



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCRA NO. 34 OF 2015**

**(FORMERLY MARIMANTI CR.CASE NO. 11 OF 2015)**

**PATRICK NJERU .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An Appeal from the Judgment and conviction of L.N. MESA - made on 11/3/2015 in Marimanti Principal Magistrate's Court Criminal Case No. 11of 2015).***

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

1. Patrick Njeru, the Appellant herein, was on 13<sup>th</sup> January, 2015 arraigned before the Principal Magistrate's Court, Marimanti with the offence of defilement contrary to section 8 (1) and (2) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 11<sup>th</sup> January, 2015 at [Particulars withheld] sub-location, in Tharaka Nithi County, the Appellant intentionally caused his penis to penetrate the vagina of "F K" a child of 12 years. The alternative charge was of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The allegation was that on the 11<sup>th</sup> January, 2015 within [Particulars withheld] sub-location, Tharaka North District within Tharaka Nithi County, the Appellant intentionally touched the vagina of "F K" a child aged 12 years with his penis.

2. The Appellant denied the charges but after trial, he was found guilty and convicted of the alternative charge of committing an indecent act. He was sentenced to ten (10) years imprisonment. Aggrieved by the said decision, the Appellant has appealed to this court. In his petition of Appeal as supplemented in his written submissions, the Appellant has set out various grounds of appeal which can be summarized into four to wit; that the trial court failed to consider that there was an existing grudge between the Appellant and the father of the complainant; that there were procedural irregularities in the trial; that the prosecution did not prove its case beyond reasonable doubt as required by law and that the trial court failed to consider that the Appellant was barred from accessing medical examination. This being the first appellate court, it behoves the court to re-appraise, review and re-evaluate the facts afresh with a view of drawing its own independent conclusions and findings. **Okeno .V. Republic [1972] EA 32**. However, in doing so, this court must warn itself that it did not have the advantage of seeing the witnesses testify in order to gauge their demenour.

3. The case facing the Appellant was that on 11<sup>th</sup> January, 2015, "F K" the complainant ("PW1") had come from herding goats. She sat at the verandah. The Appellant whom PW1, knew very well as he used to herd their goats, came held her hand and wanted to have "tabia mbaya" with her. He removed her underwear and was about to carry out his intentions when her mother (PW2) showed up. On seeing PW2, the Appellant pretended to fall down and he then ran away when he saw the complainant's father. C G N

(PW2), the mother of the complainant told the court that on the material day, she had accompanied her husband to the latter's brother leaving the Appellant sleeping on the verandah. However, because she had left behind her small child crying, she returned only to find the Appellant on top of PW1 whereupon he pretended to fall down on seeing her. She found PW1 without a panty and the Appellant only had a lessso. When the Appellant saw PW2's husband, he run away. A report was made at Gatunga Police Station whereby the Appellant was arrested the following day. PW1 was examined at Marimanti hospital and the doctor confirmed that PW1 had been defiled and that was not the first time. A P3 form was filed in respect thereof. In cross-examination, she denied that there was any dispute regarding the Appellant having an affair with her or him having fathered PW2's youngest child. The complainant's family trusted him and that is why they had invited him for Christmas.

4. Emilio Mwenda Gaichu (PW3) a clinical officer from Tharaka District hospital produced the P3 form as P Exh 1 which showed that the examination done on 12/1/15 showed that PW1's hymen was broken. He confirmed that there was no evidence of penetration. PC Onesmus Mwenda (PW4) told the court that a report of the incident was made on 12/1/15. That the reportees were PW2 and her husband and they were accompanied with the Appellant. He issued them with a P3 form and referred them to Marimanti District hospital. That the Appellant had been arrested when he returned to the complainant's home the day after the incident with an elder to settle the matter but PW1's parents refused.

5. In his defence; the Appellant stated that he had been employed by PW1's family for five (5) years; that he left that home with a grudge because the family owed him money; that PW2's husband alleged that he had was having an affair with PW2. That the complainant's father owed him Kshs.17,000/- and that he had alleged that the Appellant had sired a child with PW2.

