



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Criminal Appeal 10 of 2003**

**PETER MACHARIA GATHURA.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

***Being An Appeal Against conviction and sentence of Miss R. N. Muriuki, Resident Magistrate, In The Resident Magistrate's Criminal Case No. 501 of 2002 of Kangema)***

**JUDGMENT**

The Appellant was charged with the offence of defilement of a girl under the age of 14 years contrary to *Section 145(1)* of the Penal Code. He was also charged with the alternative offence of indecent assault contrary to *Section 144(1)* of the Penal Code.

It was alleged that on 8<sup>th</sup> July 2002 at [*particulars withheld*] in Muranga District, the Appellant had carnal knowledge of TNC a girl under the age of 14 years. Particulars relating to the alternative count alleged that on the same date at the same place the Appellant indecently assaulted TNC a girl under the age of 14 years.

The Appellant was convicted of the offence of defilement the learned trial magistrate finding that the Appellant had been identified by the complainant and her companion P.W.2 and that their evidence was corroborated by that of P.W.5 as to the identification. That having been done, the evidence of other witnesses came in to support defilement.

I have read the evidence on record and make these brief observations. There was either failure by the Prosecutor or some witnesses went to the trial court to tell lies. The prosecutor had statements of all witnesses and knew or ought to have known the case he wanted to confront the Appellant with. He should therefore have ensured that the evidence of P.W.5, Charles Mukuha whom the Appellant claims to have had a grudge with, was fussed with the unsworn evidence of P.W.1 the complainant TNC and P.W.2 CW

In other words if what P.W.5 said is truth, P.W.1 and P.W.2 should have talked about him in their respective evidence. It was important for those witnesses to have told the court in their respective evidence that they met P.W.5 at the time they were with the Appellant and that P.W.5 greeted them. That was important particularly for the purpose of identification since the two children, from their evidence, do not show they knew the person (the offender) who was with them and nowhere do they say they identified him before the Appellant was arrested. The identification the learned trial magistrate was relying upon on the part of the two children was dock identification which is useless in the absence of out of dock identification by the same witnesses.

Moreover, looking at the evidence of P.W.5 more closely, he talks of there having been children other than P.W.1 and P.W.2. Those are children P.W.1 and P.W.2, and even P.W.3 M W M, did not see and did not therefore talk about. Why is there that inconsistency?

Also P.W. 4 JW the mother of the Complainant who was so much concerned and involved and could have welcomed the assistance of P.W.5 on 8<sup>th</sup> July 2002, received no such assistance and does not therefore mention P.W.5. The father of the Complainant whom P.W.5 talks about gave no evidence.

Moreover if what P.W.5 is talking about is truth, why did the arrest of the Appellant have to wait until 14<sup>th</sup> July 2002? The Appellant told the court he had himself gone to the Police Station in connection with another case when he was detained in connection with this case.

P.W.3 told the court she saw a man but she did not say whether the man was the one P.W.1 was talking to her about. Her evidence lacks that connection yet she was there with P.W.1 talking. In any case P.W.3 did not identify the man.

There are other points I should have commented upon but I do not see the necessity since I have found that the identification of the Appellant, in the circumstances of this case, was not satisfactorily proved and I am giving the benefit of the doubt to the Appellant.

Accordingly, I do hereby allow this appeal, order the conviction of the Appellant quashed and set aside the sentence imposed. The Appellant be released forthwith unless lawfully detained in some other cause.

Dated this 28<sup>th</sup> day of February 2005.

**J. M. KHAMONI**

**JUDGE**