



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 84 OF 2013**

**JOHN MAINA GITARI .....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant **John Maina Gitari** was convicted for the offence of defilement contrary to **Section 8 (1) (3) of the Sexual Offences Act 3 of 2006** by RM's Court, Isiolo. He was sentenced to serve 20 years imprisonment. The particulars of the charge were that on diverse dates between January, 2013 and 24/4/2013, at Kiwanjani Area in Isiolo County, defiled P.K., a girl aged 14 years. In the alternative, he faced a charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. Being aggrieved by the said conviction and sentence, he filed this appeal which is based on the following grounds:

- 1. That the eye witness to the offence was not called as a prosecution witness;**
- 2. That the appellant was not subjected to medical examination;**
- 3. That the sentence is harsh and excessive;**
- 4. That the prosecution failed to prove their case to the required standard.**

The appellant urged the court to quash the conviction, set aside the sentence and set him at liberty. He filed written submissions in support of the grounds.

The appeal was opposed by the Learned Counsel for the State, Mr. Mungai, who submitted that the prosecution evidence was overwhelming, because it is an offence that took place over a period of time; that the defence did not dislodge the evidence adduced by the prosecution witnesses; that the complainant was found in the appellant's house where the appellant had detained her; that the complainant's age was proved and the sentence is lawful, appellant having been handed the minimum sentence. He urged the court to dismiss the case.

This being the first appeal, it behoves this court to examine and evaluate all the evidence that was adduced before the trial court afresh. This court must however, bear in mind that it did not have the opportunity to see the witnesses in order to assess their demeanor (**See Okeno v Rep. 1972 EA**).

The prosecution case was as follows: **PW1, P.K.** a girl aged 14 years testified on oath after a *voire dire*

examination was conducted by the court and she was found to possess the requisite intelligence to testify on oath. She testified that she hails from Tigania and had quit school in 2012, got employed by one Kaloki as a house girl at Kathatene. The accused had also been employed by Kaloki. Her parents traced her there, took her home but she ran away from home again. She went back to Kaloki and they left with appellant for Maua where they stayed in rented rooms with the appellant; after a week, they went to the appellant's home in Ngonyi where they stayed for 2 weeks, then proceeded to Timau, then Maili Nane and lastly at Kiwanja Ndege in Isiolo. She said that during all that period, she had sex with the appellant wherever he returned home in the evenings from work. She recalled that on 24/4/2013, the Area Chief and Police went where they were staying at 8.00 p.m., and arrested them. She was taken to hospital, then to child welfare. She said that the appellant had told her he loved her and used to buy for her things.

**PW2 Florence Kagendo Kanyubi** of Kiwanja Ndege, Isiolo, is a Community Health Worker. On 24/4/2013, she was informed by a lady called Kendi that a minor had been locked up in a room in their plot by somebody. She proceeded to the plot, borrowed water from the neighbor but she did not have. She saw the complainant peeping through the window, asked her for water which she gave her and from there, PW2 went to report to the Area Assistant Chief, **Rose Kanja Muthamia (PW3)**. On that evening PW2, 3 and PC Nahason Makau proceeded to the said house at Kiwanja Ndege where they found the complainant and appellant whereby the two were arrested and taken to to Isiolo Police Station. PW4 produced the skirt and book recovered in the said house.

**PW5 PC Cyrus Wahome** of Isiolo Police Station was the Investigation Officer in the matter. He took the complainant to Isiolo District Hospital for age assessment and examination. He produced the age assessment report as an exhibit (PEX. No. 3).

**PW6 Karayu Jilo** of Isiolo District Hospital testified that the complainant was examined by Mohamed Duba who found that her hymen was torn, and there was pus and spermatozoa in the genitalia. He concluded that she had taken part in sexual intercourse.

After the close of the prosecution case, the accused was called upon to defend himself. He testified that he went to Isiolo on 10/4/2013 upto 24/4/2013 and that he had not gone to work that day. He met a young girl carrying a bag who claimed to be from Timau, had disagreed with the employer and was seeking employment. She requested him to keep her bag as she went to check on a job. She kept her bag and left. He returned in the evening, found the girl at his door and she said she had not found the proposed employer. He cooked, gave her some food and when she entered his house to take her bag, he heard a knock and on opening, found it was the police; and it was alleged he had married a minor. He said that the neighbours had framed him, specifically a lady who had borrowed his *panga* and refused to return it. He denied having known the complainant.

