



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

**Criminal Appeal 107 of 2007**

**ANDREW CAURI NDUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original decision in Criminal Case No. 1884 of 2006 in the Senior Resident Magistrate's Court at Githunguri – L. Muta– SRM)*

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

ANDREW CAURI NDUNGU, the appellant, was charged before the subordinate court with defilement contrary to section 8(3) of the Sexual Offences Act 2006. The particulars of the charge were that on 2<sup>nd</sup> November 2006 at [ **Particulars Withheld**] village in Kiambu district within Central Province committed an act which causes penetration and did penetrate the genital organ of C B F a girl aged 13 years. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the Sexual Offence Act 2006. The particulars of the alternative charge were that on 2<sup>nd</sup> November 2006 at [ **Particulars Withheld**] village in Kiambu District Central Province committed an indencet act with a child namely C B F a girl aged 13 years by stripping her pants, touching her genital organs and viewing her genital organs. After a full trial, he was convicted on the main count. He was sentenced to 20 years imprisonment.

Being dissatisfied with the decision of the trial court, the appellant has appealed to this court, both against conviction and sentence. The appellant also filed written submissions, which he relied upon at the hearing of his appeal. He also submitted at the hearing, that Dr. Njagi did not examine the complainant. He further stated that the one who gave evidence was the doctor's assistant. Secondly, the appellant submitted, the complainant's mother had demanded for money for the incident and admitted such demand of money before the trial magistrate.

The learned State Counsel, Mrs. Gakobo, opposed the appeal and supported both the conviction and sentence. Counsel contended that the appellant was well known to the complainant, as the complainant was employed by the mother of the appellant as a housegirl. The appellant took advantage of this and defiled the complainant at 6 pm on 6.11.2006 when only the two of them were together in the house. Counsel submitted that, immediately after the incident, the complainant left and went and reported the incident to her parents, including PW2 her mother. A report was then made to the police. The evidence of PW1 on defilement was corroborated by that of the doctor (PW3) who found the hymen broken and the vaginal wall inflamed, which was consistent with defilement. Counsel submitted that the opinion given by the doctor (PW3), was sound, with reasons. Counsel further submitted that the appellant's defence was considered and dismissed. Lastly, counsel submitted that the sentence of 20 years imprisonment was the minimum sentence, and was therefore not excessive. Counsel emphasized that the

complainant was 13 years old, and the magistrate did not apply a wrong principle.

In response to the State Counsel's submissions, the appellant submitted that the complainant was found to be infected with a disease, while he (the appellant) was not found to be infected.

The facts are in brief as follows. The complainant C B F (PW1), a girl of about 13 years, was employed by the mother of the appellant as a housemaid. According to PW1, on 2/11/2006 at about 6.30 pm the appellant and PW1 were the only people in the house of the appellant's parents, as the parents of the appellant had gone for a church fellowship. The appellant took advantage, got hold of the complainant, blocked her mouth and knocked her down. He then pulled her pants and skirt, unzipped his trousers and defiled her. Thereafter, the appellant left the house. The complainant then went out, locked the house and went and reported the incident to her parents, including PW2, her mother. PW2 examined her and took her to the Assistant Chief who referred them to **[Particulars Withheld]** Police Post. Because it was late at night, they went to Kiambu District Hospital on the next day, 3/11/2006. The complainant was examined at the Kiambu District hospital by Dr. Njagi (PW3). The doctor found that the hymen was broken and the vaginal walls were inflamed. There was some slight infection, though not significant. No spermatozoa were traced. The doctor filled the P3 form on 15/11/2006. The doctor concluded that the complainant was sexually assaulted on the material day because of the broken hymen, inflammation and infection. The appellant was arrested and charged.

In his defence, the appellant gave an unsworn statement. It was his defence that the complainant was infact a housemaid of his mother. He stated that, on the material day in the morning, his mother had chased away the complainant because she had picked some money from her bag. However, at 1 pm when he returned from the tea buying centre, he met the complainant with his mother. He stated that his mother informed him that she had given Kshs.1000/= to the complainant, and that he (the appellant) should get the change from the complainant to pay casual workers. He later asked the complainant to go and get the money, but the complainant left, never to come back that day. The complainant and her mother brought the house keys two days later, but his mother refused to accept the keys. He denied committing the offence.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The magistrate convicted and sentenced the appellant.

