



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKUENI**  
**HIGH COURT CRIMINAL APPEAL NO. 24 OF 2017**  
**JOSEPH KIVUVA KITHEKA.....APPELLANT**  
**VERSES**  
**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant Joseph Kivuva Kitheka was charged with offence of defilement Contrary to **Section 7 of Sexual Offence Act No. 3 of 2006**.

2. The particulars of the offence were that on **08/07/2012** between **2.00 p.m. to 3.00 p.m.** at [particulars withheld] within Eastern Province intentionally and unlawfully caused his male organ penis to penetrate to the genital organ namely vagina of K M a child aged **13 years** with mental disabilities.

3. He was also charged with alternative count of sexual assault contrary to **Section 5 (i) of Sexual Offence Act No. 3 of 2006**. Particulars being that on 08/07/2012 between 2.00 p.m. and 3.00 p.m. at [particulars withheld] within Eastern Province unlawfully and intentionally manipulated his fingers to cause penetration into the genitalia of K M a child aged 13 years with mental disabilities.

4. The trial court found him guilty on the main charge convicted and sentenced him to serve 10 years imprisonment. Being dissatisfied with the above decision, the Appellant appealed against both conviction and sentence on the following grounds vide amended grounds dated 13/02/2017 namely:-

- **The trial magistrate erred in law and facts by admitting the age of the victim to be 13 years,**
- **On relying on contradictory prosecution evidence,**
- **In failing to find sections 31 and 36 (1) of Sexual Offence Act No. 3 of 2006 were not complied with and**
- **In failing to consider Appellant defence.**

5. He prays his appeal to be allowed, conviction quashed, sentence set aside and he be set at liberty.

6. The Appellant canvassed his appeal via his written submissions which he filed and served. The prosecution via Mr. Orinda opposed the appeal via oral submissions.

7. This being the first appeal the court's duty is to re-evaluate the evidence on record afresh, analyze it and come up with its own Conclusion bearing in mind that it never saw the witness testifying to evaluate her demeanor. See **OKENO -VS- R 1972 EA P.32**.

8. The prosecution called five witnesses to prove its case.

9. PW1 P M father of the victim testified that on 08/07/2012 he was at home when PW1 told him that his daughter was raped. He instructed his son to go report to the chief's camp. The next day he took the child to the Kasivani AP camp.

10. The child was born in 1978 the year president Kenyatta died. She is not able to talk. He was told the accused did the defilement. On cross examination he stated that he knew the accused at Kativani Chief's camp.

11. PW2 W M testified that on 08/07/2012 on a Sunday she heard a girl cry saying "**you are causing me pain.**" She went to the scene and found accused on top of the girl. The accused rose and forgot to zip his trouser. The child had a clutch bag. The accused told her he had given the child Kshs.500/= to sleep with her and thus was his wife. The child had sperms spilling on her feet.

12. PW2 called for the area chief who came and arrested the accused and also took away the child girl (victim).

13. On cross examination, she stated that she found accused penis outside his pants. The accused had even ejaculated and sperms were tickling down the child's legs.

14..PW3 peter Mutinda Mutheka area chief stated that a person went to him and reported that the accused had been found defiling a child who suffers from a mental problem.

15. He went to the scene and found crowd gathered. PW2 informed him what happened. He said he saw the girl who had soiled back and head.

16. He arrested accused and on 09/07/2012 went and reported and recorded statement in Kibwezi police station.

17. On cross examination, he said he knew the accused by face. He did not witness the incident/act.

18. PW4 a medical doctor testified that he prepared P3 form of the girl on 10/07/2012. She was aged 13 years. On cross examination, he stated that he found bruises on right index finger, foul smelling whitish vaginal discharge, torn hymen, and the vaginal walls were tender. He concluded that the offence disclosed was defilement. He produced P3 form as Exhibit-1.

19. On cross examination, he stated that the hymen was broken showing there was penetration. PW5 is Sergeant Alice Kioko who testified and stated that on 08/07/2012, the girl was taken to the station by her father PW1. She was mentally handicapped and could not express herself. She booked the report in the OB and did investigation and issued P3 form which was duly filled. The area chief availed witnesses. The accused was charged.

20. After the close of the prosecution case the accused was put in his defence. The accused opted to give unsworn statement after explanation by court on the import of the provisions of Section 211. He told the court that on 03/07/2012 he woke up and went to the river at 2.00 p.m.

21. He ate and bathed and took his phone for charging. On the way people arrested him. They took him to police and told him he had defiled a girl. After hearing prosecution and defence case, the court found accused guilty on Count 1 and sentenced him.

