



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 10 OF 2016

JACOB KIMATHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.517 of 2015

of the Senior Principal Magistrate's Court at Tigania

by Hon. P.M Wechuli – Resident Magistrate)

JUDGMENT

The appellant, **JACOB KIMATHI**, was charged with an offence of defilement contrary to section 8(1) (3) (sic) of the Sexual Offences Act No. 3 of 2016.

The particulars of the offence were that on diverse dates in the month of December 2014 at Thau location in Tigania West District of Meru County intentionally caused his penis to penetrate the vagina of **A.K**, a child aged 13 years.

Alternatively, he was charged with an offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2016. The particulars of the offence were that if he did not defile the complainant, he touched her vagina with his penis.

He was tried and convicted for the offence in the substantive charge.

He was sentenced to thirty years imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised five grounds that can be summarized as follows:

1. That the complainant's evidence was inconsistent and untrue.
2. That there was no sufficient evidence to found a conviction on.
3. That the sentence was manifestly harsh.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

Briefly the facts of the prosecution case were as follows:

In the month of December 2014, the complainant was asleep. The appellant went to her bed and defiled her. When she raised an alarm, her mother asked her to go back to sleep and alleged that she was dreaming.

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 Vs. REPUBLIC 1972 EA 32**.

The substantive charge was wrongly drafted. It is incorrect to cite a nonexistent section. The charge ought to have been "**contrary to section 8(3)**... and if the drafter wanted to include the definition section then it ought to have read "**.. contrary to section 8(1) as read with section 8(3)**...".

There was however no prejudice occasioned to the appellant for he fully participated in the proceedings to signify that he understood the charges.

After going through the evidence on record I find that the case was lost at the investigation stage. The investigating officer failed to elicit sufficient evidence so as to establish whether the claim by the complainant was founded on facts or not.

From the narration by the complainant it was important to establish the sleeping arrangement in that home. Was the appellant sharing a bed with his wife? How far was the room the complainant was sleeping from her mother's?

It would have been crucial for the investigation to establish why the complainant's mother dismissed her complaint as a dream. Was she actually dreaming? Was the cry so soft to be mistaken as one crying in her sleep? Unfortunately all these questions and probably others were not asked by the investigating officer.

The P3 form produced did not assist the court much; the only important remark was the absence of the hymen. There was nothing else to suggest that the complainant had been defiled. It is well documented that a hymen can be broken in other ways than in sexual activities for example where a girl is involved in vigorous games. It is also documented that some hymen break as a result of walks. In the instant case the complainant was aged 13 years. The conclusion by the clinical officer that there was penetration because of the absence of the hymen without any other evidence was therefore erroneous.

The conviction of the appellant was unsafe.

The appeal is allowed, conviction quashed and the sentence set aside.

The appellant is set on liberty unless if otherwise lawfully held.

DATED at Meru this 19th day of December 2016

KIARIE WAWERU KIARIE

JUDGE