



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.37 OF 2016

JOSEPH MUTETHIA KATHURIMA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case No. 817 of 2011 of the Principal Magistrate's Court at Tigania by Hon. J.W Gichimu – Ag. Principal Magistrate)

JUDGMENT

The appellant, **JOSEPH MUTETHIA KATHURIMA**, was convicted for the offence of defilement contrary to section 8 (1) (2) (sic) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on 6th August 2011 at [particulars withheld] , Tigania West District of Meru County defiled **Y.N** a child aged 8 years.

The appellant was found guilty of the offence and sentenced to serve life imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact by failing to make a finding that the conditions obtaining at the time of the alleged offence were not favourable for a positive identification.
2. That the learned trial magistrate erred in law and in fact by failing to factor in the expert evidence before convicting the appellant.
3. That the learned trial magistrate erred in law and in fact by relying on contradicting and uncorroborated evidence.

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

The facts of the case were briefly as follows:

At about 6 PM, the complainant was returning home from a river where she had gone to fetch some water. The appellant who was walking behind her whistled and signaled to her to stop but she declined. He caught up with her, grabbed and knocked her down and defiled her. After the ordeal she reported to Makena.

The defence of the appellant was that while he was returning home from the garden, he heard screams. He rushed to the scene and found many people. On enquiries, he was accused of harming the complainant. He was arrested and taken to the police.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I 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 charge was wrongly drafted. It ought to have read:

"... contrary to section 8 (1) as read with section 8 (2) ..."

I however find that the appellant was not prejudiced for he understood the charge against him. The defect is therefore curable under section 382 of the Criminal Procedure Code.

Both the prosecution and the defence were in agreement on the time of the alleged offence. They put the time at between 6 PM and 7PM. Though the appellant raised the issue of visibility, it is clear from the narration of the witnesses by the prosecution and the appellant, this was not an issue. It is no wonder he never raised it during cross examination of the prosecution witnesses. From the analysis of the evidence on record, I am satisfied that the visibility was good.

The appellant contended that the learned trial magistrate disregarded the expert evidence in his judgment. This is not the true position. In his judgment the learned trial magistrate observed:

"Lastly the evidence of PW3 and the medical records produced in court supports the fact that the complainant was defiled"

What the appellant points out as contradiction is not. Human beings react differently. at the face of danger some may do extra ordinary feats and may not even feel pain then but once the danger is over and reality sets in, pain also sets in. It would appear this is how the complainant reacted.

This is one case where the complainant acted very naturally. when she met with Makena (PW3) she hugged her. This was another reaction of feeling secure at last. To say that there was contradiction on her evidence is to trivialize the ordeal she went through.

From the foregoing analysis of the evidence on record, I find that the conviction of the appellant was found on watertight evidence.

Section 8 (2) of the Sexual Offences act provides:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The appellant was sentenced to the only legally available sentence.

I therefore come to a conclusion that his appeal must fail in entirety. The same is dismissed.

DATED at Meru this 19th day of December, 2016

KIARIE WAWERU KIARIE

JUDGE