



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**

**CRIMINAL APPEAL CASE NO.409 OF 2010**

ROBERT NDUNGU GITAU..... **APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 2637 of 2008  
Republic vs. Robert Ndungu Gitau in the Chief Magistrate's Court at Kibera by Mrs. Kasera  
Senior Resident Magistrate on 24<sup>th</sup> May 2010)*

**JUDGMENT**

The Appellant was charged with the offence of defilement contrary to **Section 8(1) and (3) of the Sexual Offences Act** and in the alternative the offence of committing an indecent act with a child contrary to **Section 11(1)** of the same statute. Upon his plea of not guilty, the trial court proceeded to conduct a trial and to convict the Appellant for defilement and to sentence him to serve a prison sentence of 16 years.

The Appellant then filed this criminal appeal vide his Petition of Appeal filed on 1<sup>st</sup> July 2010 on the following grounds:

1. That the learned magistrate erred in law in upholding the prosecution evidence and basing a conviction on it in total disregard of the inconsistencies and conflicting nature of the testimonies;
2. That the prosecution did not prove their case beyond reasonable doubt;
3. That the learned magistrate erred in failing to note that the Appellant's constitutional right under **Section 72(3)** of the Constitution which had been violated; and,
4. That the learned magistrate rejected the Appellant's defence case without giving any cogent reasons as required by law.

The State opposed the appeal on the ground that there was sufficient evidence linking the Appellant to the offence of defilement against the complainant.

The first question that I need to answer is whether the prosecution proved their case beyond reasonable doubt, thereby laying a sufficient basis for the conviction of the Appellant. Black's Law Dictionary defines "reasonable doubt" as the doubt that prevents one from being firmly convinced of a Defendant's guilt. "Beyond reasonable doubt" is further defined as follows:

"The standard that must be met by the prosecution's evidence in a criminal prosecution: that no other logical explanation can be derived from the facts except that the defendant committed the

crime, thereby overcoming the presumption that a person is innocent until proven guilty.”

The pertinent facts of this case are that the complainant, a child of 13 years, went to church in the company of her brother and sister on 24<sup>th</sup> August 2008 where she remained until 6pm when she was met by the Appellant who was in the company of his friends. She testified that the Appellant held her hand and took her to his house where he closed the door and forced her to sleep with him on his bed. She testified that he removed her inner pant and had sex with her. She further stated that he bought her food but did not allow her out of the house the following day. She testified that he locked her in and left, only to return at 6 pm and to later force her to have sex with him on the second day. She testified that she remained in the custody of the Appellant for 15 days when the Appellant told her to leave his house. She further testified that she made friends with one E and one Ew who were relatives of the Appellant. She further stated that she met one C and slept at their place on Saturday and that both C and her mother took her to her auntie’s place over the weekend. She testified that it is her auntie and her father who went to arrest the Appellant. Her parting shot was that the Appellant told her that she is a girl and she must give him what he wanted. In cross-examination, the complainant disclosed that she feared that the Appellant would kill her or do something crazy. The complainant’s father (PW2) testified that indeed, his daughter went missing on 24<sup>th</sup> August 2008 when the complainant’s two siblings returned home from church without the complainant. He testified that he looked for the complainant for two days and made a report at Langata, Rongai and Hardy Police Stations, as he thought she had been abducted. He further testified that he found her two weeks later in the company of two strange ladies who said they did not want to be known. He reported that the complainant told him that she was taken to Gataka by the Appellant, a place which was 3 kilometres away. He further reported that the complainant told him that the Appellant had defiled her without using condoms. He confirmed having reported to the police that he had found his daughter where he was given a letter by the Rongai police to proceed to arrest the Appellant. He further confirmed that he is the one who apprehended the Appellant at the shopping centre after he was pointed out to him by the complainant. PW3, who lived in Gataka, being the same area where the Appellant lives, testified to having seen the complainant come to her house in the company of one Eunice. She further confirmed that the Appellant is a son of her sister-in-law and that his house is only 180 metres away from her home. PW4 further stated that she also lives in Gataka and that the Appellant, who is her sister’s son and therefore her nephew, approached her on 3<sup>rd</sup> September 2008 requesting for her help to remove a girl from his house and return her to her home. She testified having gone to the Appellant’s house in the company of a neighbor where they met a girl seated on a stool in the Appellant’s house. She testified to having later returned at 3pm where she told the complainant she was taking her home. She testified to having told the Appellant not to make a report to the police as the girl would be beaten. PW5, a police man based at the Gataka Police Post, Ongata Rongai, testified that he was in the police post when the Appellant was brought by, among others, the complainant’s father and was reported to have defiled the complainant and that the Appellant was identified by being pointed out. PW7, a police woman based at Ongata Rongai Police station, confirmed that she was in the office with the complainant’s father came to report that the complainant was lost for 2 days since 24<sup>th</sup> August 2008. She further testified that on 6<sup>th</sup> September 2008, the complainant’s father called her to inform her that someone had brought the complainant home. She further testified that the complainant was brought to the police station where she said she had been taken by the Appellant to Gataka. She further confirmed having taken the complainant to Nairobi Women’s Hospital where the complainant was examined by a doctor and was confirmed to have been sexually assaulted.

This evidence points to a clear chain of events that led to the arrest and charging of the Appellant. To my mind, the evidence adduced by the prosecution, part of which I have reproduced above, shows that the Appellant was positively identified by the complainant as to have been the one who defiled her. It has been shown that the complainant was in the company of the Appellant for several days and thus, the complainant knew him. The fact that the complainant was in the custody of the Appellant for a number of days is further corroborated by the testimony of the Appellant’s neighbor being PW3 as well as the Appellant’s auntie, PW4. In light of this evidence, there is therefore no chance of a mistaken identity in this case. Further, the sequence of events as narrated by the prosecution witnesses are clear, consistent and corroborate the testimony of the complainant. With that in mind, I am convinced that no other logical explanation can be given of the facts other than that the Appellant committed the offence of defilement on the complainant. To that extent therefore, I find that the prosecution discharged its burden of proof by

proving their case beyond reasonable doubt and that this formed a sufficient basis upon which the learned magistrate could and did base his decision to convict the Appellant.

As to whether the trial court properly took into account the Appellant's defence, it is to be noted that the Appellant did not call any witnesses but merely gave an unsworn statement of a few sentences wherein he stated that on 6<sup>th</sup> September 2008, he went to buy a cigarette when people came to him and arrested him and took him to Gataka Police Post. He denied having defiled the complainant stating that she was living with a good Samaritan who was a neighbor. He further stated that that neighbor was his enemy and had threatened to fix him and that she is the one who took the complainant to her home. Looking at the trial magistrate's judgment, I can see that she did indeed set out the Appellant's defence and proceeded to find the Appellant as guilty as charged. I agree with her.

On the issue of the Appellant's constitutional rights having been violated, I note that this issue was never raised when this case was undergoing trial before the trial court. To that extent, I find that the Appellant is precluded to raise that issue in this criminal appeal and proceed to rule that that ground of appeal fails.

Overall, I find that the Appellant has failed to prove his grounds of appeal.

However, on the sentence of 16 years imprisonment meted out by the Trial Magistrate, I find it to be contrary to **Section 8(3) of the Sexual Offences Act** which prescribes a minimum sentence of 20 years imprisonment for a person who commits an offence of defilement with a child between the age of twelve and fifteen years. As the complainant was defiled while she was 13 years old, I therefore vary the sentence of the Appellant to a term of 20 years imprisonment.

**SIGNED AND DELIVERED IN NAIROBI ON THE 15<sup>TH</sup>**

**DAY OF NOVEMBER 2013**

**MARY M. GITUMBI**

**JUDGE**