To commit an offence of defilement under **Section 8 (1) and (3) of Sexual Offences Act**, the following must be established:

1. ***That there was penetration;***
2. ***That the minor was aged between 12 and 15 years.***

PW1 was subjected to an age assessment and an age assessment report was produced in evidence as an exhibit. The Doctor who examined her confirmed that she was 14 years of age.

The Doctor's evidence confirmed that indeed, the complainant had engaged in sexual intercourse. On examination of her genitalia, she had pus, spermatozoa and her hymen was broken. This evidence did corroborate the complainant's evidence that she engaged in sexual intercourse with the appellant for the period that they stayed together in Maua, Ngonyi, Timau and Isiolo. The appellant testified that the complainant had no grudge with him. There is no reason why she would frame him.

The complainant vividly explained how she met the appellant, how they moved together to Maua and the various places they stayed together. Her evidence remained unshaken. PW1's evidence was corroborated

by that of PW2, 3 and 4 who actually found her in the appellant's house. The appellant's defence that PW1 had just gone to his house for assistance is not truthful. It was an afterthought which is not believable. He alluded to a lady neighbor who had borrowed his *panga* and refused to return. He did not mention her name. He did not say it was 'Kendi' who was not called. This allegation was also raised in the defence. The appellant had an opportunity to cross examine the prosecution witnesses but never alluded to the said grudge.

PW2 mentioned a lady by name Kendi, who informed her that a child was locked up in a house by a man as a wife. PW2 went where the complaint was and saw it for herself and she is the one who called the Assistant Chief and Police. Failure to call Kendi as a witness does not weaken the prosecution case at all or prejudice the defence because she did not see the appellant actually defile the complainant but witnessed what PW2 actually saw; the complainant peeping through the window of a house where she later found her in company of the appellant.

PW2 and 3 denied knowing the appellant before and there was no reason why they could frame him and he did not allude to any. I find the evidence of the prosecution to be overwhelming. The appellant was actually found in company of PW1 whom he had kept for over a month. She was aged 14 years and therefore, had no capacity to consent to the sexual acts.

The appellant complained that he was not taken for medical examination. Indeed he was not but it is no longer mandatory that a suspect in a sexual offence be taken for medical examination. Under **Section 124 of the Evidence Act**, there is no longer need for corroboration in sexual offences cases. It is enough that the court believes the victim and records the reasons for so doing. It may be necessary in some cases but not all. In the case of **Andrew Cauri Ndungu v Republic NAI CA Criminal Appeal No. 132 of 2008 [2013] eKLR**, the Court of Appeal stated that;

***“We agree that there are instances in which an accused person ought to be medically examined before a court of law can positively connect him to commission of an offence, but we do not think that in this particular case there was dearth of evidence to enable the two courts below reach a conclusion that it was the appellant who defiled the complainant. Even in the absence of a medical examination on the appellant, there was sufficient evidence to enable the trial court reach the finding that it arrived at. We must, therefore, reject the third ground of appeal.”***

I find that it was unnecessary for the appellant to undergo medical treatment because the complainant was found in company of the appellant, they had been staying together for some time and there was sufficient evidence on record to link appellant with the offence of defilement.

Having considered both the evidence of the prosecution and defence, I am satisfied that there is overwhelming evidence that the appellant did defile PW1 over a period of time till he was arrested on 24/4/2012. His defence was a mere denial and the trial court rightfully dismissed it. The conviction was well founded and I do confirm it. The appellant was handed the minimum sentence under **Section 8 (3) of the Sexual Offences Act**. The appeal is devoid of any merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED THIS 10<sup>TH</sup> DAY OF DECEMBER, 2015.**

**R.P.V. WENDOH**

**JUDGE**

**10/12/2015**

**PRESENT**

Mr. Mulochi for State

In Person, Appellant

Ibrahim/Peninah, Court Assistants