



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.132 OF 2013**

*(An Appeal arising out of the conviction and sentence of L.D. OGOMBE - RM delivered on 19<sup>th</sup> July 2013 in Kiambu CM. CR. Case No.2515 of 2012)*

**HARRISON MWANGI GITAU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Harrison Mwangi Gitau was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 14<sup>th</sup> July 2013 in Kiambu County, the Appellant unlawfully and intentionally committed an act which caused penetration with his genital organ (penis) into the genital organ (vagina) of B W N, a child aged 9 years. When he was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to life imprisonment. The Appellant was aggrieved by his conviction and sentence. He duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of medical evidence that did not conclusively link him to the commission of the offence. He faulted the trial magistrate for convicting him on the basis of prosecution's evidence that they did not prove the charge to the required standard of the law. He took issue with the fact that his defence was not properly considered before he was convicted. In particular, he stated that the trial court did not take into account that there existed a grudge between him and the complainant's mother which formed the basis for his implication with the offence. He stated that he was convicted on the basis of a charge that was defective. The Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Ngetich for the State opposed the appeal. She submitted that the prosecution had established its case on the charge of **defilement** to the required standard of proof. She urged the court not to interfere with the conviction and sentence.

The facts of this case according to the prosecution witnesses are as follows:

The Appellant was at the material time a boyfriend to A N who is the mother of the complainant. According to the complainant, who testified as PW2, on the night of 14<sup>th</sup> July 2012 at about 11.00 p.m., their mother left them at home and went to work. The complainant then aged 9 years was with 2 of her younger siblings, namely, J C and G T. While they were asleep, they were woken up by the Appellant. The complainant opened the door for the Appellant because she knew him as a friend of their mother. She recalled that the Appellant cooked for them before asking them to go to sleep. The Appellant then carried the complainant from where she used to sleep to the bed of her mother. He then removed her clothes including her inner wear before he sexually assaulted her. The complainant testified that during the act, she bled. She felt pain. She cried. The complainant's testimony in regard to what happened was corroborated by the testimony of her brother PW3 James Chege who testified that on the material night, he saw the Appellant lie on top of the complainant. He heard the complainant cry. He also cried in sympathy with her sister. Her mother peeped through the window and saw the Appellant lying on her bed. She called the Appellant's name.

The Appellant opened the door and fled from the house. The complainant testified that her mother beat her with a cooking stick. She also cut her with a knife. On 21<sup>st</sup> July 2012, the complainant's mother travelled to work in Saudi Arabia. The complainant informed her aunt PW1 J N T what had transpired after the mother had left them in her custody. This was after PW1 had noticed that the complainant kept going frequently to the toilet. She took the complainant to be seen by a clinical officer. Upon examination, the clinical officer told PW1 that the complainant had been defiled. The clinical officer PW4 Richard Munene testified that on examining the complainant, he noted that the complainant's hymen was torn. She had a foul smelling discharge. He noted that the complainant contracted a sexually transmitted disease. He treated her. The medical treatment notes and the P3 form were produced into evidence by PW4. The case was investigated by PW5 PC Grace Opiyo then based at Karuri Police Station. After concluding the investigation, she was of the view that a case had been established for the Appellant to be charged with the offence for which he was convicted.

This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced by the prosecution witnesses and by the defence so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In re-evaluating the evidence, this court is required to always have in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding their demeanour (**see Okeno –vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution proved the charge of **defilement** to the required standard of proof beyond any reasonable doubt.

For the prosecution to establish the charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act**, it was required to prove three elements to the charge: that there was penetration, the identity of the perpetrator and finally the age of the victim. In the present appeal, the prosecution proved that indeed the complainant was defiled. PW4 produced a P3 form which established that indeed the complainant had been defiled. Her hymen was torn. She had a foul smelling discharge emanating from her vagina. According to the clinical officer, this was proof that the complainant had been infected with a sexually transmitted disease. Taking into consideration the age of the complainant (she was 9 years old at the time), it was not possible that she had prior sexual experience. This court established to the required standard of proof that the complainant was indeed defiled. As regards her age, the complainant testified that she was born in 2003. The Appellant did not dispute this fact. The clinical officer who testified in court also noted that the complainant was 9 years old at the time of the sexual assault. Although no documentary evidence was produced to support the age of the complainant, this court is of the view that there was no dispute that the Appellant was 9 years old at the time of her sexual ordeal.

The issue that remains for determination by this court is the identity of the perpetrator. The complainant testified that it was the Appellant who sexually assaulted her. Her testimony was corroborated by that of her brother PW3. The evidence of identification of the Appellant by the complainant was in fact evidence of recognition. The Appellant was known to the complainant prior to the sexual assault. The Appellant was a friend of their mother. In his defence, the Appellant stated that he was implicated in the case

because of a difference he had with his girlfriend. What was instructive was that the Appellant did not say what this difference was.

Under **Section 124** of the **Evidence Act**, the evidence of a child in a sexual offence is not required to be corroborated where the trial court forms the opinion that that evidence was the truth. The trial court did warn itself of the danger of convicting the Appellant on the basis of the testimony of the complainant. She however was clear in her mind that the complainant and her brother's evidence was the truth. Having re-evaluated the evidence adduced by the complainant and her brother in regard to the circumstance in which they identified the Appellant, this court is convinced to the required standard of proof beyond any reasonable doubt that the complainant had no reason to implicate the Appellant if indeed he was not the perpetrator of the sexual assault. The Appellant was known to them prior to the sexual assault. They trusted him as a friend to their mother. They opened the door for him when their mother was away. He cooked for them after which he sexually assaulted the complainant. This court holds that it was the Appellant who sexually assaulted the complainant. His protestation of innocence cannot hold in the circumstances of this case because he was well known to the complainant before the sexual assault.

In the premises therefore, the Appellant's appeal against conviction lacks merit and is hereby dismissed. His appeal against sentence is similarly dismissed. The sentence was legal. The conviction and sentence of the trial magistrate's court is upheld. It is so ordered.

**DATED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JULY 2015**

**L. KIMARU**

**JUDGE**