



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 131 OF 2013

(FORMERLY NYERI HC. CR. APPEAL NO 275 OF 2010)

**(Appeal against original Conviction and Sentence in Kigumo SRM Criminal Case No 391 of 2009 –
Mutuku, RM)**

JORAM MACHARIA NJERIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein **Joram Macharia Njeri** was convicted after trial of **defilement of a girl under the age of 16 years** contrary to **section 8(1) and (4)** of the **Sexual Offences Act No 3 of 2006**. It was alleged in the particulars of the charge that on diverse days between October 2008 and March 2009 at *[particulars withheld]* in Murang'a South District of Central Province, intentionally and unlawfully, he had carnal knowledge of one **T W M**, a girl under the age of 16 years. He was sentenced to serve 15 years imprisonment. He appealed against both conviction and sentence.
2. Learned prosecution counsel, Mr. Njeru, did not support the conviction upon the ground that the evidence tendered by the prosecution was not sufficient to sustain the conviction.
3. I have read the record of the trial court in order to evaluate the evidence 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 hear and see the witnesses, and I have given due allowance for that fact.
4. The complainant (PW1) was at the trial aged about 17 years and was said to be mentally retarded. After a *voire dire* examination the trial court permitted her to give unsworn evidence. She was cross-examined. The long and short of her testimony was that she was accosted one evening by the Appellant as she came from the river to fetch water; he took her to a bush and had sexual intercourse with her. It was not the first time; he had had intercourse with her on about 4 other occasions. She had never had sex with any other person.
5. The complainant's further testimony was that she did not report this incident to anyone, just like the previous encounters with the Appellant. It was only after her mother (PW2) and others discovered that she was pregnant, about 5 or 6 months after the last incident with the Appellant, that she told them what had been going on.
6. Her story to the police (PW4: Corporal Oware) was slightly different. She told PW4 that she had been "defiled" by the Appellant and also by one **Ochilio** – apparently on different occasions.

7. Medical evidence was of course of no assistance in the circumstances. Nothing relevant was to be found in her genitalia 6 months after the alleged defilement.

8. The trial court was satisfied that the complainant had told the truth about the Appellant for the reason that her testimony was clear, consistent and had not been shaken in cross-examination. The Appellant was convicted solely upon that testimony. The trial court was of course entitled to do so under the **proviso to section 124** of the *Evidence Act, Cap 80*.

9. The trial court made no reference at all in its judgment to the other person whom the complainant had stated had had sexual intercourse with her. This is worrying. The circumstances of this case (including the fact that the complainant made no complaint to anyone, and that the alleged defilement came to light only when she was discovered pregnant 5 or 6 months later, and also the fact that there was at least one other male involved) demanded some corroboration of the complainant's story. There was no such corroboration to be found in the evidence placed before the trial court.

10. The Appellant was charged and tried after the birth of the complainant's child. DNA evidence of the paternity of the child could easily have either condemned or exonerated the Appellant beyond reasonable doubt. However, no DNA testing was conducted, and no reason was given by the prosecution why this was not done. Given the Appellant's consistent denial of the charge as evidenced by his cross-examination of the complainant and other witnesses, there ought to have been DNA evidence of the paternity of the complainant's child.

11. I am thus not satisfied that the charge against the Appellant was proved beyond reasonable doubt. The conviction cannot stand, and learned prosecution counsel properly conceded the appeal.

12. I will allow the appeal in its entirety. The Appellant's conviction is quashed and the sentence imposed upon him set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 22ND DAY OF SEPTEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 23RD DAY OF SEPTEMBER 2016