6. At the hearing, the Appellant relied on his written submissions. He submitted that it was not clear where the act of defilement took place; that PW1 told the court that he did not know the name of the Appellant; that crucial witnesses failed to testify, that PW1's evidence was incomprehensible and should not have been relied on to convict him and that the medical evidence did not connect him with the offence. On Mr. Ongige's part, submitted that the evidence of PW1 was firm and consistent; that her evidence was corroborated by that of PW2 and that there were no procedural irregularities with the trial. He urged that the court dismisses the appeal.

7. The first ground of appeal was that the trial court erred in not considering that there was an existing grudge between the family of the complainant and the Appellant. It was the Appellant's contention that he had worked for the complainant's family for five years. That the complainant's father owed him Kshs.17,000/-. That he left the employment because the complainant's father had suspected him to have had an affair with his wife (PW2). The trial court found that if the Appellant's narrative was correct, the complainant's family could not have invited him and his wife to their home for christmas. This court finds that there is nothing that was produced by the Appellant to fault the trial court's finding on that fact. The alleged grudge was never established to have existed. The Appellant did not deny that he and his wife had been invited to the complainant's home for christmas. It would be improbable for a family which has been hit with suspicion or allegations of infidelity on the part of one spouse, more so, leading to a birth of a child from such infidelity touching on its employee, to turn around, invite and entertain such a perpetrator to its Christmas party. The fall out would normally be acrimonious and such family cannot be expected to entertain the presence of such a person in its midst. The Appellant did not deny or even challenge PW2's testimony that the Appellant left his employment because he demanded for salary increment that was declined by the complainant's family. That ground fails.

8. The second ground was that the trial court erred in convicting the Appellant on insufficient evidence. Put in another way, the prosecution's case was not proved beyond reasonable doubt. The testimonies of the prosecution witnesses established that the Appellant used to work for the complainant's family before leaving due to disagreement on a demand for salary increment. On the material night, the Appellant was left sleeping on the verandah by PW2 and her husband. The complainant came and sat at the verandah, the Appellant came, put her down, removed her underwear and was about to do 'tabia mbaya' with her but PW2 turned up. PW2 told the court that she found the Appellant on top of the complainant who had no panty and the Appellant had no clothes except a lessso. The medical examination showed that there had

been no penetration. If the Appellant had no clothes on and was on top of a pantyless child, obviously his body or parts thereof including the penis must have come into contact or must have rubbed themselves on the child's body parts including and not limited to her vagina and breasts. Indeed as the trial court found out, the Appellant's intention was to defile the child but for the mother (PW2) appearing suddenly.

9. The Appellant did not deny that on the material day and time he was at the scene of crime. His allegation that he was arrested when he had gone to the complainant's home with two elders to discuss about the alleged debt owed by the complainant's father was but diversionary. He did not call any of the two alleged elders to confirm his allegations. In any event, he never denied the evidence tendered by the prosecution witnesses. In this court's view, the prosecution case proved the alternative count beyond reasonable doubt. The Appellant is lucky not to have been charged with attempted defilement which would have resulted in stiffer sentence. Accordingly, the ground that his defence was not considered is also rejected.

10. The other grounds are that there were procedural irregularities with the trial and that the Appellant was barred from accessing medical examination. The record shows that the prosecution witnesses tendered their testimonies and the Appellant was allowed to cross-examine them. He was also given an opportunity to present his defence after section 211 of the Criminal Procedure Code had been complied with. The Appellant did not specify what the alleged procedural irregularities were. On its part, this court has looked for them and has found none. As regards the alleged medical examination, there was no reason for any such examination as there was no evidence from the P3 form (PEXh 1) that there was any penetration or that PW1's vagina had any spermatozoa to warrant any medical examination on the Appellant to confirm whether they emanated from him. These grounds also fail.

11. In the circumstances, I find the appeal to be without merit and dismiss the same.

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

**A.MABEYA**

**JUDGE**

**Judgment read and delivered in the open court in presence of all parties. Right of appeal 14 days explained.**

**A.MABEYA**

**JUDGE**

**26/5/2016**