



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO.2 OF 2011**

**BETWEEN**

**ISAAC MUTUMA IRIKIA .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Nyanyuki SPM's Court*

*Criminal Case No.2884 OF 2009 dated 7th January, 2011, Hon. E.N. Gichangi, RM)*

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to **Section 8 (1) (3)** of the **Sexual Offences Act No.3 of 2006**, the particulars of which were that on 28th day of December 2009 in Buuri District within Eastern Province, penetrated R.N.M. who is a child of 15 years.
2. He faced an alternative charge of Indecent Act with a child contrary to **Section 11 (1)** of the **Sexual offences Act No.3 of 2006**, the particulars of which were that on 28th day of December 2009 in Buuri District within Eastern Province intentionally and unlawfully committed an Indecent Act with R.N.M. a child of 15 years by touching her vagina.
3. He pleaded not guilty, was tried, convicted and sentenced to 20 years on the 1st main charge. Being aggrieved by the conviction and sentence, he filed the appeal and raised the following grounds of appeal as per his home grown grounds:-
  - a. *The prosecution case was not proved beyond reasonable doubt as the same had inconsistencies and discrepancies.*
  - b. *Vital witnesses were not called.*
  - c. *His defence was not taken into account.*
4. When the appeal came up for hearing before me, the appellant who was not represented filed an amended grounds of appeal and written submissions which he relied upon. Miss Kitoto appeared for the State and opposed the appeal.

**Submissions**

1. On behalf of the appellant, it was submitted that he was prosecuted by a prosecutor who was not competent hence there was a mistrial. It was submitted that PC Ihaji was not qualified to prosecute and the case of **Eliema and another -vs- Republic** was submitted. It was further submitted that vital

documents to prove the prosecution's case were not produced and that the age of the complainant was never established. It was submitted that the complainant did not in her initial report give the police the name of the appellant and that since he was not medically examined he could not have been linked to the sperm found in PW1.

2. Miss Kitoto for the State submitted that PC Ihaji was a gazetted officer; that on the age of the complainant she testified that she was born on 18th December 1995 which was confirmed by PW2. She submitted that on the authority of **High Court Criminal Appeal No.404 of 2009 Nairobi Jon Cardon Wagner -vs- Republic**, birth certificate is not the only thing to confirm the age of a child.

3. It was submitted that the P3 form was properly produced. PW1 clearly identified the appellant. Her testimony was confirmed by PW2 who found PW1 in the house of the appellant where she had spent the night and PW3 confirmed that the complainant had pus discharge from her private part and her hymen was broken with spermatozoa in the vagina.

4. This being a first appeal, the court is required to reassess the evidence tendered and to come to its own conclusion though taking into account the fact that it did not have the advantage of seeing and hearing witnesses.

5. PW1 stated that she was born on 18th December 1995, the appellant had an hotel in Ngushishi and on the material day she had been hit by her mother so she decided to leave home to visit her mother's friend, when the appellant called her and asked her what her problem was. He told her to sleep at his place which she agreed. At night the appellant told her to sleep on his bed where he joined her and defiled her until morning when her mother found her there and later came with the police.

6. It was PW1's evidence that she had seen the appellant before and that he had asked her to be going to his place but was advised by her friend Millicent Kathure not to accept the proposition. Under cross examination, she stated that the appellant was with his friend called Karani and that the appellant had threatened to kill her if she screamed.

7. PW2 IWM the complainant's mother testified that on 28th December 2009 she had beaten the complainant having lied on her whereabouts after which she left home. They looked for her upto 10.00 p.m. but she did not return. The following day at 9.00 a.m she went to the market and found her in the appellant's house. The appellant was subsequently arrested while PW1 was medically examined.

8. PW3 Joseph Bowen Kangoko produced P3 from on behalf of Richard Kateiya which confirmed that the complainant had been defiled since her hymen had been broken and sperms seen in the vagina.

9. When put on his defence, the appellant gave unsworn statement and stated that on 28th December 2009 he slept at Mia Moja where he had an hotel. On 29th he collected milk to go and sell in Timau and was arrested at around 11.00 a.m., taken to the police station where he was asked for Kshs.10,000/= . At the report desk he found a lady he had known who pointed at him and stated that he had raped her kid. He further stated that he had a grudge with the complainant's mother since he rented an hotel which was previously her husband's.

10. From the proceedings herein, the court has identified the following issues for determination:-

- a. *Whether the age of the complainant was proved.*
- b. *Whether the prosecution case against the appellant was proved beyond reasonable doubt.*

11. As submitted by Miss Kitoto, the age of the complainant was proved by herself, PW2 and through the P3 form exhibit No.1a. The appellant did not at the time of trial dispute the fact that the complainant was born on 18th February 1995 which age was confirmed by her mother who is better placed when it comes to when the same was born.

12. From the evidence as analysed herein above, the complainant was found by PW2 in the appellant's

house having slept there the previous night and in her evidence in chief the same confirmed that she had sex with the appellant throughout the night. This fact was confirmed by PW3 through P3 form. It is therefore clear that the prosecution had proved its case against the appellant beyond reasonable doubt.

13. The appellant in his defence alleged that there was a grudge between him and the complainant's mother but note that the appellant did not put this across to PW2 when cross examining her even after the issue had been raised by the prosecution in her evidence in chief. I therefore agree with the trial court's finding that the said issue only came during the defence.

14. I therefore find that the conviction of the appellant was safe and therefore dismiss the appeal herein.

**Signed and dated this day of 2014**

**J. WAKIAGA**

**JUDGE.**

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November 2014.

**J. NGAAH**

**JUDGE.**

In the presence of:

----- for Appellant

----- for State

Dated this day of 2014