



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

HIGH COURT CRIMINAL CASE NO. 30 OF 2016

ZACHARIAH NYAGAKA GIKERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of HON. Makila RM in criminal case no. 355 of 2013

delivered on the 5<sup>th</sup> August 2018)

**JUDGMENT**

1. Zacharia Nyagaka Gikera the appellant was charged with defilement of a child below eleven years contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act. The particulars of the offence were that, on the night of 31/3/2013 and 1/4/2013 in Kisii central District within Kisii County the appellant intentionally caused his penis to penetrate the vagina of RMN a child aged 10 years. The appellant was sentenced to life imprisonment by trial court. His appeal is against the conviction and sentence.
2. The appellant's grounds of appeal are that; the trial court convicted him on flawed evidence, the prosecution case was not proved beyond reasonable doubt, the complainant's age was not proved, his defence was over looked.
3. The respondent conceded to the appeal.
4. As the first appellant court it's my duty to re-evaluate the evidence that was adduced before the trial court and arrive at my own conclusion bearing in mind that I did not hear and see the witnesses( **see Okeno vs. Republic**)
5. The appellant's main ground of appeal is that he was convicted on flawed evidence and that the prosecution did not prove their case beyond reasonable doubt.
6. I have considered the evidence adduced. The complainant in her evidence testified that she was defiled by the appellant. Her evidence on what happened on the material day is not consistent. In her evidence she indicated that she was being taken home then she was handed over to her father. Her evidence on how she met the appellant has gaps. What happened between the time she was with her father and then met the appellant is not clear. The time of the alleged defilement too is not indicated. Pw1 said it was in the evening. From the record I cannot tell if the complainant knew the appellant or how she identified the appellant. When examining the complainant the court noted that she had a troubled childhood. The only persons who could have corroborated her evidence were not called to testify. There is evidence that the appellant was defiled but it's not clear who defiled the complainant on the material night.
7. On the appellant identification as the one who defiled her. The appellant was not arrested on the material day of the alleged offence. From the evidence of Pw3 the appellant was not taken through any identification parade. It appears that the appellant was taken to the complainant. An identification parade was necessary in the circumstance. On the whole I find the conviction is unsafe. The conviction is quashed and sentence is set aside. The appellant shall be set free unless lawfully held.

**Dated signed and delivered at Kisii this 17<sup>th</sup> day of December 2018.**

**R.E.OUGO**

**JUDGE**

**In the presence of ;**

**Appellant in person**

**Mr. Otieno for the State/ Prosecution**

**Rael Court Clerk**