



REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL NO. 8 OF 2018

BETWEEN

PETER THANGA KAGO.....APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal against the original conviction and sentence dated 26th June 2012 in Criminal Case No. 854 of 2012 at Chief Magistrates Court in Kiambu before Hon. J. W. Onchuru, SRM)

JUDGMENT

1. The appellant, **PETER THANGA KAGA**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (3)** of the *Sexual Offences Act*. The particulars of the charge were that on 16th December 2011, at [particulars withheld] village, he unlawfully and intentionally caused his penis to penetrate the vagina of MWN, a child aged 12 years. He was sentenced to serve 20 years' imprisonment and he now appeals against conviction and sentence.
2. In his grounds of appeal and written submissions he contends that the prosecution did not prove the offence beyond reasonable doubt. In order to prove the offence of defilement, the prosecution needs prove that the complainant is a child, the fact of penetration and that the accused caused the penetration.
3. The respondent supported the conviction and sentence on the ground that the prosecution proved all the elements of the offence of defilement and that the sentence was legal and within the law.
4. As this is a first appeal, the duty of the court is to subject the evidence on record to a fresh review and scrutiny and come to its own conclusion while bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic* [1972] EA 32).
5. I have considered all the evidence and the parties' respective submissions and I find as follows. After voire dire, PW1 gave sworn testimony. On the material day, PW1 was at home when the appellant's wife, C, asked her to accompany her to the shop. They first went to the appellant's house where the appellant insisted on her staying behind. She narrated what took place as follows:

[He] closed the door and came to where I was sited and started touching my private parts. He warned me not to tell anybody of whatever he could do to me. He removed my trouser, biker ---- and pant. He then opened his trouser zip. I was left with a T-shirt [He] lay me on the sofa set. He had sex with me. I felt pain in my private parts.

6. As the appellant was committing the act of penetration, PW1's mother, PW2 knocked the door and the appellant opened. The appellant told PW 2 that PW 1 was watching a movie. PW 2 confirmed that the appellant told her that PW 2 was watching a movie. PW 2 testified that when PW1 came out of the house, she looked nervous her eyes were red and her shirt was worn wrongly. When she reached home, PW 2 tried to ask PW1 what had happened but she did not tell her anything.

7. The following Saturday, PW 1's sister came and gave PW 1 Kshs. 300/- which she said had been given by the appellant. The appellant also told her she should keep the money. When school opened, PW 1 began spending the money which raised suspicion. In February the appellant gave PW 1 Kshs. 500/- with which she bought refreshments for her friends. PW 1 accepted that the appellant gave her Kshs. 500/- four times.

8. PW 3, a mother to a friend of PW 1, recalled that she found her 6 year old daughter with Ksh 10/- and when she asked, she was told that it was PW 1 who gave the money. She asked PW 2 whether she had given money to PW 1. PW 2 denied and informed her that she did not know where PW 1 got the money from. PW 4, a teacher at PW 1's school, got the information from PW 3 about the money and decided to investigate. When she asked PW 1 and threatened to punish her, PW 1 told her how the appellant had defiled her and was giving her Kshs. 500/- every Sunday.

9. It is only after the discovery of this fact, that the appellant was arrested on 16th March 2012 by the investigating officer, PW 6. PW 1 was taken for medical examination. PW 5, the medical officer, who saw her on 19th March 2012 and filled the P3 form confirmed that PW 1 came to the facility 13 weeks and 5 days after the incident. When PW 1 was examined the hymen was absent and there was an old vaginal tear. He concluded that penetration had taken place in the past.

10. The totality of this evidence is that the appellant was well known to PW 1 as he was a neighbor. He lured her into his house and proceeded to have sexual intercourse with her. On the material day PW 2 found her in the appellant's house and notice her state of distress. PW 1 did not report immediately because the appellant had threatened her. He continued to buy her silence by giving her money and it is only when PW 3 and PW 4 inquired about the source of her money that his felonious act was discovered. PW 6 was clear that upon examination of PW 1's vagina, there was evidence of penetration. The appellant's alibi defence that he was away from home during the material time when considered alongside the prosecution case sinks on quicksand. The child's age was proved by production of the birth certificate.

11. The conviction and sentence are affirmed The appeal is dismissed.

DATED and DELIVERED at KIAMBU this 13th day of February 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Ngulukyu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.