REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 34 OF 2015

JAMES MURAGURI NGATIA …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(An appeal from conviction and sentence in original Karatina SRM CR. 281/2011 delivered on 28/2/2012 by L. Mbugua Senior Principal Magistrate)

JUDGMENT

The appellant **James Muraguri Ngatia** was charged in the Magistrate's court with the offence of defilement contrary to section **8(1) (3)** of the sexual offences act **No.3 of 2006**.

The particulars of the offence were that on the 27th day of March, 2011 at Kiamariga village in Mathira West District of the Central Province, intentionally caused his penis to penetrate the vagina of **Christine Murigu Wanjiru** a child a child aged 12 years.

The appellant also faced an alternative count of committing an indecent Act with a child contrary to section **11 (1)** of the sexual offences **Act No.3 of 2006**.

The particulars of the offence are that on the 27th day of March, 2011 at Kiamuiga village in Mathari District of the Central Province intentionally touched the Vagina of **Christine Murigu Wanjiru** a child aged twelve (12) years with his penis.

The appellant after the trial was found guilty of the main charge and sentenced to serve life imprisonment. Appellant was dissatisfied with the conviction and sentence and preferred this appeal. The appellants grounds of appeal are that the trial magistrate erred in basing the conviction on the evidence of the complainant whose credibility was doubtful; that the charges against him were not proved and finally that the trial court erred in rejecting the evidence of the appellant.

Mr. Njue for the Respondent state conceded to the appeal. He submitted that it is true that the complainant was defiled but the identity of the person who defiled her is not clear as the complainant gave …….. evidence thus making her evidence unsafe as a basic of conviction.

This is a first appeal and the duty of the first appeal court where set out in an **Ekeno – V – Republic 1973 EA**. The first duty is to examine the evidence in the trial court and evaluate the same and arrive at its own conclusions bearing in mind that the judge did not hear or see the witnesses give evidence.

Briefly the evidence in the magistrate court was that PW2 Christine Muringo Wanjiku was aged 12 years

and a pupil at Rware Primary School in Std. 6. The appellant was a neighbor who had a daughter called Wanjiku and who was the complainant's friend. On 27/3/2011 the complainant went to borrow a book from Wanjiku. She went to her home but did not find her but found the appellant present. The appellant told her Wanjiku was not in but held her and took her to the house in a bedroom and defiled her. She went away and told the grandmother who informed a clan elder and was taken to Kauahui police station where the matter was reported. She was taken to hospital where she was examined. She gave the name of appellant as the person who defiled her and he was arrested and charged with present offence. This is the evidence that the court accepted as true.

The complainant however on 8/8/2011 told the court

> **"On 27/3/2011 at mid-day I went to the accused's home to borrow a book. Wanjiku daughter of the accused who is my classmate is the one who was to give me the book. I found another man there at accused's home who is called Maraguri the same name as accused. Accuseds daughter was not there. Just then the boy pulled me. The boy is called Maraguri.**

At that point the prosecution applied that the complainant be treated as a refractory witness. The trial magistrate then remanded her at Karatina police station and when she came back the next day she gave the evidence alluded to above equaled and which the court accepted was in accordance to the statement recorded at the police station.

The issues which distill out in the submissions and which this court has to determine are

> **a) Was the complainant defiled?**
>
> **b) If the answer to (a) is yes, is it the appellant who defiled her?**

PW2 the complainant gave a detailed evidence of what happened on that day. She stated.

> **"Accused took me to the bed-room it is then that accused removed my clothes. He first removed my skirt; he also removed my cream pant (MFI P3) it is this one in court. He removed my clothes then I was on his bed. Accused had covered my mouth with his hand and pushed me on the bed. After accused removed my clothes, he also removed his trouser. The trouser is that one in court (MFI 1 P4). Accused had also worn this T-shirt (MFI P5) accused removed his long trouser. By then I was on his bed. I was facing up such that my face was facing up. I can recall what happened. Accused then did a bad thing to me. I attempted to scream but he suppressed my screams by putting a hand on my mouth"**

The complainant informed PW3 Agnes Njeri Kinyua about when the appellant had done to her. The grandmother PW3 and directed her to go and call the elder while she went to church. The clan elder then took the complainant to the police station where a report was made.

PW1 Dr. Wilson Gichuki Kareku who produced the P3 form testified that his colleague Dr. Kimenthi had examined the complainant and found

> ***"Victim had inflamed hymen which was torn at 3-5 o'clock position. There was a clear discharge from the vagina. The ……..vaginal swab revealing pus cells but not spermatozoa".***

From the evidence of the doctor who examined the complainant it is clear that there was penetration of the complainant's vagina which penetration is the essential ingredient of the offence of defilement. An offence of defilement is committed when a person commits an act which causes penetration with a child. In answer to the ……issue I am satisfied and agree with the trial magistrate that there was penetration and therefore the complainant was defiled.

The second issue for determination is whether it is the appellant who defiled the complainant. An

identification of the appellant as the author of the crime is an essential ingredient in proof of a charge. In Regina – VS – Republic 1976 BWLR445 the court set out factors for consideration in assessing whether there was positive identification which include inter alia the lighting ……., length of time and whether the complainant knew the perpetrator before.

In the present appeal the evidence of the complainant in that she went to home of appellant who has a child called Wanjiku to borrow a book. The complainant is in standard 6 at Rware primary school where the appellant's daughter is also a pupil. The complainant testified that she found the appellant present. In answer to cross-examination by appellant the complainant stated that there was only one homestead between her home and the home of the appellant and is about 100-150 metres away. She also testified that she went to appellants home at mid day. In my view the conditions obtaining at the time of commission of the offence were favourable for positive identification of the appellant. The complainant knew him well; she went to his home looking for appellant's daughter; it was Monday and after the commission of the offence the complainant reported to her grandmother and gave the name of the appellant. These to me leaves no doubt that the complainant knew the appellant well and was positive that he is the one who defiled her.

The appellant has placed reliance on the evidence given by the complainant on 8/8/2011 to the effect then she was defiled by another Maraguri. This as the trial court vigaly observed was as a result of an attempt to interfere with the evidence by the grandmother of the complainant. The correct versices of event, I am satisfied in that given by the complainant on 9/8/2011.

The appellant was charged with the offence of defilement C/S 8(1) 3 of the Sexual Offences Act. The particulars of the charge sheet indicate that the child was aged 12 years old. The medical report from Karatina District Hospital shows that the complainant age was 12 years. The age of the complainant is an important ingredient in defilement cases which must be proved more so because of its determination of the sentence to be imposed. I find that the prosecution did prove that the age of the complainant was 12 years. Section 8 (3) of the Sexual Offences Act under which the appellant was charged provides

> **3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years"**

The trial magistrate sentenced appellant to serve life imprisonment with respect, I find that this was an error as under section 8(3) the appellant was to serve a minimum sentence of twenty years. In view of this, I hereby substitute the sentence of life imprisonment and appellant sentenced to serve 20 (twenty) years imprisonment. In the result the appeal against conviction is dismissed and the sentence reduced to 20 years imprisonment. It is so ordered.

Dated and **signed** this …… February, 2016

S RIECHI

JUDGE

31/3/2016

Before – Hon S. Riechi – Judge

Catherine – C/clerk

Njue for state – present

Appellant – present

Court – the judgment is read over and delivered in open court in presence of appellant and Njue for

respondent this 31st day of March, 2016.

S RIECHI

JUDGE