



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**  
**HCCRA NO. 7 OF 2015**  
**(FORMERLY MERU HCCRA 63 OF 2015)**

**KENNETH KINOTI KATHARE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An Appeal from the Judgment and conviction of L.N. MESA - made on 7/5/2015 in Marimanti Senior Resident Magistrate's Criminal Case No. 280 of 2013).***

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

1. Kenneth Kinoti Kathare, the Appellant, was on 25<sup>th</sup> July, 2013 arraigned before the Principal Magistrate's Court, Marimanti with the offence of defilement contrary to section 8 (1) as read with section 3 of the Sexual Offences Act No. 3 of 2006. It was alleged that on 9<sup>th</sup> June, 2003, in Tharaka North District within Tharaka Nithi County, the Appellant intentionally caused his penis to penetrate the vagina of "E K" a child of 13 years. He also faced a second count of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. It was alleged that on the 9<sup>th</sup> of June, 2013 at Makutano trading centre in Tharaka North District within Tharaka Nithi County, the Appellant intentionally touched the buttocks and vagina of "D K" a child of 9 years with his hands.

2. The Appellant denied the charges but after trial, he was convicted of both counts and was sentenced to imprisonment for 20 years on count 1 and 10 years on count 2. Both sentences were to run concurrently. Aggrieved by the said decision, the Appellant has appealed to this court. He has set out five (5) grounds which can be summarized into three; to wit, that the trial court erred in convicting the Appellant on contradictory evidence; that the trial court erred in failing to note that there was a grudge between the mother of the complainants and the Appellant and lastly, that the trial court had failed to consider the Appellant's defence. This being the first appellate court, it behoves the court to review and re-evaluate the evidence afresh with a view to drawing its own independent conclusions and findings. **Okeno .V. Republic [1972] EA 32.** However, in doing so, the court must have in mind that it did not have the advantage of seeing the witnesses testify.

3. The prosecution case was that on 7<sup>th</sup> June, 2013, "E K" (PW1) came home from sports at Gakaoni Primary School and did not find her mother. Therefore she sat outside their house. The Appellant came and lured her to his father's hotel which was within the visibility or compound of PW1 house. He removed her pant and had sex with her. Then on 9<sup>th</sup> June, 2013, at about 10.00p.m, while "E K" and her sister "D K" were sleeping in their house which was separate but adjacent to where their mother was sleeping, the Appellant opened the door and slept between the two. "D K" asked "E K" why she was behaving badly. When "E K" said it was not her, "DK" shone a torch and discovered that the Appellant

was the one sleeping between them. The Appellant then ran away leaving behind one of his shoes and a knife. The mother heard “D K’s” complaint’s and came to the children’s room and locked it. “E K” did not tell her mother what had happened. The following day “E K” told Cecilia Gitonga (PW4) what had happened. PW4 took “E K” to Makutano Police Station and lodged a report thereat before taking “E K” to hospital at Marimanti where a P3 Form (P Exh 3) was filled.

4. PW2 “D K” told the court that on 9<sup>th</sup> June, 2013, she was sleeping in the same house and bed with “E K” when at about 10.00 pm she heard the door shaking. She later felt somebody touching her on her private parts. She asked her sister “E K” why she was behaving badly but “E K” said she was not the one. “DK” then lit a torch and saw that it was the Appellant whereupon she called her mother. The Appellant ran away leaving behind his right leg shoe and a sword. The mother came and locked the house. In cross-examination, she stated that she knew the Appellant well before that incident as they were neighbours. She knew that the one shoe left behind belonged to him as she used to see him wear the same every day. PW3, MKM the mother of the complainants told the court that PW1 and PW2 were 14 and 10 years and produced their birth certificates as P Exh 4 and P Exh 5, respectively. She told the court how on 9<sup>th</sup> June, 2013 at around 11.00 am she heard PW2 ask PW1 why she was behaving badly. That when PW1 denied that she was the one behaving so, PW2 demanded that lights be lit. When they were lit, PW2 called her to go and see the Appellant on their bed. When she rushed there, she saw the Appellant running to his house. She entered the house of PW1 and PW2 and saw a green shoe and sword (P Exh 1 and P Exh 2). She told the girls to go back to sleep and she locked the house. The following day she learnt that PW1 had been taken to hospital. That when she asked PW1 why she did not tell her what had happened, PW1 told her that she feared because the Appellant had threatened her with a knife if she dared tell anyone. In cross-examination, she maintained that she actually saw the Appellant running away on the material night. She denied the Appellant’s suggestion that she had been his girlfriend.

