



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KIAMBU**  
**CRIMINAL APPEAL NO. 17 OF 2017**

**BETWEEN**

**JOSEPH GATHECHA MBUGUA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the original conviction and sentence dated 16<sup>th</sup> December 2016 in Criminal Case No. 5 of 2015 at Gatundu Principal Magistrates Court before Hon. A. M. Maina, PM)***

**JUDGMENT**

1. The appellant, **JOSEPH GATHECHA MBUGUA**, was charged and convicted of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act***. The particulars of the offence were that on various dates between 1<sup>st</sup> August 2015 and 14<sup>th</sup> August 2015 in Gatundu South Sub-county within Kiambu County, he intentionally and unlawfully did an act which caused penetration with his genital organ namely penis into the genital organ namely vagina of FNN, a child aged 4 years old. He was sentenced to life imprisonment.
2. The appellant now appeals against conviction sentence on the ground that the evidence was unsatisfactory, that there were contradictions and inconsistencies such that the conviction could not be supported. He also filed supplementary grounds in which he challenged the medical evidence.
3. The respondent supported the convictions and stated that the prosecution proved all elements of the offence. Counsel submitted that the testimony of the complainant was sufficient to support the conviction and need not have been corroborated although there was sufficient corroborating evidence.
4. As this is the first appeal, I am required to review all the evidence and come to my own conclusion bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour.
5. After a *voire dire*, the complainant (PW 1), gave unsworn testimony in which she stated she was 5 years old and school going. On the material day, the appellant called her to his house to pick eggs. She described what happened as follows;

*I entered the house and he placed me on his bed. He removed the thing used to urinate and he put it in my thing for urinating. It is here (points to her vagina area). He was lying on top of me. He produced milk from the thing he used to urinate. Gathecha asked me to remove my clothes. I removed all my clothes. I wore my clothes and went home.*

6. PW 1 went home and informed her mother what had happened. The testimony of PW 1 was clear and consistent as to the fact that it is the appellant who committed the act of penetration. In cross-examination she was resolute that the appellant called her to his house and they were alone. This evidence, according to the proviso to **section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, is sufficient to support a conviction if the trial magistrate, for reasons to be recorded, believed the child was telling the truth. This is what the trial magistrate concluded and I have no reason to depart from her assessment.

7. There was corroborative evidence in any case. PW 1 immediately informed her mother PW 2 of the incident of 14<sup>th</sup> August at 2.00pm when she came home. PW 2 noted her state of distress and when she checked her vagina she noted it was wide and opened. She reported the matter to the police station and was referred to Gatundu Hospital where she was treated and examined. Additional corroborative evidence was adduced by PW 3, the doctor who examined her and produced the P3 form and who observed that the child's hymen was torn and concluded that there was penetration.

8. In his defence the appellant denied the offence and claimed that he could not defile PW 1 as he was disabled. He never raised the issue of disability with PW 1. His defence when considered alongside the prosecution case is weak. When he put to PW 2 the issue of a grudge in cross-examination, she flatly denied the suggestion. The appellant's defence was properly dismissed.

9. As regards the age of the child, there is no doubt that she was below the age of 11 years. Her mother testified that she was born on 22<sup>nd</sup> December 2010 and she produced her baptismal card. She was thus aged 4 years at the time of the offence. In the circumstances the sentence imposed under **section 8(2)** of the *Sexual Offences Act* was warranted.

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

**DATED and DELIVERED at KIAMBU this 13<sup>th</sup> day of February 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Kinyanjui, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.