



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO.188 OF 2012**

**A K R.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against Conviction and Sentence imposed in Nyeri S.O Criminal Case No. 37 of 2011 by Hon. E.K.Makori SPM on 19.11.12)*

**JUDGMENT**

**The Trial**

The Appellant herein **A K R** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the offence are that:-

***On 12.9.11 at [particulars withheld] in Nyeri District within the Central Province intentionally and unlawfully caused his penis to penetrate the vagina of SN a girl child aged 9 years***

The prosecution called a total of five (5) witnesses in support of their case. Complainant **SN** stated that she was born on 27.10.02 and was in class 2. She recalled that on 15.9.11 at about 7 pm, one **G** found her on the playing ground, covered her head with a scarf and took her to his house where he defiled her. She said she reported the matter to her mother on 17.8.12 and was taken to hospital.

PW2 **J M**, the complainant's mother stated that complainant was born on 27.10.02 as shown by her immunization card PEXH. 1. She told court that she did not know that complainant was defiled until 17.9.12 when she saw her walking with a limp and upon checking her private parts found them swollen. That complainant told her that she was defiled by one **G**. That appellant who is also known as **G** was married to her between 2007 and 2009 but they separated.

PW3 Dr. Njoroge Susan presented complainant's P3 form filled by Dr. Waweru on 5.10.11 as PEXH. 1 and it showed hymen was broken, vulva was lacerated, genitalia was inflamed and she had brownish discharge and an infection.

PW4 Habiba Sahibu recalled that on 17.8.12, she saw complainant walking with difficulty and she said she had a boil. That she later realized that complainant had been defiled. That complainant said she was defiled by **G**, appellant herein.

At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charges. He told court that he was framed.

The learned trial magistrate considered the evidence, dismissed the defence and sentenced appellant to serve 20 years imprisonment.

### **The appeal**

Aggrieved by this decision, the appellant lodged the instant appeal. In his supplementary grounds of appeal filed on 3.5.17, the appellant set out 4 grounds of appeal to wit:-

- 1. The learned trial magistrate erred in law and in fact in overlooking that the prosecution violated his rights by failing to provide him with written statements of prosecution witnesses***
- 2. The learned trial magistrate erred in law and in fact in disregarding the fact that no document was produced to determine the actual age of the complainant***
- 3. The learned trial magistrate erred in law and in disregarding the fact that no clothes were produced in court as exhibits***
- 4. The learned trial magistrate erred in law and overlooking the fact that the prosecution failed to produce treatment chits as exhibits***

When the appeal came up for hearing; appellant wholly relied on his supplementary grounds of appeal and written submissions filed on 3.5.17.

Mr. Nyamache, learned counsel for the state submitted that court ordered that appellant be supplied with statements on 23.1.12 and he did not raise any further complaint on that issue because the statements were supplied as ordered. It was submitted that the immunization card PEXH. 1 clearly shows that complainant was born on 27.10.02 and that appellant was lucky to have been jailed for 20 years although he was liable to a life imprisonment. It was further submitted that non-production of complainant's clothes was not fatal and further that the P3 form confirmed that complainant had indeed been defiled.

### **Analysis and Determination**

This is the first appellate court and as such I am guided by the principles set out in the case **David Njuguna Wairimu V Republic [2010] eKLR** where the Court of Appeal stated:

*“The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”*

I have considered the submissions by the appellant and by the state and I will address the issues raised as follows:

#### **1. Was appellant provided with written statements of prosecution witnesses?**

Article 50 of the Constitution provides that: -

***(2) every accused person has the right to a fair trial, which includes the right—***

***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;***

In the case of ***Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013]***

**eKLR** where the court held as follows:

***“The right to be provided with” material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence.”***

I have perused the record of the trial court and as rightfully submitted by learned counsel for the state; the court record shows that since 23.1.12 when court ordered that he be supplied with statements, he did not raise the issue of non-availability of statements during the trial. The court makes a finding that the only reason why appellant did not raise any further appellant was because he had been supplied with statements. I therefore find no merit in this ground of appeal.

## **2. Was complainant’s age determined?**

Complainant and her mother stated that she was born on 27.10.02 as shown by her immunization card PEXH. 1. Although the immunization card has some writings that are not clear, the date of birth remains intact and it shows that complainant was 9 years when she was allegedly defiled and not 12 to 15 as stated by the trial magistrate.

## **3. Complainant’s clothes**

There is no evidence that the complainant’s clothes would added any value to the prosecution case or that the non-production has caused the appellant any prejudice.

## **4. Treatment chits**

It is indeed true that the complainant’s initial treatment notes were not produced as exhibits. The non-production is however not fatal to the prosecution case since the P3 form gives details of the injuries that complainant suffered which without a doubt confirm that she was defiled.

## **5. Was appellant framed?**

There is evidence that appellant who is also known as G was married to complainant’s mother between 2007 and 2009 when they separated. Complainant was then 5 to 7 years and there is no doubt that she knew the appellant well. Appellant did not question the complainant’s mother on the alleged unresolved family squabbles between them and his defence that he was framed was therefore considered and rightfully rejected.

## **Decision**

Having considered each ground of appeal *vis-a-vis* the evidence and submission by the appellant and the state, I am satisfied that the appellant was convicted on sound evidence. He was lucky to have escaped a life imprisonment and although this court has discretion under Section 354 (3) (b) of the Criminal Procedure Code to increase or reduce the sentence or alter the nature of the sentence, this discretion cannot be exercised to the detriment of the appellant since he was not warned of such a consequence during the hearing of his appeal. Accordingly and for the reasons set out hereinabove, this appeal is dismissed and the conviction and sentence imposed on the appellant is upheld.

**DATED THIS 18th DAY OF July, 2017**

**T. W. CHERERE**

**JUDGE**

**DELIVERED ON THIS 27<sup>TH</sup> DAY OF JULY 2017**

**BY: -Ngaah J**

**JUDGE**

**In the presence of-**

Court Assistant -

Appellant -

For the State -