



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO. 128 OF 2014**

**ROBERT KURIA MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....STATE**

*(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. H. O Barasa – Resident Magistrate delivered on the 12<sup>th</sup> April, 2010 in CMCR Case No. 242 of 2009)*

**JUDGEMENT**

The Appellant herein **ROBERT KURIA MWANGI** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting the Nakuru Law Courts. The appellant had been taken to court on 6/11/2009 on a charge of **DEFILEMENT CONTRARY TO SECTION 8(1)(3) OF THE SEXUAL OFFENCES ACT, 2006.**

*“On diverse dates between 2<sup>nd</sup> and 3<sup>rd</sup> day of November, 2009 at [particulars withheld] of Nakuru District within Rift Valley province wilfully and unlawfully committed an act which caused penetration of his genital organ namely penis into the genital organ namely vagina of J M W child aged 14 years”*

The appellant faced an alternative charge of **INDECENT ASSAULT WITH A CHILD CONTRARY TO SECTION 11 OF THE SEXUAL OFFENCES ACT, 2006.**

The appellant entered a plea of ‘**Not Guilty**’ to both charges. His trial commenced on 21/12/2009. The prosecution led by **INSPECTOR OYIER** called a total of four (4) witnesses in support of their case.

The complainant **J M** told the court that she was 14 years old having been born in 1996. The complainant told the court that she lived with her grandmother in *[particulars withheld]*. However she was mistreated there and her school fees were not being paid. She decided to go to search for her sponsor or in the alternative to go to her father whom she had been told lived in *[particulars withheld]*.

On 2/11/2009 the complainant came to Nakuru Town to search for the sponsor who used to pay her school fees. The complainant met a *boda boda* operator who drove her all over Nakuru Town searching for the offices of this sponsor. They were unable to find the office. In the evening they gave up and returned to the Central Taxi Cyclists Office.

There they met the appellant who offered to take the child to sleep at his brother's house. They left

together and instead the appellant took her to his own house where he locked her in and left.

By then it was about 8.30pm. The appellant returned at 10.00pm and found the child crying. He ordered her to shut up. He picked her and placed her on his bed. He removed her clothes and defiled her.

The next morning the appellant took the child to his brother's place. She demanded to be taken back to the *boda boda* office. The complainant told the *boda boda* operators that she had been defiled. The appellant was apprehended and beaten up by the mob.

**PW3 M G** told the court that on 4/11/2009 he was in a kiosk in *[particulars withheld]* taking tea. A girl was brought to the kiosk and she was limping. **PW3** as a parent became concerned and questioned her. The child told him what had happened. **PW3** decided to take the child to Central Police Station to report the incident and he recorded his own statement.

The appellant was arrested and placed into cells. He was later taken to court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on to his defence. He denied having defiled the child.

On 12/4/2010 the learned trial magistrate delivered his judgment. He convicted the appellant on the main charge of defilement and thereafter sentenced him to serve 25 years imprisonment. Being aggrieved the appellant filed this appeal.

This being a first appeal this court must re-evaluate the evidence adduced before the trial court and draw its own conclusions.

In the case of **AJODE Vs REPUBLIC [2004] KLR 81** the Court of Appeal held as follows:

***“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that”***

The appellant who appeared in person during the hearing of this appeal relied upon his written submissions which had been served on the court. **MS OUNDO** Senior Assistant DPP acting for the State opposed the appeal.

The first question is whether the complainant was indeed defiled as she has claimed. The complainant told the court that due to frustrations from her grandmother and aunt she decided to travel to Nakuru to look for her sponsor. She came alone and found a *boda boda* rider who took her around Nakuru town trying to trace the offices of this sponsor in vain.

At the end of the day they returned to the central office of the *boda boda* operators. The complainant had nowhere to go for the night so the appellant pretending to be Good Samaritan offered to take the child to sleep at his brother's place. Instead he took the girl to his own house where he locked her in.