5. PW4 Cecilia Gitonga told the court that PW1 was one of those who her organization, Compassion International sponsored. That on 11<sup>th</sup> June, 2013 she heard other children talk about how the Appellant was misusing PW1. She therefore talked to PW1 who told her that the Appellant had been misusing her for a long time. She took her to the police station and reported the matter. She took her to Tharaka District hospital where she was examined and a P3 Form was filled. PW5 Emilio Gaichu a registered clinical officer from Tharaka District hospital told the court how PW1 was examined on 11<sup>th</sup> June, 2013 and found that she had been defiled. He produced the P3 Form as P Exh 1. PW6, PC. Chacha Marwa told the court how PW5 reported the incident to the Police on 11<sup>th</sup> June, 2013 in the company of PW1. He visited the house of the complainants and recovered the green plastic men shoe P Exh 1 and knife P Exh 2. He arrested the Appellant on 12<sup>th</sup> June, 2013 from his house where he also recovered a green left plastic men shoe P Exh 1 (b).

6. In his defence, the Appellant told the court that on 11<sup>th</sup> June, 2013 he woke up and went to his place of work in a hotel. That the complainant’s mother (PW3), used to be her friend. That in the morning of the material day, they discussed about her refunding him half of some money she owed him. That later she invited him to her house then she called the police who arrested him. That she had earlier on threatened him with dire consequences. In cross-examination, he denied having sex with PW1. According to him problems began after his father stopped him from going to PW3’s house.

7. At the hearing of the appeal, the Appellant relied on his written submissions. He submitted that because of darkness, it was unlikely that PW1 and PW2 saw the person who was in their house on the material date. That although PW2 told her mother (PW3) that her private parts had been touched she never told her that it was the Appellant who did it. That PW3, might have seen the people who had come out of their houses and not the Appellant as she claimed. That PW3 refused to report the incident because there was nothing to report. The Appellant urged the court to consider his defence. Mr. Ongige Learned Counsel for the state submitted that the alleged grudge between the Appellant and the complainant’s mother was never demonstrated at the hearing; that the prosecution case was watertight and remained unshaken; that the same was corroborative, and that the medical evidence proved that PW1 had been defiled. That the green shoe found in the complainant’s house proved that it was the Appellant who had been there. Counsel urged that the appeal be dismissed. This court has considered the record and the

respective submissions.

8. The first ground was that the trial court erred in convicting the Appellant on evidence that was contradictory. The record shows that the Appellant faced two counts, one for defiling PW1 on 9<sup>th</sup> June, 2013 and the second for committing an indecent act with PW2 a child of 9 years on 9<sup>th</sup> June, 2013. The evidence on both counts was that after attending sports at Gakaoni Primary School on 9<sup>th</sup> June, 2013, PW1 went home at Ushauri market. However, since she found no one at home and the house was locked, she sat outside the house. Then the Appellant who was their neighbour came, held her by the hand and led her to his house, closed the door and defiled her. That the Appellant threatened her with a knife. That on the night of 9<sup>th</sup> June, 2013 at about 10 pm, PW1 and PW2 were sleeping together in their own house which was next to their mother (PW3). They heard the door shaking. Later, PW2 felt someone touch her private parts and she complained to PW1 to stop behaving badly. When PW1 denied that she was the one, they shone a torch, and discovered that the Appellant was sleeping between them. PW2 called their mother who, when coming, she saw the Appellant running away from that house. The following day, PW1 told PW4 what had transpired. PW4 took PW1 to the police and reported the incident. They were issued with a P3 form which was filled at Tharaka District Hospital. PW5 confirmed that upon examination, it was found that there were abrasions on PW1's vaginal walls and the hymen was broken.

