



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT MERU

#### CRIMINAL APPEAL NO. 97 OF 2017

*(Appeal originating from the conviction and sentence by Hon. STELLA ABUYA SRM in Meru law Court, in criminal case no.475 of 2015)*

**PETER KIMATHI.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

### J U D G M E N T

The Appellant was charged with the offence of defilement contrary to Section 8(2) of the Sexual Offences Act No.3 of 2006. The particulars were that on 14<sup>th</sup> March 2015 in Kiirua location, Meru County the Appellant intentionally caused his penis to penetrate the vagina of BK a child aged 9 years.

The alternative charge was the offence of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 14<sup>th</sup> March 2015 in Kiirua Location, Meru County the Appellant intentionally and unlawfully touched the vagina of TW a child aged 5 years with his penis.

The Appellant was convicted of the main charge and sentenced to life imprisonment.

The Trial Court convicted the Appellant after full hearing. The prosecution availed 5 witnesses. In defence, the Appellant gave sworn statement.

The Appeal is on both conviction and sentence. Mutuma Advocate represented the Appellant in Appeal.

Counsel for the Appellant submitted that the Trial Magistrate erred in failing to note that the charge as drafted had provision which do not exist in law and argued that under Article 150(h)(1) of the Constitution, an accused shall not be convicted of an act which was not an offence in Kenya. He cited the case of **Rep Vs Titus Kyalwa** where the Court found that much as prosecution could have corrected the error.

Counsel submitted that the Appellant was unrepresented and could not have known that sub Section 2 does not exist in Section 8 of the Sexual Offences Act. He argued that the charge was defective and was not cured during the trial.

The second ground is that post rape care form was used to charge the Appellant. He further submitted that two perpetrators were separately charged in respect of the complainant and that the description was an hotelier aged 50 years.

Counsel further submitted that there is inconsistency in the minor's evidence in that she said she was defiled in a shamba while the Investigating Officer said the child informed him she was defiled in her grandmother's house. He added that page 25 of the record show that the complainant was defiled in a hotel and that 2 people had defiled the child before the incident.

Counsel argued that the doctor said he was not 100% certain the child was defiled.

Third ground is that the Appellant was not placed at the scene at any time.

In response, Mr. Mwathi for the state opposed the appeal and argued that the only thing missing in the charge sheet is a coma between 1 and 2 but the offence and particulars are clearly stated. Counsel cited Kisumu Criminal Appeal No.24 of 2013 where the Court defined 3 ingredients of defilement as follow:-

- Age must be proved;
- Assailant must be identified;
- Penetration must be proved.

Mr. Mwathi submitted that in line 2 of the complainant's testify, she said she knew the accused as Peter Kimathi and that he works at her grandmother's; that he ploughs and takes care of the cattle; which show that the child knew the Appellant.

On penetration, he submitted that the child explained how the Appellant inserted his penis into her vagina and post rape care form indicated that the child complained of pain while urinating.

He clarified that it is not the doctor who said he was not certain 100% that the minor was defiled.

On age of the Appellant on post rape care form he said a child aged 9 years cannot accurate estimate a person's age.

As concern defilement of the child by 2 people the State Counsel submitted that it does not negate the impact the Appellant did on the child.

He further submitted that Pw1's testimony places the Appellant at the scene.

In a rejoinder, Mr. Mutuma questioned whose post rape care report was and further that complainant said she was enticed to a hotel with mandazi; on Charge Sheet he submitted that prosecution had liberty under Section 214 to amend; that failure to amend is prejudicial to Appellant.

He further submitted that as much as evidence of a minor is sufficient there was need for corroboration.

This being the first Appellate Court, I am obligated to reevaluate evidence on record and arrive at an independent finding. I however do this knowing that unlike the Trial Court, I have not had the benefit of taking evidence first hand nor had opportunity to observe the demeanor of witnesses.

On perusal of the record, I note that in respect of placement of Appellant at the scene, Pw2 who is the mother of the child testified that the child informed her that the Appellant defiled her at the shamba on 14<sup>th</sup> while one Koome defiled her on 15<sup>th</sup> at the hotel. While testifying, Pw5 said that the child reported to her that she had visited her grandmother and that she was defiled in her grandmother's house. On the other hand, the complainant testified that the Appellant opened the door, called her in, and defiled her inside her grandmother's house. The post rape care report indicated that the child had been defiled before the incident herein but she could not tell when. The rape care report further indicated that the perpetrator was hotelier, which I believe was description of the other person referred to as Koome. Pw2 and Pw3 who are mother and father of the minor respectively confirmed that the Appellant worked for their mother and was therefore known to the child.

The child herein is aged 9 years. At that age, a child is expected to be able to accurately describe the scene of the incident. In her testimony, she said she was defiled in the farm while when reporting to the police she talked of being defiled inside her grandmother's house. She contradicted her own statement to police. Appellant talked of bad blood between the complainant's mother and himself.

It is not also disputed that the child had been defiled few days before by other persons. In the presence of such history and inconsistency in the complainant's evidence, doubt arises whether the Appellant participated in the act of defilement.

From the foregoing, I find that it was unsafe to convict the Appellant. My view is that the Appellant should have been accorded benefit of doubt.

**FINAL ORDER**

Conviction and sentenced imposed on Appellant are quashed.

The Appellant is hereby set free unless lawfully held.

**Judgment Dated and Signed at Nairobi this 19<sup>th</sup> day of November 2018.**

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**RACHEL NGETICH**

**HIGH COURT JUDGE**

**Delivered at Meru this 23<sup>rd</sup> day of November 2018.**

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**JUDGE**

**IN THE PRESENCE OF**

.....COURT ASSISTANT

.....COUNSEL FOR APPELLANT

.....STATE COUNSEL