



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 70 OF 2014**

**GITHINJI DAVID NGARA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. E.Tanui –Resident Magistrate delivered on the 20<sup>th</sup> September, 2011 in CMCR Case No. 110 of 2010)*

**JUDGEMENT**

The accused **GITHINJI DAVID NGARA** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts.

The appellant had been arraigned before the trial court on 21/7/2010 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8 (2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

*“On the 16<sup>th</sup> day of July, 2010 in Nakuru District within the Rift Valley Province, unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of Z A a child aged 10 years which caused penetration”.*

Additionally the appellant face an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant pleaded ‘Not Guilty’ to all the charges and his trial commenced on 17/5/2016. The prosecution led by **INSPECTOR MAKORI** called five (5) witnesses in support of their case.

The complainant **Z N A** who testified as **PW1** stated that she was 11 years old. She told the court that on 16/7/2011 she left school and returned to her home at about 12.00 noon as she had been sent away from school due to lack of exam fees. At the gate **PW1** met the appellant who asked her what the problem was. **PW1** explained her dilemma. The appellant promised to give her the required fees if she accompanied him to his house. They boarded a matatu and went to the appellant’s house.

At the house the appellant told **PW1** to lie down and rest on his bed. He took a scarf with which he wiped her face. The appellant then removed the child’s panty and proceeded to defile her.

After the act they again boarded a matatu and **PW1** returned home. She did not reveal the incident to anyone.

**PW2 A M** was the complainant’s father. He told the court that on 19/7/2010 the complainant’s head teacher told him to investigate his child’s associations. Apparently some person had seen the appellant with the child and reported the matter. When confronted **PW1** revealed to her father that she had been defiled. The matter was reported to the police. The child was taken for medical attention.

Later **PW2** told the court whilst he was walking with the complainant at the market, she pointed out the appellant to her father as the man who had defiled her. The appellant was roasting maize at the market. **PW2** alerted the police who came and with the help of members of public they apprehended the appellant. He was taken to the police station and was later taken to court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant gave a sworn defence in which he denied having defiled the complainant.

On 20/9/2011 the learned trial magistrate delivered his judgment in which he convicted the appellant on the charge of Defilement and thereafter sentenced him to life imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this present appeal.

The appellant who was not represented during the hearing of his appeal chose to rely upon his written submissions which had been duly filed in court. **MR. CHIGITI**, learned State Counsel made oral submissions in which he opposed the appeal.

Being a first appeal this court is obliged to re-examine and re-evaluate the evidence adduced during the trial court and draw its own conclusions thereof [see **AJOE Vs REPUBLIC [2004] KLR 82**]. Similarly in the case of **MWANGI Vs REPUBLIC [2013]eKLR**, the Court of Appeal held as follows:-

***“1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court’s own decision on the evidence.***

***2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions”.***

With this in mind I shall now proceed to analyze the evidence on record.

In any case of defilement the prosecution has a duty to tender sufficient proof of the following key issues

- (1) The fact of defilement
- (2) Identity of the perpetrator
- (3) The age of the victim

In his written submissions the appellant submitted that the fact of defilement was not proved to the required standard. The complainant herself testified that she accompanied the appellant to his house. Upon arrival there she states at page 11 line 3

***“He requested me to climb into his bed and rest. He took a scarf to wipe sweat on my face. He proceeded to remove my pant and then he removed his trousers and then he took his thing which he uses to urinate and put it in my vagina. He inserted it inside and raped me....”***

Here the child has given a graphic and detailed account of what happened to her. It is unlikely that a child so young would fabricate such a tale.

The appellant queries why the child did not report the incident to her parents or teachers immediately after she returned home. The child explains the reasons why at page 11 line 7

***“He asked me not to explain the incident to anyone. I took my bag and went home. I didn’t tell anyone.....”***

The child had been threatened not to reveal the incident. It is not unusual for a child so young to be fearful of revealing that she had been sexually assaulted.

Later on as it transpired a lady who had spotted the appellant and the child together reported to one of her teachers who in turn informed **PW2** the complainant’s father. Upon being questioned by her father the complainant disclosed that she had been defiled.

The appellant submitted that failure to call this lady who spotted him with the complainant is fatal to the prosecution case. I do not agree. This lady was not a crucial witness as she did not witness the actual assault. She was more of a periphery witness and her failure to testify is in no way fatal to the prosecution case. The lack of an eyewitness to the actual defilement is not surprising. Sexual offences are ordinarily committed in secret and there is unlikely to be any witness other than the victim herself. The corroboration of the child’s testimony in so far as proving the fact of defilement will have to come from other evidence.