The first complain of the appellant is that on 27/11/2006, the name and rank of the prosecutor was not indicated by the magistrate. I have perused the court record. Indeed, on that day, the court record does not show who the prosecutor was and his rank. Section 85(2) of the Criminal Procedure Code (cap.75) provides for the powers of the Attorney-General to appoint public prosecutors. For the police, such a prosecutor must be of the rank at least an Assistant Inspector. In the case of ROY RICHARD ELIREMA & ANOTHER -VS- REPUBLIC (2003]1 EA 50 (CAK), the Court of Appeal held that proceedings conducted without a qualified prosecutor, or where the prosecutor is not indicated, renders the whole trial a nullity. I am bound by the decision of the Court of Appeal. However, in my view, what happened on 27/11/2006, was strictly speaking not the proceedings that ended up in the conviction of the appellant. It was in the nature of proof of surety for bail, who was approved by the court. In my view, this was just akin to a mention of the case. Therefore, in my view, the decision of the Court of Appeal in the ELIREMA case (supra) is not applicable. The proceedings herein therefore did not become a nullity by virtue of the court record indicating who the prosecutor, if any, was present.

The second complainant of the appellant is that the medical evidence was farfetched. I do not think so. There is no evidence that the person who examined the appellant was not Dr. Njagi (PW3). The fact that no spermatozoa was found on the complainant did not also mean that no defilement occurred. A penetration can occur without ejaculation. In addition, the infection of the complainant was not stated to have been transmitted by the appellant, nor was it said to be transmittable. It could as well be because of bad hygiene or carelessness by a young girl. Therefore, the fact that the appellant was not proved to be infected did not mean that he did not defile the complainant. The evidence of the doctor, infact, established that defilement did occur with the breaking of the hymen and the inflammation in the vagina.

That ground also fails.

The third complaint of the appellant is that the magistrate erred in relying on the evidence of the complainant, which required some independence evidence. I presume that the appellant is stating that the evidence of the minor complainant, needed corroboration. Indeed, the complainant was 13 years old. After voir dire examination, the magistrate decided to take unsworn evidence from her, but allowed her to be cross-examined. Probably the cross-examination was not necessary, since the magistrate allowed the complainant to give unsworn evidence

The law is that, the evidence of a complainant who is a child of tender years in sexual offences does not require corroboration, so long as the court is satisfied that the child is telling the truth. This is clearly stated under the proviso to section 124 of the Evidence Act (cap.80), which was introduced under Act No. 5 of 2003, and states:

“124-----

Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”

In our present case, the evidence of the complainant child is in fact consistent with the evidence of the mother PW2. The child reported the incident almost immediately. The allegation of the child that she was defiled, is corroborated by the evidence of the doctor (PW3) who confirmed that the hymen was broken and also there was inflammation in the vagina. All of this was consistent with defilement. In my view, there was ample evidence that there was defilement, and there was also adequate proof that the defilement was by the appellant, as there does not appear to be any reason why the complainant should have framed up the appellant. The two were evidently together at the time of the incident, and the appellant took the opportunity to commit the offence. The ground is dismissed.

The appellant also complains that his defence was not considered. I do not agree with him. The learned magistrate considered his defence and dismissed it, as the magistrate found that it lacked validity and was doubtful. I also find that the defence did not shake the prosecution case.

For the above reasons, I find no merits in the appeal against conviction. I find that the prosecution proved its case against the appellant beyond any reasonable doubt.

I now turn to the sentence. The appellant complains that the sentence was harsh and excessive. The appellant was sentenced to serve 20 years imprisonment. Under section 8(3) of the Sexual Offences Act – No. 3 of 2006, the minimum sentence for an offence of defilement of a child of an age between twelve and fifteen years is 20 years imprisonment. The complainant, in our present case, was aged 13 years. Consequently, the magistrate imposed the lawful minimum sentence. I find no misdirection on the part of the magistrate. I find no basis to interfere with the sentence imposed.

Consequently, I dismiss the appeal and uphold both the conviction and sentence.

Dated and delivered at Nairobi this 16<sup>th</sup> day of April, 2008.

**George Dulu**

**Judge**

**In the presence of –**

Appellant in person

Mrs. Gakobo for State - absent

Mwangi – court clerk