



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.131 OF 2014**

***(AN APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE OF J.D. KWENA AG.  
SPM DELIVERED ON 24<sup>TH</sup> JANUARY 2014 IN GITHUNGURI PM. CR. CASE NO.720 OF 2010)***

**JACKSON NJENGA NGUNYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Jackson Njenga Ngunya 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 the 26<sup>th</sup> and 27<sup>th</sup> day of May 2010 at [Particulars withheld] Village in Githunguri District within Central Province, the Appellant unlawfully committed an act which caused penetration with his genital organ (penis) into the genital organ (anus) of J M, a child aged 10 years. He was alternatively charged with the offence of **committing an indecent act with a male child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the 26<sup>th</sup> and 27<sup>th</sup> day of May 2010 at [Particulars withheld] village in Githunguri District within Central Province, the Appellant committed an indecent act with a male child namely J M by touching his anus. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main count of **defilement**. He was sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. In summary, the Appellant faulted the trial magistrate for declining his application to recall the complainant. According to the Applicant, his right to a fair trial was infringed. He was aggrieved that the trial magistrate misdirected himself in his decision to convict him. The Appellant was of the view that the prosecution had not established its case against him to the required standard of proof beyond any reasonable doubt. He faulted the trial magistrate for relying on the prosecution's inconsistent and contradictory evidence to convict him. He was aggrieved that his defence had not been considered before the trial magistrate reached the decision to convict him. He was aggrieved that the sentence that was imposed on him was harsh and excessive in the circumstances. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the Appeal, the Appellant presented to the court written submission. He further made an oral submission in support of his petition of appeal. He complained that he was prevented from properly defending himself because the charge sheet was not read out to him during trial. He stated that

he had been framed with the offence due to an existing family dispute over land. He urged the court to allow his appeal. Ms. Njuguna for the State opposed the appeal. She submitted that the prosecution had established, to the required standard of proof that indeed the Appellant had defiled the complainant. She therefore urged the court to disallow the appeal and confirm the conviction and sentence of the trial court.

The facts of the case according to the prosecution are as follows: The complainant, PW1 J M, an orphan, was at the material time living at [Particulars withheld] Children's home which was run by PW4 B W N. The complainant testified that he came to know the Appellant while at the home as the Appellant visited the home on numerous occasions. The complainant had on numerous occasions gone to the Appellant's house to assist him with work. The complainant recalled that sometime in the year 2009, on a Saturday, he and other children from the Children's Home had gone to the Appellant's house to repair some wooden structure. While there, the complainant asked to go to the toilet. The Appellant took him to the toilet and asked him to remove his pants. He gave the complainant five (5) shillings before he had sexual intercourse with him. The complainant described the sexual intercourse by describing how his anus was penetrated by the Appellant's penis. The Appellant asked him not to report the incident to anyone.

The complainant testified that in May 2010, he met the Appellant on the road. The Appellant told him that he could go to his house if he had any issues. He told the court that in June 2010, the complainant stole fifty shillings (50/=) from a teacher in his school. When he was discovered, he went and sought refuge at the Appellant's house. He told the court that at night while he was sleeping at the Appellant's house, the Appellant carried him from where he was sleeping and placed him on a table. He testified the Appellant again had sexual intercourse with him in the similar manner as the previous one. He recalled that when he woke up the following day, his short was stained with blood. There was also blood on the table. The Appellant cleaned the table, washed the complainant's clothes and bathed him. He told the complainant to go to school and return back to his house after school.

When the complainant returned from school that day, he went to the Appellant's house. He informed Appellant that he felt pain on his anus and he gave him some tablets to take. He also gave the complainant ten (10) shillings and promised to take him to Nairobi. Later, the complainant accompanied the Appellant to Ikinu where the Appellant bought a pair of slippers for the complainant. He also gave the complainant meat, cabbage and wheat flour to take to his house while he remained in Ikinu. When the complainant arrived at the Appellant's house at around 1.30 pm, he saw PW3 J W R, a neighbour of the Applicant. PW3 testified that she saw the complainant on 28<sup>th</sup> May 2010. PW3 asked the complainant what he was doing at the Appellant's house. The complainant told her that the Appellant had told him to go to his house in case he had any issues. He informed her that he was staying at the Appellant's house because he got into trouble at the Children's Home. She made a telephone call to PW4 to inform her that she was with the complainant. PW4 told her to tell the complainant to go back to school. In the evening, the complainant did not go back to the Children's Home. PW4 telephoned PW3 to find out if she had seen the complainant. She was told that the complainant was at PW3's house.