Later that night at 10.00pm the appellant returned from work and pulled the child onto his bed where according to her testimony he defiled her forcibly. The next day the appellant took her to his brother's house where they met the brother's wife. The complainant asked to be taken back to the *boda boda* office and eventually the appellant returned her there.

The complainant has told the court that she was forcibly defiled. She was consistent in her testimony and she remained unshaken under cross-examination.

The complainant's evidence is corroborated by **PW3** who saw her a day after the incident at the tea kiosk. He told the court that he noticed the complainant was limping. As a parent he became concerned and questioned her. He learnt she had been defiled. **PW3** then decided to take the child to Central Police

Station where she reported the matter.

**PW2 DR. SAMUEL ONCHERE** a medical officer at the Nakuru PGH told the court that he examined the complainant. He saw that her panty was blood stained and she complained of tenderness on both legs. Upon examination her private parts **PW2** noted

***“She had a freshly broken hymen and she was bleeding. Spermatozoa were seen on her vagina when lab tests were carried out”.***

**PW2** concluded thus

***“There was clear evidence of defilement”***

He filled and signed her P3 form which he produced in court as an exhibit **P Exb 1**. Under cross examination by the appellant **PW2** stated that the complainant probably sustained the injuries to her legs due to struggling with her attacker.

This was expert medical evidence. It was not controverted at all. I find from the evidence that the fact of defilement has been proved.

The next question requiring proof is the identity of the attacker. The complainant has identified the appellant as the man who defiled her. She spent a period of roughly 2 days with the appellant. The appellant took the child to his house where they were alone just the two of them. The appellant had ample time and opportunity to see the appellant well.

The next day the child pointed out the appellant to the other *boda boda* riders who apprehended him and began to beat him. **PW3** confirms that the man whom the child identified as her defiler was the appellant. The complainant remained consistent in her identification of the appellant as the man who defiled her. At no time did she waver in this. In his defence the appellant claimed that the complainant was a girl he knew and had proposed marriage to. He claimed further that on that day the child came willingly to his house having agreed to his marriage proposal.

This defence rings untrue for the following reasons. Firstly the appellant did not put these allegations to the complainant at the time he was cross-examining her. This is clearly an afterthought. Secondly whether or not the child came to his house willingly is irrelevant in a case of defilement. A minor is deemed in law to have no capacity to give consent. Finally if the child was indeed his girlfriend as alleged what made her turn against him and accuse him of defilement? If they were friends the child would not have gone to make a report with police.

This defence rings hollow. It is clearly a fabricated afterthought and I dismiss the same.

Given the circumstances and the fact that the child was in close proximity with the appellant for an extended period of time, I am satisfied that there has been a positive identification with no possibility of mistake.

The last issue requiring proof is the age of the complainant. In any case of defilement the age of the victim is a critical factor which requires specific proof. This is because the victim's age will be the determining factor for the sentence to be imposed in the event that the accused is convicted.

In this case the complainant told the court that she was 14 years old having been born in 1996. No proof of the complainant's age was tendered – no birth certificate, no immunization card or other document was produced to prove her age. In the absence of documentary proof the court would accept an oral statement from a parent or guardian of the complainant corroborating her evidence regarding her age. Unfortunately no parent or guardian of the child testified in court. As such I find that no independent evidence regarding the age of the complainant was tendered. In the circumstances the trial magistrate ought not to have rendered a conviction on the main charge of Defilement. I therefore quash that conviction.

Having said that, I am satisfied that the actions of the appellant did at the very least constitute an indecent assault as against the complainant. This offence does not require proof of age. I therefore substitute a conviction for the alternative charge of Indecent Act with a child contrary to Section 11 of the Sexual Offences Act. Section 11 of the Sexual Offences Act provides for a mandatory minimum sentence of ten (10) years upon conviction.

The sentence of 25 years imposed by the trial court is set aside and in its place I sentence the appellant to serve to (10) years imprisonment. The sentence to run from the date of the appellant conviction in the trial court. To this extent only does this appeal succeed.

**Dated in Nakuru this 9<sup>th</sup> day of December, 2016**

Read in open court

Appellant in court

**Maureen A. Odera**

**Judge**