22. After going through the evidence and submissions tendered, I find the issues emerging are:-

- **Whether the age of the girl was proved as required by the law?**
- **Whether the prosecution case was proved beyond reasonable doubt?**
- **Whether Section 31 and 36 (1) of Sexual Offence Act were complied with?**

• **Whether accused defence was considered by the trial court?**

23. On issue No. 1, the father of the victim stated that the girl was 13 years. However, he stated that she was born in 1978. The simple calculation would have placed her birth date in 1998 or there about to be 13 years or so at around 2012 when the incident took place. The doctor PW4 found the girl to be 13 years. This would mean that the girl was born around 1997/98.

24. If we take her date of birth to be 1978 as PW1 stated, it would mean she was 35 years on 08/07/2012 or thereabout. That would not make sense as every witness referred to her as a child and at 35 years of age she would be a mature woman. The accused did not challenge the evidence on age tendered by the doctor or the PW1. The court thus rejects ground 1.

25. On ground 2, on the issue of whether there was prove of case beyond reasonable doubt, the court has evaluated the PW2 and 4 evidence. PW2 caught accused red handed defiling the girl. He even talked to her and said that he paid her Kshs.500/= to sleep with her and thus she was his wife. She even actually saw his exposed penis as he had not zipped his trouser.

26. PW4 observed the injuries sustained by the girl in her genitalia and made an opinion that she was defiled. There was penetration.

27. The accused did not challenge this evidence of PW2 and PW4.

28. The other issue is whether the Provisions of Section 31 and 36 (1) Of the Sexual Offences Act were breached?

**SECTION 31 SOA STATES THAT;**

**(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is:-**

- a) The alleged victim in the proceedings pending before the court;**
- b) A child; or**
- c) A person with mental disabilities.**

**(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable; a person with mental disabilities. witness if in the court's opinion he or she is likely to be vulnerable on account of -**

- a) Age;**
- b) Intellectual, psychological or physical impairment;**
- c) Trauma;**
- d) Cultural differences;**
- e) The possibility of intimidation;**
- f) Race;**
- g) Religion;**

- h) Language;**
- i) The relationship of the witness to any party to the proceedings;**
- j) The nature of the subject matter of the evidence; or**
- k) Any other factor the court considers relevant.**

**3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.**

**4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures:-**

- a) Allowing such witness to give evidence under the protective cover of a witness protection box;**
- b) Directing that the witness shall give evidence through an intermediary;**
- c) directing that the proceedings may not take place in open court;**
- d) Prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or**
- e) Any other measure which the court deems just and appropriate.**

**(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.**

**(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.**

**(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may:-**

- (a) Convey the general purport of any question to the relevant witness;**
- (b) Inform the court at any time that the witness is fatigued or stressed; and**
- (c) Request the court for a recess.**

**(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including:-**

- (a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;**
- (b) Any views expressed by a knowledgeable person who is acquainted with or has**

**dealt with the witness;**

**(c) The need to protect the witness's dignity and safety and protect the witness from trauma; and**

**(d) The question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.**

**(9) The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.**

**(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.**

**(13) An accused person in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness.**

**SECTION 36 OF SOA STIPULATES THAT; 36.**

**1. Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.**

29. PW3 chief and PW5 police officer testified that the victim was mentally challenged. The same victim was not treated as vulnerable witness to enable court follow the process set out under the provisions of s 31 SOA. The victim was not called as witness either to corroborate PW1 testimony that the victim cried during the commission of the offence saying she was feeling pain.

30. The appellant never got opportunity to cross-examine the victim or the intermediary as stipulated by above provisions. The aforesaid omissions cannot be cured by Article 159 constitution of Kenya and the provisions of the CPC cap 7 LOK.

31. As to the alleged breach of the provisions of section 36 SOA, the court finds that the provisions stipulations are not mandatory as court could have relied on other evidence other than forensic and other scientific testing, including a DNA test to convict the appellant.

32. In sum the court finds merit in the appeal and orders that, same is hereby allowed as the trial court did error in law and facts as complained of by the appellant with regard to non-compliance with section 31 SOA.

33. The court thus makes the following orders:-

**1. Conviction is hereby quashed.**

**2. Taking to account that the appellant has been in custody for about 5 years and that the witnesses may not be available, the court is reluctant to order a retrial thus sentence is set aside and the appellant shall be released forthwith unless otherwise held.**

**SIGNED, DELIVERED THIS 20<sup>TH</sup> DAY APRIL, OF 2017.**

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**C. KARIUKI**

**JUDGE**