



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NUMBER 201 OF 2011**

**BETWEEN**

**DAVID NJUE WAMAE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Embu Criminal Case No. 2052 of 2010 by M.W. Wachira, CM on 02.11.11)*

**JUDGMENT**

1. The appellant appeals against conviction and sentence. He was charged with the offence of defilement contrary to **section 8(1)** of the *Sexual Offences Act* and an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the *Sexual Offences Act*. He was convicted of the main charge of defilement and sentenced to 20 years imprisonment.
2. The prosecution case was that on 7<sup>th</sup> November 2010 at about 2.00 pm, the appellant enticed, the child, PW 1 to his house under the pretext of giving her sugarcane. PW 1 gave unsworn testimony when she entered in the house, he undressed her and proceeded to insert his penis into her vagina. After ejaculation, he asked her to wipe herself with the bed sheet. He thereafter gave her 20/= and sugarcane and told her not to tell anyone. PW 1 testified that her friend PW 2, was outside the house at the window and saw what happened when the appellant tried to get her, she ran away. She did not tell her parents about what happened but when she bought doughnuts using the money the appellant had given, her father asked where she got the money from, it is when she told him what the appellant had done to her. She was later taken to hospital by her father.
3. PW 2, also a child, gave sworn testimony. She stated that on 17<sup>th</sup> November, 2010, while she was with PW 1, the appellant enticed them to go to his house for sugarcane and money to buy doughnuts. She confirmed that the appellant held PW 1's hand and took her into the house. She saw the appellant remove his penis and insert it into PW 1's vagina. She testified that she saw the appellant give PW 1 Kshs. 20/= and a piece of sugarcane. Thereafter the appellant came outside and gave her 5/= and a piece of sugarcane. When he tried to catch her, she fled and reported the matter to PW 1's aunt who then informed PW 1's mother who then informed her father. When PW1's father asked PW2 what had happened to PW 1, she narrated the incident to him.
4. PW 3, the father of PW 1, testified that he was informed of the incident on 8<sup>th</sup> November 2011 at about 7.20pm by PW 1 when he inquired where she got money to buy the doughnuts. It was then that PW 1 narrated the story. He also asked PW 2 who confirmed the incident. He thereafter

- reported the incident to Itabua Police Station on 9<sup>th</sup> November 2010 where the complaint was received by PW 7, PC Susan Njeri. The child and father were referred to Embu General Hospital.
5. Dr Stephen Mwangi, PW 4 confirmed that he examined PW 1 on 9<sup>th</sup> November 2010 and prepared a P3 form. He observed that her private parts had bruises on the labia manora but there was no discharge. The high vaginal swab confirmed blood stains but there was no spermatozoa. When cross-examined by the appellant, PW 4 confirmed that the bruises on the inner private parts were consistent with forced penetration of the vagina.
  6. PW6, a lady from the locality, also testified how on 7<sup>th</sup> November 2010, met PW1 and PW2 buying doughnuts. She asked them where they got the money. PW2 informed her that PW 1 was defiled by the appellant who gave her money. She reported this to PW3. She also reported to the police and recorded a statement. She knew the appellant as a sugarcane seller.
  7. The appellant gave sworn evidence. He denied that he had committed the offence as alleged. He testified that on 7<sup>th</sup> November 2010 he went to PW 1's parent's home to collect money he was owed. He was surprised that he was later arrested for the offence.
  8. After hearing all the evidence, the learned Magistrate convicted the appellant of the offence of defilement. The duty of the first appellate court is to evaluate the evidence afresh and make independent conclusions bearing in mind that it did not see or hear the testimony.
  9. The appellant in his grounds of appeal complains that the learned Magistrate relied on evidence that was contradictory and uncorroborated, that she failed to consider that no DNA test was conducted to ascertain whether in fact there was body contact with the appellant. That PW1 was examined three days after the incident when she had washed and changed her clothes and that the Court failed to consider his defence. The State on the hand, supports the conviction.
  10. **Section 8(1)** of the *Sexual Offences Act* provides as follows: “**A person who commits an act which causes penetration with a child is guilty of an offence of defilement.**” Under the *Children Act*, a child is any person under the age of 18 years.
  11. The evidence on record to prove the offence is overwhelming. PW 1, the child gave unsworn evidence which was unshaken on cross-examination. Her evidence of the sexual act was corroborated by the sworn evidence of PW 2, a child who witnessed the event. The act of penetration was confirmed by evidence of the doctor, PW 4 who, confirmed that the high vaginal swab had blood stains and that the vaginal parts were bruised thus conforming that penetration took place. Although the test was conducted three days after the incident, the evidence of penetration which was important was still proved.
  12. In dealing with the evidence of PW 1 and PW 2, who were children, the court conducted a *voir dire* and made the appropriate finding. In respect of PW 1, the court found that she was aged 13 but although she understood the importance of telling the truth, she did not understand the seriousness of the oath. As regards PW 2, though she was aged 10 years, the court concluded that she understood the seriousness of the oath and the importance of telling the truth. In either case, the learned magistrate believed the evidence of the two witnesses.
  13. The learned magistrate also directed her mind to the provisions of **section 124** of the *Evidence Act* which requires evidence of a child to be corroborated but provides an exception for sexual offence, where the only evidence is that of the alleged victim in which case the court shall receive evidence of the alleged victim and proceed to convict, the accused person, if, for reasons to be recorded in the proceeding, the alleged victim is telling the truth.
  14. The court found that PW 1 and PW 2 were telling the truth and that the doctor's evidence corroborated PW 1's evidence. The appellant was also properly and positively identified as the

offence happened in broad daylight at about 2 pm and both PW 1 and PW 2 knew the appellant as a neighbour. In view of the clear and convincing evidence that the appellant committed the offence for which he was charged, there was no need to conduct a DNA test to confirm that the appellant committed the offence.

15. Finally, like the Magistrate, I find the appellant's defence an afterthought in light of the clear evidence of the prosecution.

16. As regards the age of the PW 1, the learned magistrate was satisfied that her age was 13 years. She relied on the testimony of the victim which she held was truthful and that the age assessed by the doctor shown on the P3 form was 13 years. The appellant did not dispute the age of the PW 1. Likewise I find that the child's age was established.

17. The mandatory sentence under **section (8)(3)** of the *Sexual Offences Act* is 20 years imprisonment as such the sentence imposed is legal. It is neither harsh nor excessive.

18. The appellant was properly convicted and sentenced. The appeal is therefore dismissed.

**DATED, SIGNED and DELIVERED** at EMBU this 30<sup>th</sup> day of October 2013

**D. S. MAJANJA**

**JUDGE**