9. From the evidence of both PW1 and PW5, it was clear that PW1 was actually defiled. The broken hymen and abrasions on the vaginal walls was a clear indication of peno-vaginal intercourse. According to PW1, the defilement occurred on the 7<sup>th</sup> June, 2013 after she came from sports. PW4 told the court that she had learnt from PW1 that the Appellant had been having sex with PW1 previously and that the 7<sup>th</sup> June, 2013 was not the very first time. The problem arises when one juxtaposes this glaring evidence with the charge sheet. The charge facing the Appellant was that he defiled PW1 on the night of 9<sup>th</sup> June, 2013. The evidence of PW1 was clearly that on that night, the Appellant only touched PW2 leading to the latter's protestation. She was firm that she was defiled on 7<sup>th</sup> June, 2013. That being the case, I find that the evidence on record did not prove the first count against the Appellant. Both the trial court and prosecution failed to amend the charge after hearing the evidence of PW1. As regrettable as it is, it will be wrong to convict the Appellant on evidence that proves an offence that he had not been charged with. Accordingly, the trial court was wrong to have convicted the Appellant on count 1. That conviction cannot stand.

10. As regards the second count, PW2 was firm that she felt someone touch her private parts with hands. That she reprimanded PW1 of that act as they were sleeping together. PW1 denied having done so which led PW2 to switch on a torch and thereby see that it was the Appellant who was sleeping between her and PW1. The Appellant run away leaving behind one right green plastic male shoe and a sword (P Exh 1 and 2). PW2 was firm that she saw the Appellant from the light coming from the torch she shone on him on the material night. She was also firm that the green right plastic male shoe left in their house was the Appellant's. PW3 also was firm that she saw the Appellant running away from her children's house on the material night. She also saw the Appellant from the light which she shone on the Appellant. PW6 told the court that when he arrested the Appellant, he recovered a green left plastic male shoe from the Appellant's house. The Appellant did not deny that the shoes were his. In this court's view, the evidence on record relating to the second count was consistent and not contradictory. The first ground succeeds partially as regards count 1 but fails as regards count 2.

11. The second and third grounds are enter twined. They were to the effect that there was a grudge between the Appellant and the mother of the complainants (PW3) and that the Appellant's defence was not considered. The position taken by the Appellant is that PW3 was his girlfriend that he had advanced her Kshs 30,000/- which PW3 was unable to raise and refund. That problems started after the Appellant was stopped by his father from going to PW3's house. The record shows that the trial court did consider the Appellant's defence. It made a finding that he had admitted to there being no any grudge between him and PW3. It also found that when the Appellant cross-examined PW3, he never raised the issue of the alleged Kshs.30,000/- and that it was only diversionary.

12. This court has reviewed the record. When PW3 testified, she denied ever having been the Appellant's

girlfriend. She also denied ever having differed with him. She also denied ever having asked for any money from the Appellant. It is clear that the Appellant did not put to PW3 in cross-examination that she had his Kshs.30,000/- as contended in his defence. He did not deny having gone to the house of PW1 and PW2 on the night of 9<sup>th</sup> June, 2013. Likewise, he never denied the testimony of PW2 that he touched her private parts on the material night. He only tried to show how it may have been difficult for PW2 or PW3 to recognize the person who was in the children's bed that material night because of darkness. He only narrated to court what happened on the day of his arrest, 11<sup>th</sup> June, 2013. This court's conclusion is that, the alleged grudge between the Appellant and PW3 was never proved. This court also finds that the Appellant's defence did not displace the prosecution case. Accordingly, the said grounds also fail.

13. In this regard, I find that the appeal partially succeeds. The conviction on count 1 is hereby quashed and the sentence of 20 years set aside. The conviction on count 2 stands. The Appellant shall serve the ten (10) years sentenced on that count.

**DATED and DELIVERED at Chuka this 26<sup>th</sup> day of May, 2016.**

**A.MABEYA**

**JUDGE**

**Judgment read and delivered in open court in the presence of all parties.**

**A.MABEYA**

**JUDGE**

**26/5/2016**