a Post Rape Care (PRC) Form and a P3 Form detailing the result of the examination were produced in evidence. Also produced was a Child Health Card to prove the age of the complainant.

4. When the trial court put the appellant on his defence he elected to make an unsworn statement the gist of which was that he was framed by the said D because he refused to continue working for her as she was not paying him. He denied that he committed the offence and contended that the said Damaris should have gone to court if she was in fact staying with the complainant and paying her fees.

5. After evaluating the evidence by both sides the trial Magistrate found the appellant guilty of defilement, convicted him and sentenced him on the charge of defilement but acquitted him on the alternative charge. The appellant did not offer any mitigation and the Trial Magistrate then sentenced him to twenty (20) years imprisonment.

6. Being aggrieved by the conviction the appellant preferred this appeal which is premised on three amended grounds: -

> **"1. THAT, the Hon. trial magistrate erred in matters of law and fact by not finding that one of the elements of the offence of defilement were not conclusively proved to warrant a conviction.**
>
> **2. THAT, the Hon. trial magistrate erred in matters of law and fact by not finding that essential witnesses necessary to prove basic facts did not testify.**

**3. THAT, the Hon. Trial magistrate erred in matters of law and fact by relying on the incredible evidence of pw1 in this case."**

He urged this court to allow the appeal, quash the conviction and set the sentence aside.

7. The appeal is opposed.

8. At the hearing of the appeal the appellant relied on written submissions to which Prosecution Counsel responded orally. I must admit that the appellant's submissions are well researched and articulated. However, I see no need for reproducing the submissions here. Suffice it to say that I have read and considered them and the cases cited carefully.

9. An appeal is in the nature of a retrial and I am therefore required to analyse and re-evaluate the evidence so as to arrive at my own independent conclusion bearing in mind that I did not see or hear the witnesses giving evidence **(see Okeno v Republic [1972] EA 32).**

10. To sustain a conviction for defilement it must be shown **there was penetration, that the victim of the offence was a child and that she identified the perpetrator positively**. The burden of proof as always being upon the prosecution and the standard of proof being beyond reasonable doubt.

11. The foremost argument by the appellant is that penetration was not proved beyond reasonable doubt. My finding however is that penetration was proved beyond reasonable doubt. The complainant narrated how the appellant pulled her into his house, shoved her on a bed, removed her clothes and his before having sexual intercourse with her. The **Black Law Dictionary** defines **Sexual Intercourse** as follows: -

**"Intercourse**

**2. Physical sexual contact, especially involving the penetration of the vagina by the penis – Also termed sexual intercourse."**

The concise **Oxford English Dictionary** twelfth edition described the term as: -

**"Sexual contact between individuals involving penetration, especially the insertion of a man's erect penis into a woman's vagina…."**

12. The complainant may not have used the words commonly used by victims of her age but the ordinary meaning of the words she used is that there was penetration of the appellant's genital organ into her organ. I find and hold therefore that her description of what occurred as sexual intercourse proves there was penetration.

13. The appellant also argued that the complainant's evidence was not corroborated therefore it fell short of the standard required. He urged this court to draw an adverse inference from the prosecution's failure to call Damaris to testify and also urged this court to note that the medical evidence did not offer any corroboration to the complainant's evidence. On this my finding is that it is for the exact two scenarios above that Parliament enacted the proviso to **Section 124 of the Evidence Act** so that the evidence of the victim alone is sufficient to sustain a conviction provided the court believes the victim and records its reasons for doing so. In this case I believe the complainant. She explained why she did not disclose what the appellant had done to her. It was her evidence that he threatened to kill her. For her age that explanation is plausible. When she eventually opened up she was very consistent – what she told her mother is what she told the investigating officer PC Mary Kitote (Pw4). As evidenced by her outpatient card it is also what she told her first contact at the Gatundu Level 4 Hospital. This is proof that she was a truthful and reliable witness.

14. To prove her age, the prosecution produced a Child Health Immunization Card showing that she was born on 18th March 2003. This offence was committed on 7th September 2016 when she was 13 years old. Her age was proved to the required standard.

15. On identification my finding is that the appellant was positively identified by the complainant as her molester. They knew each other well as they were staying in the same home – he being a farm hand and she having been "given" to his employer by her mother to help her with chores. Moreover, it was in broad daylight and it all happened in his quarters. I am satisfied that there was no possibility of mistaken identity.

16. The appellant alleged that he was framed because Damaris wanted him to continue working for her yet she was not paying him. This allegation was made in an unsworn statement and was therefore not tested through cross examination. It was also not put to the witnesses through cross examination and I am of the view that it was an afterthought. I find no merit in the appeal against conviction. The same is dismissed.

17. In regard to the sentence, my finding is that the same is lawful and as the appellant has not expressed remorse, it shall be upheld. In any event he did not appeal against the sentence.

18. The appeal is dismissed in its entirety.

**Signed, dated this 23rd day of September 2019.**

**E. N. MAINA**

**JUDGE**

**Dated and delivered in Kiambu this 26th day of September 2019.**

**C. W. MEOLI**

**JUDGE**