



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CRIMINAL APPEAL NO 84 OF 2015**

**(From original conviction and sentence in Kangema PM Criminal Case No 38 of 2015 – E M Kagoni, SRM)**

**J K M (alias M).....APPELLANT**

**VERSUS**

**REPUBLIC OF KENYA.....RESPONDENT**

**J U D G M E N T**

1. The Appellant **J K M** (alias **M**) was convicted after trial of **defilement of a child** contrary to **section 8(1) & (2)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged that on 18/01/2015 within Murang'a County, he intentionally and unlawfully caused his penis to penetrate the vagina of C W N, a child aged 8 years. On 26/08/2015 he was sentenced to life imprisonment. He has appealed against both conviction and sentence.

2. In his petition of appeal filed on 07/09/2015 the Appellant has complained (grounds of appeal appropriately re-phrased) –

- (i) That the evidence adduced by the prosecution was contradictory.
- (ii) That the alleged defilement was reported to the police after about 5 days, which cast doubt about any defilement having taken place as alleged.
- (iii) That his defence was rejected without satisfactory reason.
- (iv) That his witness was not accorded a chance to testify.
- (v) That the charge against him was not proved beyond reasonable doubt.

3. At the hearing of the appeal the Appellant tendered amended grounds of appeal together with written submissions. No additional grounds of appeal emerged.

4. Learned prosecution counsel supported the conviction and sentence. He submitted that the Appellant was convicted upon good and sound evidence which was overwhelming. As for the sentence imposed, learned counsel submitted that it was the only one provided by law for the offence.

5. I have considered the submissions of the Appellant who was unrepresented and those of the learned prosecution counsel. I have also read through the record of the trial court in order to evaluate for myself the evidence placed there and arrive at my own conclusions regarding the same. This is my duty as the

first appellate court. I have borne in mind however that I neither heard nor saw the witnesses, and I have given due allowance for that fact.

6. The complainant gave an unsworn statement as PW1 after the court conducted a *voire dire* examination. It found that though she was possessed of sufficient intelligence and understood the need to tell the truth, she did not appear to understand the meaning of the oath. She was cross-examined by the Appellant.

7. The complainant was aged about 8 years at the time of the offence. This age was proved by her mother's (PW4's) testimony and also by her birth certificate which was produced in evidence.

8. The complainant's testimony was that on the material day, a Sunday, and time, she was at home with her siblings playing outside their house. She knew the Appellant who lived in a house behind theirs. The Appellant came and took her to his house. He placed her on the bed and undressed her. He then inserted his penis into her vagina while he lay on top of her. She felt pain and he stopped. She then left and went back to the other children. She did not report the matter to anyone because the Appellant promised to buy for her *mutura* – a tasty Kikuyu sausage.

9. The following day, Monday, the complainant further testified, the Appellant again took her to his house and repeated the same act on her. She did not tell her mother because she used to come home late. But on Friday following, when her auntie called R M came visiting, she told her what had happened. The auntie then called an uncle called H who came and took her and her younger sister to *Kiriaini Police Station* and then to hospital where she was examined.

10. PW2 (R M) visited her sister's house on 23/01/2015 and found her children in the house. Her sister was the complainant's mother. She noticed that the complainant had difficulties walking. She interrogated her, and when the child opened up, she said that she had been defiled two times by "Uncle J". She led PW2 to Uncle J house but they did not find him there. PW2 then called her brother H, and together they took the complainant and her sister to Kiriaini Police Station and then to hospital where they were examined.

11. PW3 (Peterson Chomba) was a clinical officer at *Kangema Sub-district Hospital* where the complainant had been examined. He produced in evidence the medical report of the complainant prepared and signed by his colleague called Robert Mwangi who had examined the complainant. The findings of the clinical officer were that the complainant was in fair general condition whose external genitalia were normal, though the hymen was broken. There were no lacerations and no blood was seen; however, pus cells were present, and the complainant had an infection. The clinical officer noted signs suggestive of penetration.

12. PW4 (I N M) was the complainant's mother. She examined the complainant after she had been taken to hospital by PW2. She noted bruises on her private parts. The complainant said that "J" had done that to her and had threatened not to bring her *mutura* should she reveal what he had done to her. PW4 subsequently led the police to the Appellant's house and he was arrested. She knew him.

13. PW5 (PC David Chepkwony) was the police officer who investigated the case. He received the complainant and her sister when they were brought to the police station by PW2 and escorted them to hospital. He also recorded the complainant's statement.

14. The Appellant gave an unsworn statement. He had indicated to court on 28/07/2015 that he would call one witness and his defence was scheduled for 12/08/2015. On that date apparently his witness was not in court. At any rate his witness never testified. In his unsworn statement the Appellant denied the charge and put forth the defence of alibi.

15. That was the totality of the evidence placed before the trial court.

16. The Appellant was convicted solely upon the testimony of the complainant, the court proceeding

under the *proviso* to **section 124** of the *Evidence Act, Cap 80*. That section provides –

**“124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of an alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**

**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”.**

**17.** The trial court was satisfied that the complainant was telling the truth. It recorded its reasons in the proceedings for being so satisfied.

**18.** Upon my own evaluation of the testimony of the complainant, I am also satisfied that she was telling the truth and nothing else. She knew the Appellant well. It was broad daylight and she could not have been mistaken in his identity. She had no reason to fabricate any story against him.

**19.** In any case, there was plenty of corroboration in the testimony of PW2, and to some extent in the testimony of PW3 and PW4. The child opened up to PW2 upon some prodding. PW2 had noted her difficulties in walking. PW4 (the child’s mother) examined her about 4 or 5 days after the alleged defilement and noted bruises in her private parts. Though the clinical officer who examined her appears not to have seen these bruises, nevertheless, he noted signs suggestive of penetration. At any rate the hymen of this girl of 8 years in age was broken.

**20.** The Appellant denied the offence in his unsworn statement and put forth an alibi. Though he was not under any legal obligation to prove the alibi, he did not call any witness in regard to the alibi as would have been expected. He was given a date for his defence. Apparently his witness did not attend court on that date. The record does not reflect that he sought to call his witness and was denied the chance to do so. His alibi was clearly disproved by the evidence tendered by the prosecution.

**21.** I am satisfied that the Appellant was convicted upon good and sound evidence. His conviction cannot be faulted on any lawful ground.

**22.** As for the sentence, life imprisonment was mandatory for defilement of a child aged 11 years and below.

**23.** In the result, I find no merit in the Appellant’s appeal. The same is dismissed in its entirety. It is so ordered.

**DATED AND SIGNED AT MURANG’A THIS 18<sup>TH</sup> DAY OF MAY 2017**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG’A THIS 19<sup>TH</sup> DAY OF MAY 2017**