



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.113 OF 2016

NAFTALLY MATHIU KATHITHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.926 of 2016 of the Senior Resident Magistrate's Court at Githongo by Hon. C.A Mayamba – Senior Resident Magistrate)

JUDGMENT

The appellant **NAFTALLY MATHIU KATHITHU**, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act.

The particulars of the offence were that on 31st July 2016 at [particulars withheld] Location Imenti Central District of the Meru County, he intentionally caused his penis to penetrate the vagina of **S K** a child aged 7 years.

The appellant was sentenced to serve life imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by G. Mutuma Muthuri, learned counsel. He raised eight grounds of appeal that I have summarized as follows:

1. That the learned trial magistrate erred in law and in fact by failing to take into account the doctor's evidence that there was no penetration.
2. That the learned trial magistrate erred in law and in fact by rejecting the appellant's defence.
3. That the learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence.
4. That the learned trial magistrate erred in law and in fact by meting out an excessive sentence.

The state conceded the appeal through Mr. Namiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

The appellant, who is **S K's** grandfather, called her to his house. After giving her a piece of cake, he took her to his bed and defiled her. She bled from her genitalia. she went and informed her mother that she was

bleeding. She was taken to the police station where the matter was reported and to the hospital on the same day.

In his defence the appellant contended that the appellant mentioned him for fear of being caned.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

For the offence of defilement to be established three ingredients are required to be proved beyond reasonable doubts. These are:

1. Whether there was penetration of the complainant's genitalia (if a girl child);
2. Whether the complainant is a child by proof of age; and finally;
3. Whether the penetration was by the alleged culprit, in this case the appellant.

This was held in the case of **Fappyton Mutuku Ngui v Republic [2012] eKLR**. In the instant case, I will address my mind to these ingredients and find out if they were proved.

In her evidence, **S K** testified that she was seven years old. This is what her father **M M M** (DW2) testified to. **Dr. Samuel Mutegi** (PW6) said that the record from Meru Level 5 Hospital indicated that the complainant was 7 years old. **Frankline Mwirigi Mworja** (PW2) a clinical officer at Githongo sub-county hospital gave the age of the complainant who was taken to him as 7 years. He examined her before referring her to Meru Level 5 hospital. I have no reason to doubt the age of the complainant. The same was proved to the required standards. The proof of age is based on facts and even observation where documents are not forthcoming, like in this case. Had the trial magistrate observed that she appeared older than 7 years, he would have recorded the same.

S K said that when the appellant took her to his bed, he lowered her dress and pant and then inserted his "thing" for urinating into her genitalia. when she screamed due to pain, the appellant covered her mouth using his hand. After he was through, he asked her to go home. She was then bleeding from her genitalia. She went home while crying. Her mother **J M** (PW3) testified that when the complainant told her that she was urinating blood, she confirmed that her pant was blood stained. When she was taken to the hospital, **Frankline Mwirigi Mworja** (PW2) a clinical officer made the following observations:

1. Her pant which was carried was blood stained.
2. She was stable but in mild pain.
3. There were blood stains around the genitalia.
4. The hymen was perforated.
5. There was a protruding mass from the vaginal orifice that was tender to touch.

In consultation with Dr. Ibrahim, they made an impression of uterine prolapse. Since this was an emergency, the complainant was referred to Meru Level 5 hospital.

This evidence, that of the complainant and her mother's indicated that there was penetration. The appellant gave prominence to the evidence of **Dr. Samuel Mutegi** (PW6) who said there was no penetration. This witness said he only relied on documents and did not examine the complainant. The learned trial magistrate was justified to reject his evidence. I have on several occasions observed that penetration in children of tender age is the easiest to establish and one need not have any medical

background to make an observation of defilement.

The complainant was clearly inflicted great pain and had to undergo an operation and was hospitalized for several days.

According to **S K**, the appellant was the perpetrator. She was however branded a liar by her parents. Her mother described her as a big liar. When pressed to expound on why she said so, she attributed this to her teacher whom she said did not give them reasons for describing her as such. Her father also attributed this description to her school. There was no basis for the complainant's parents to brand her as a liar without any supporting evidence. I therefore find that the learned trial magistrate was entitled to dismiss this line of defence. He was able to see the diabolical attempt to sacrifice the child and save the appellant. The proviso to section 124 of the Evidence Act provides as follows:

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.

In the instant case, I have nothing to fault the learned trial magistrate on his finding that the appellant was the perpetrator. The evidence on record was overwhelming against the appellant. I accordingly dismiss the appeal on conviction. Section 8 (2) of the Sexual Offences Act states:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

This is a mandatory sentence. It is what was meted out to the appellant.

It was the only legal sentence available. The appeal on sentence is dismissed as well.

DATED at MERU this 27th day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE