



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL 80 OF 2008**

**GEOFFREY GITONGA .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*From original conviction and sentence in Cr. Case No. 554 of 2007 at the Senior Resident Magistrate's Court at Runyenjes*

**J U D G M E N T**

Geoffrey Gitonga was charged with offence of Defilement of a girl contrary to section 8(1) as read with section 8(2) Sexual Offences Act No.3 of 2006. The particulars were as follows;

**GEOFFREY GITONGA: On the 19<sup>th</sup> and 20<sup>th</sup> day of October 2007 at Embu District within Eastern Province had carnal knowledge of D.K. a girl under the age of 11 years.**

**Alternative charge**

Indecent assault on females contrary to section 11(1) of the Sexual Offences Act No.3/06. The particulars in the charge sheet were as follows;

**GEOFFREY GITONGA: On the 19<sup>th</sup> and 20<sup>th</sup> day of October 2007 at Embu District within Eastern Province unlawfully and indecently assaulted D.K by touching her private parts namely vagina.**

The matter proceeded to full hearing and the Appellant was convicted and sentenced to life imprisonment. The Appellant was dissatisfied with the Judgment and had appealed against conviction and sentence on the following grounds;

- 1) The learned trial Magistrate erred in law and fact when he put reliance on nuclear evidence adduced by P.W.1 and P.W.2 who were mother and daughter and the same were his family members.*
- 2) The learned trial Magistrate failed in law and fact when he did not observe that there was grudge between P.W.1 and the Appellant. That the Appellant refused the complainant to come home at night.*
- 3) The learned trial Magistrate failed to act in law and fact when he put reliance on evidence adduced by P.W.3 and P.W.4 who were both, whereby their evidence was surrounded by doubts.*

4) *The learned trial Magistrate erred in law and in fact by not observing the essential witness i.e. members of the public who alleged to have arrested the Appellant were not summoned by the Prosecution to clear the doubts.*

5) *The learned trial Magistrate erred in facts to reject the Appellant's defence without sufficient reasons.*

When the matter came before me for hearing the Appellant presented written submissions raising;

- 1) That he overstayed in police custody and so his Constitutional rights were violated.
- 2) The Court relied on the testimony of a single witness (a child).

The State through learned Counsel M/s Macharia opposed the appeal stating that the evidence of P.W.2 was supported by that of the doctor (P.W.4). P.W.2 is not a biological daughter of the Appellant.

As a 1<sup>st</sup> appeal Court I am enjoined to re-examine and re-evaluate the evidence that was adduced in the lower Court and arrive at my own independent conclusion. I am not losing sight of the fact that I did not see any of the witnesses. I refer to the case of **NGUI -VS- REPUBLIC [1984] 279**.

The only eye witness was P.W.2 who was said to be 10 years. She was at home with her step-father (Appellant) and other children who are younger than P.W.2. The father took her to the shamba, to his bed twice and defiled her in both places. The mother (P.W.3) was not at home during that time. The medical evidence by P.W.1 and P.W.4 confirmed that the child had been defiled.

The Appellant in his defence blamed his wife for this saying she had framed him for asking her why she had slept out.

It's true the Appellant was in Police custody for an unexplained period of 5 days. He is at liberty to take that up at the relevant forum.

Section 8(2) of the Sexual Offences Act provides;

***A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life***”.

The element of sentencing under the Sexual Offences Act heavily relies on the age of the minor. Besides proving that the offence was committed the Prosecution has a duty to confirm the age of the child. This was not done in this case. P.W.3 did not even try to state when P.W.2 was born.

I have re-evaluated the evidence which I find to be strong.

Would it therefore be necessary that the matter be reheard in order to arrive at a just decision? The Appellant herein was convicted and sentenced on 21/4/2008 i.e. 4½ years ago. He was arraigned in court 5½ years ago. In the case of **MUIRURI -V- REPUBLIC [2003] KLR 552** it was held that the lapse of 15 years was too long a time and a retrial could not be ordered. And in **EKIMAT -V- REPUBLIC [2005] 1 KLR 182** it was held that;

***1. Where a conviction is vitiated by a gap in the evidence or other defect for which the Prosecution is to blame, the Court will not Order a retrial. But where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame it does not follow that a retrial should be ordered.***

***2. A retrial should not be ordered unless the Court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for retrial should only be made***

***where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.***

The Prosecution failed to produce evidence to confirm the age of P.W.2. And the Court failed to order for an age assessment of the minor. So both the Prosecution and the Court are to blame for the gap in the evidence.

I am also considering that P.W.2 could be about 15-16 years of age and a retrial is most likely to embarrass her. She may also have undergone counseling and is not ready to go through the trauma again.

I will therefore not consider a retrial for the sake of the minor.

The Appellant will benefit from that gap in the evidence. The Appeal is allowed. The conviction is quashed and sentence set aside. Appellant to be released unless otherwise lawfully held under a separate warrant.

**DATED AND DELIVERED AT EMBU THIS 28<sup>TH</sup> DAY OF DECEMBER 2012.**

**H.I. ONG'UDI  
J U D G E**

In the presence of;

M/s Macharia for State

Njue – C/c

Appellant