PW4 sent people to get the complainant from the Appellant's house and he was taken back to the Children's Home. PW4 interrogated the complainant on his whereabouts after he went missing and he revealed that he had been staying at the Appellant's house. He told her that the Appellant had sexually assaulted him. A report was made to Githunguri Police Station by PW2. The police advised him to take the complainant to Githunguri Health Centre. The complainant was examined on 29<sup>th</sup> May 2010 by PW5 Regina Muthoni Kimaru, a clinical officer. She noted that the complainant's anus had bruises and was tender. This was consistent to the complainant being defiled. She filled a P3 which was produced into evidence as **Prosecution's Exhibit No. 2**. PW5 also carried out an age assessment on the complainant. The complainant was assessed to be between six (6) and twelve (12) years old. The age assessment report was produced into evidence as **Prosecution's Exhibit No. 3**. PW6 Ag. IP Christine Mandi was assigned to investigate the case. After concluding her investigations, she formed the view that indeed a case had been established for the Appellant to be charged with the current offence. When the Appellant was put on his defence, he denied committing the offence. The Appellant's testimony was that on 26<sup>th</sup> May 2010 at around 8.00 p.m the complainant found him at a bar. He requested to spend the night at the Appellant's house because he had got in trouble for stealing money from a teacher. Since it was raining, the Appellant agreed. The following day, the complainant went to school. He went back to the Appellant's house after

school. The Appellant testified that he was framed with the offence due to an existing grudge between him and PW3.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to a fresh evaluation with the objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither heard nor saw the witnesses as they testified and must therefore give due regard in that respect (see **Okeno –vs- Republic (1972) EA 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge that was brought against him.

On re-evaluation of the evidence and the submission made in this appeal, it was clear to this court that the prosecution did indeed establish the guilt of the Appellant to the required standard of proof beyond any reasonable doubt. In a case of defilement, the prosecution is required to establish that there was penetration, that the victim of the sexual assault was a child and finally the identity of the perpetrator. In the present appeal, proof of penetration was established by medical evidence. The complainant was examined by PW5, Regina Muthoni Kimaru at Githunguri Health Centre on 29<sup>th</sup> May 2010. The Appellant had sustained bruises in his anus an indication that the complainant had been penetrated. **Section 2(1)** of the **Sexual Offences Act** defines penetration as:

*“the partial or complete insertion of the genital organ of a person into the genital organs of another person.”*

The second issue that the prosecution was supposed to establish is the age of the victim. From the charge sheet, the complainant was said to be said to have been 10 years old at the time of the incident. His birth certificate was not produced in evidence. However, age assessment was carried out on the complainant at Githunguri Health Centre by PW5 Regina Muthoni Kimaru. The complainant was assessed to be between the age of six (6) to (12) years. This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of **Section 2(1)** of the **Children Act**.

As regards who perpetrated the penetration, the complainant testified that he knew the Appellant. He had assaulted him on several occasions. The complainant had visited the Appellant’s house severally prior to the incident. There was no doubt that the complainant properly identified the Appellant as the perpetrator of the sexual assault. The Appellant’s defence that he had been framed with the offence does not hold. In this court’s assessment, the complainant was telling the truth. This court is of the view that the defence put forward by the Appellant does not dent the otherwise strong evidence adduced by the prosecution connecting him with the offence. His culpability was established to the required standard of proof beyond any reasonable doubt. His appeal lacks merit.

As regards sentence, **Section 8(2)** of the **Sexual Offences Act** provides a sentence of life imprisonment for any person convicted of defiling a child of less than twelve (12) years. The complainant was assessed to be between six (6) and twelve (12) years old at the time the offence was committed. The trial court sentenced the Appellant to serve life imprisonment. The sentence was legal. The appeal on sentence is similarly dismissed. It is so ordered.

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

**L. KIMARU**

**JUDGE**