



**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO 42 OF 2014**

**(From original Conviction and Sentence in Kandara SRM Criminal Case No 143 of 2013 – P Nditika, Ag SRM)**

**DKN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

1. The Appellant **DKN**, 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 in the charge that on 04/05/2013 in [particulars withheld] Location, Kandara District within Murang'a County he unlawfully and intentionally caused his penis to penetrate the vagina of one **RNK**, a girl aged 8 years. Notwithstanding the express provisions of **section 8(2)** aforesaid of the Act which provide for mandatory imprisonment for life, the trial court inexplicably sentenced the Appellant to fifteen (15) years imprisonment. The court brought this issue to the attention of the Appellant, who was unrepresented, and cautioned that should his appeal against conviction be dismissed the court must act in accordance with the law and impose the mandatory sentence of life imprisonment. After deliberating after adjournment for that purpose, the Appellant chose to proceed with his appeal against both conviction and sentence.

2. In his petition of appeal the Appellant complained –

- (i) That the evidence relied upon by the trial court to convict him was not “sufficiently trustworthy” and was fabricated.
- (ii) That the prosecution case was not proved to the required standard.
- (iii) That his defence was not properly considered.

3. At the hearing of the appeal the Appellant tendered amended grounds of appeal and written submissions which I have read. The following additional grounds of appeal emerge –

- (iv) That the testimonies of PW1 to PW6 were “flawed with a lot of doubts”.
- (v) That the credibility of those witnesses was “doubtful” because they were all family members.
- (vi) That the trial court erred in convicting the Appellant without considering that the complainant was the Appellant’s granddaughter who he had brought up.

4. Learned prosecution counsel supported the conviction but not the sentence. He submitted that the evidence placed before the trial court proved the offence charged beyond reasonable doubt.

5. I have read 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 did not myself hear and see the witnesses testify, and I have given due allowance for that fact.
6. The complainant testified as PW1. She gave an unsworn statement after a *voire dire* examination but was offered for cross-examination by the Appellant. He did not cross-examine her. She testified that she knew the Appellant as her grandfather; that on 04/05/2013 at about 8.00 p.m. she was with him and one GK at home in the house; that the Appellant then called her to his bedroom and he told her to remove her clothes, which she did; the Appellant put the clothes on a hanging line; he also removed her underpants and also his own clothes. The Appellant then flashed his torch and lay by her side on the bed. She lay on her back. The Appellant then put his penis in her private parts. She felt pain and cried. The Appellant ordered her to stop. She then started to bleed and the Appellant poured something on her.
7. The Appellant then dressed and left her on the bed. The following day he told her to go and clean up.
8. In the course of the day her step-father called her and asked her why she was crying. Then they and others proceeded and reported the matter to her mother where she lived. Subsequently she was treated and she identified in court her treatment card.
9. PW2 (**AW**) was the complainant's mother. She testified how the complainant, accompanied by her uncle (the brother of her father) and others came to her, and the uncle reported that the complainant had been defiled by the Appellant. The following day she took the child to hospital. Before she did so she had examined the child and noted that her private parts had been "interfered with".
10. PW3 (**MNK**) was a child in class 8 primary. After a *voire dire* examination he gave an unsworn statement but was offered for cross-examination. The Appellant did not cross-examine him. His testimony was that the Appellant was his father; that the complainant was living with the Appellant, himself and others; that on 04/05/2013 at 8.00 p.m., as he was going to the house, he heard the Appellant call the complainant to go and sleep in the bedroom; that she went into the bedroom and he heard the Appellant tell her that when somebody is sleeping they should not sleep with clothes on. He had noted that the Appellant was drunk. He went and opened the bedroom door and saw the complainant lying on the bed naked with the Appellant beside her. He heard the complainant crying as the Appellant asked her where she had pain. The following morning the complainant told him that she had been defiled by the Appellant. He accompanied the complainant and others when they went to the complainant's mother.
11. PW4 (**PC Robert Langat**) took over the matter from one Cpl. Godfrey as the investigating officer after the latter went for training. He produced in evidence the complainant's clinic card.
12. PW5 (**Cpl. Otuga**) arrested the Appellant and charged him. He also recorded the complainant's statement.
13. PW6 (**Moses Muriithi Njiru**) was a clinical officer. He examined the complainant and filled her medical report. She complained of pain in her private parts. Though her vagina was "intact", her hymen was broken and she had pus cells in her urine produced by an infection. A vaginal swab did not show the presence of any spermatozoa.
14. In his own defence the Appellant gave an unsworn statement and called his wife (RNK (DW2)) as a witness. He stated that he had left home on 03/05/2013 for duty and went back there on 06/05/2013. He was arrested on 17/05/2013 while going to work. He never denied the offence in terms.
15. On her part DW2 stated that the Appellant was her husband; that she and him had brought up the complainant and her siblings. She further testified that "on the material day" she was at home and "nothing was done". She only learnt of the defilement afterwards after the Appellant was arrested. In cross-examination she stated that the Appellant had never told her where he worked and she had never been there; that the Appellant slept in the house one day in a month; that on 03/05/2013 he was at his

place of work; and that on 04/05/2013 and on 05/05/2013 he was at home.

16. DW2 stated further that PW3 was her son with the Appellant and that he had grudges with the Appellant. She did not state what sort of grudges.

17. That was the totality of the evidence placed before the trial court. There is no issue of identity as the complainant was the Appellant's granddaughter living with him and others. Though she and PW3 (both children of tender years) gave unsworn evidence after *voire dire* examination, they were nevertheless offered for cross-examination by the Appellant. He did not cross examine them.

18. The complainant clearly recalled and testified how the Appellant called her into his bedroom on the early night of 04/05/2013 and there had her undress, lie on the bed naked, and proceeded to defile her. PW3 clearly heard the Appellant call her. He also went up to the bedroom, opened the door and saw the complainant lying naked on the bed with the Appellant beside her. There was no challenge at all to the testimony of these two children by the Appellant who chose not to cross-examine them. Why would they lie against their grandfather and father respectively?

19. Medical evidence produced by PW6 showed that the complainant had been defiled as her hymen was broken and she had a bacterial infection in her urinary tract and vagina.

20. The trial court wholly believed the testimonies of the complainant and PW3 and rejected the defence offered by the Appellant, including the testimony of his wife (DW3) who was clearly lying regarding his alleged alibi. He was indeed at home on 04/05/2013 when the child was defiled and not away as he had stated and as she had initially stated to court.

21. The complainant's age was amply proved by her *Child Health Card* (Exhibit 3). It showed that she was born on 28/12/2005. It contained also information of her immunizations. She was therefore under 8 years old at the date of the offence (04/05/2010).

22. Upon my own evaluation of the evidence placed before the trial court, I am satisfied that the Appellant was convicted upon good and sound evidence; the offence charged under section 8(1) & (2) of the Sexual Offences Act was proved beyond reasonable doubt. There is no merit in the appeal against conviction.

23. As for sentence, having convicted him under section 8(1) & (2) of the Act, the trial court should have imposed upon the Appellant the mandatory sentence under the law, that is life imprisonment. For some unknown reason the trial court sentenced him to fifteen (15) years imprisonment. That sentence was clearly unlawful. It is hereby set aside, and a sentence of life imprisonment substituted therefor.

24. The Appellant's appeal is otherwise dismissed in its entirety. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2017**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2017**