



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 46 OF 2012**

**PETER NDUNGU MATIMO .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal case No.17 of 2011 of the Chief Magistrate's Court at Nakuru by Hon. B. Kituyi-Resident Magistrate)*

**JUDGMENT**

1. **Peter Ndungu Matimo**, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) (2) (sic) of the Sexual Offences Act No. 3 of 2006.
2. The particulars were that on diverse dates between 14<sup>th</sup> and 28<sup>th</sup> January 2011 at **[particulars withheld]** village in **Nakuru** District within Rift Valley Province unlawfully and intentionally caused his penis to penetrate the anus of **BWK**, aged 9 years.
3. The appellant was sentenced to life imprisonment. He now appeals against both conviction and sentence.
4. The appellant raised four grounds of appeal as follows:
  - a) The learned trial magistrate erred in law and in fact by disregarding the fact that his rights to fair trial were violated.
  - b) The learned trial magistrate erred in law and in fact by convicting him where elements of the offence of defilement were not proved.
  - c) The learned trial magistrate erred in law and in fact by convicting him on insufficient evidence which was full of contradictions.
  - d) The learned trial magistrate erred in law and in fact by casually rejecting his defence.
5. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards. He urged the court to find that the sentence meted out was lawful.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. I have noted that the charge was erroneously drafted. It ought to have been drafted as follows:

**Contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act...**

This error, in my opinion, did not prejudice the appellant in any way. He understood the charges facing him and fully participated in the trial. The error is therefore curable under section 382 of the Criminal Procedure Code.

8. The appellant complained that his rights to a fair trial were violated. My perusal of the record does not reveal any such violation. What he highlighted as the breach was that his defence was not considered. I will revert to this issue of defence later in my judgment. The ground of his rights to fair trial is dismissed for it is not merited.

9. In order for the prosecution to discharge its duty in the offence of defilement, it has to prove beyond reasonable doubt that (a) there was

penetration, (b) that the person accused was responsible for the penetration; and (c) that the age of the complainant was established. These ingredients were recapitulated in the case of **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** by the learned judge Joel M. Ngugi.

10. BW (PW1) in her evidence testified that the man who did bad manners to her was called Peter and she identified him in Court. According to her, she was playing near the road next to their house. The appellant held her and took her to his house and did what she called bad manners to her. She testified that he removed her skirt and blouse and her panty. He then removed his trouser and panty and did bad manners to her she went on to say that she felt a lot of pain. When she wanted to urinate she could not because she felt a lot of pain. In her evidence she said that he did bad manners to her on three occasions. At the time of the appellant's arrest she testified that she was the one who pointed him out to the police.

11. AWM (PW3) is the village elder from where both the complainant and the appellant reside. She testified that the complainant informed her that the appellant used to defile her on his bed and give her sweets. This allegation was repeated by the area chief Lewis Kiaraho Mwangi (PW4) who testified to the same effect.

12. The medical evidence was adduced by Tabitha Ngugi (PW5). She is a clinical officer based at Lare Health Centre. She said at the time she examined the complainant on 29<sup>th</sup> of January, 2011, she found that her hymen was broken 2 weeks prior to the examination. She also found that the vulva was red and the girl was in pain and had found smelling and yellowish discharge. According to her she had been defiled. I make a finding that the prosecution proved penetration to the required standards.

13. The complainant (BW) testified that she was 9 years old. Her out-patient card which was issued at Lare Health Centre, indicate that she is 8 years old. However, her child immunization card gives her date of birth as 10<sup>th</sup> March 2002. This is an authentic record which indicates all the dates she was immunized. We can therefore without any shadow of doubt conclude that at the time of the offence the minor was aged 8 years and 10 months. The ingredient of age was therefore proved. The ground that the elements of defilement were not proved has no basis.

14. Though the appellant raises an issue with the judgment that the learned trial magistrate did not consider his defence this is not the true position. Upon my reading of judgment I find that the magistrate considered his defence before dismissing it. This ground also lacks merit.

15. 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 appellant herein was sentenced to life imprisonment. This is the only prescribed sentence. It was therefore lawful.

16. From the foregoing analysis of the evidence on record, I find that the appeal lacks merit. The same is dismissed.

**DATED and SIGNED at Nakuru this 5<sup>th</sup> Day of December, 2019**

.....

**KIARIE WAWERU KIARIE**

**JUDGE**

**DELIVERED at Nakuru this 10<sup>th</sup> day of December, 2019**

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**JOEL NGUGI**

**JUDGE**