After disclosing the fact that she had been defiled to her father, the complainant was taken for medical attention.

**PW5 JACOB CHELIMO** a clinical officer attached to the Njoro Health Centre told the court that he examined the complainant on 19/7/2010. He noted that she had lacerations on her genitals and found that there had been a partial penetration of her hymen.

Section 2(1) of the Sexual Offences Act defines ‘**Penetration**’ to mean and include

***“The partial or complete insertion of the genital organs of a person into the genital organs of another person”.***

Thus the fact that the sexual act may not have been concluded does not negate the fact of defilement.

The evidence of **PW5** corroborates the testimony of the complainant that she was indeed defiled. The lacerations seen on her genitals and the partial penetration of her hymen are all evidence of a sexual assault. In addition a lab test revealed blood stains in the child’s urine which is further evidence of forcible entry. **PW5** opined that the ‘**weapon**’ used to defile the child was probably a ‘**male external genitalia**’ ie a

penis. **PW5** produced the P3 form as an exhibit in court **P. exb 2**. I therefore find that the fact of defilement has been proved beyond reasonable doubt.

On the question of identification, the complainant told the court that on the material day she returned home at about noon having been chased away from school due to lack of exam fee. On reaching her gate the child met the appellant and she explained to him her problem. The appellant offered to give the complainant money required by the school if she accompanied him to his house.

No doubt the child being gullible believed that the appellant was actually going to give her the required money and that is why she agreed to go with him.

The incident occurred in the daylight hours. The complainant boarded a matatu with the appellant and travelled with him to his house. Inside the house the two were alone. The appellant and the child conversed as he tried to persuade the child to eat in his house. The complainant spent several hours in close proximity with the appellant. She had ample time and opportunity to see him well.

A few days later **PW2** told the court he was at the market centre with his daughter when she pointed out the appellant to him as the man who had defiled her. The events were still fresh in her mind. **PW2** alerted the police who came and arrested the appellant.

There would be no reason why the child would identify the appellant as the man who defiled her if he was not the one. She had no motive to frame the appellant.

In his defence the appellant claims that he knew the complainant's father before hand. He suggests that this case was planted upon him at the instigation of **PW2**. The appellant did admit under cross-examination that the child was unknown to him previously. It is therefore farfetched to say that she would identify the appellant solely upon the instigation of her father. In any event the appellant did not explain why even the child's father would have wanted to frame him.

From the evidence on record I am satisfied that there was a clear, positive and reliable identification of the appellant by the complainant. At no time did the complainant waver in this identification at all. The complainant was a mere child who had never disagreed with the appellant. She therefore had no reason to frame him.

The final issue requiring proof in a case of defilement is the age of the victim. That the complainant was a child is evidenced by the fact that the trial court deemed it necessary to conduct a '*voire dire*' examination before receiving her evidence. In her evidence the complainant gave her age as 11 years. **PW2** the complainant's father also told the court that his daughter was 11 years old.

In his defence the appellant sought to imply that **PW2** was an imposter and not the true father of the complainant. He cited as proof the fact that in his evidence **PW2** only gave one name of the complainant '**Z**'. The appellant claimed that **PW2** did not know the child's full names as a real father should.

I find this defence to be merely an attempt by the appellant to clutch at straws. **PW2** clearly explained that the complainant was his 3<sup>rd</sup> born child and he referred to her by her given name '**Z**'. At no was **PW2** called upon to give the full names of his child. **PW2** went on to state that the complainant was in class 5 at [particulars withheld] This confirmed what the child herself had told the court. In the absence of any proof to the contrary, I have no reason to doubt the evidence of **PW2** that he was the father of the complainant. I find this defence has no basis and the same is hereby dismissed.

The child's Immunization Card was produced in court as an exhibit **P. exb 1**. It gave her date of birth as 27/7/2000. That means that in July 2010 when the incident occurred the child was 10 years old. I am satisfied that the age of the complainant was proved sufficiently.

Based on the strength of the evidence availed I find that the prosecution did prove this case beyond reasonable doubt. The appellant's conviction was sound and I uphold that conviction.

Section 8(2) of the Sexual Offences Act provides a mandatory minimum sentence of life imprisonment in cases where the child is aged 11 years or below. The appellant was not a first offender. He conceded that he had a previous similar conviction. The sentence of life imprisonment was both lawful and appropriate. I therefore confirm that sentence.

Finally this appeal fails and is dismissed in its entirety.

**Dated and delivered in Nakuru this 19<sup>th</sup> day of June, 2017.**

Appellant in person

Mr. Chigiti for State

**Maureen A. Odera**

**Judge**