



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MURANG'A**  
**CRIMINAL APPEAL NO.12 OF 2012**

**JACOB NDURUNGO KIMUNDO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in criminal case No.312 of 2012 of the Principal*

*Magistrate's Court at Kangema by Hon. Mrs. A. Too – Resident Magistrate)*

**JUDGMENT**

The appellant, **JACOB NDURUNGO KIMUNDO**, was charged with an offence of defilement contrary to section 8 (1) (3) (sic) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on 4<sup>th</sup> August 2012 at [particulars withheld] sub location, of Murang'a County, intentionally caused his penis to penetrate the vagina of **L.W.M**, a child aged 13 years.

He was sentenced to thirty years imprisonment.

He now appeals against both conviction and sentence.

The appellant was in person. He raised four grounds of appeal which can be summarized into one as follows:

That the learned magistrate erred in law and in fact in convicting the appellant when there was no sufficient evidence.

The state conceded the appeal through Mr. Njeru, the learned counsel.

Briefly the facts of this case are as follows:

As the complainant was walking along the road, a motor vehicle stopped and she was called by someone from the vehicle. When she went to check, the door was opened and she was pulled inside. She tried to scream but her mouth was covered. At [particulars withheld] primary school the vehicle was stopped and she was defiled.

In his defence the appellant denied any involvement in the offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32.**

The first duty of the trial court is to ensure that the charge is correctly drafted in all aspects. In the instant case, the charge ought to have read:

**"contrary to section 8(1) as read with section 8(3) ..."**

Since the appellant understood the charge and fully participated in the trial, I find that he was not prejudiced in any way by this flaw.

Whereas there is no doubt from the evidence on record that the complainant was defiled, I concur with the learned state counsel that the identity of her defiler is doubtful. **L.W.M(PW1)** in her testimony said the two men in the vehicle she was defiled in were unknown to her. Her P3 form indicated that she reported that her defiler was known to her. P M (PW4), her father, testified that the complainant told him she did not know her defiler but was able to identify him. Her brother S M (PW2) however testified differently. He said that at the police station she gave the name of the person who defiled her as Ndurungo.

Other than the issue of the identity of the defiler, there are statements that were attributed to the complainant which contradicted her evidence. This raises a question of her credibility and whether she should be relied upon. The Court of Appeal in the case of **NDUNGU KIMANYI V REPUBLIC (1979) KLR 282** the court of appeal held:-

**The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.**

In the instant case it was not safe to rely on the evidence of the complainant in view of the contradictions.

From the foregoing of the analysis of the evidence on record, I find that the conviction of the appellant was unsafe. The same is quashed and the sentence set aside. The appellant is set at liberty unless if otherwise lawfully held.

**DATED at MURANG'A this 24<sup>th</sup> day of June 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**