



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO. 331 OF 2015**

**MOSES MARAPA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....STATE**

*(Appeal from the Sentence of the Chief Magistrate's Court at Narok Hon. A. K. Ithuku –  
Senior Resident Magistrate delivered on the 22<sup>nd</sup> May, 2014 in CMCR Case No. 1776 of 2013)*

**JUDGEMENT**

The appellant **MOSES MARAPA** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Narok Law Courts. The appellant was arraigned in the lower court on 9/12/2013 facing the charge of **DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(1)(4) OF THE SEXUAL OFFENCES ACT, 2003**. The particulars of the charge were that

***“On the 6<sup>th</sup> day of December, 2013 in Narok North District within Narok county intentionally and unlawfully caused his penis to penetrate the vagina of N M a girl aged 16 years”***

The appellant pleaded ‘**Not Guilty**’ to the charge and his trial commenced on 23/11/2013. The prosecution called four (4) witnesses in support of their case.

The complainant told the court that she is 16 years old and works in a hotel in Nkareta. On 6/12/2013, the complainant left work and headed for home together with her two friends Chepkurui and Alba. Later the appellant, one Sango and one Leshamoni joined them in their house. At some point the complainant and Chepkurui went to sleep locking the door. The three men came and banged the door demanding to be let in but the girls declined to open.

Then the three men then forced their way into the house. Chepkurui ran away leaving the appellant behind.

The appellant and Sango proceeded to rape her in terms. The next day when the complainant went to work her employer advised her to report the incidence to the police. She was taken to Narok Hospital there she was examined and treated. The appellant was later arrested and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denies having defiled the complainant. On 21/5/2014 the learned trial magistrate delivered his judgment in which he convicted the appellant and

sentenced him to serve fifteen (15) years imprisonment. Being aggrieved the appellant filed this appeal.

Being a first appeal this court must review and re-evaluate the prosecution case a fresh and draw its own conclusions on the same (see **AJODE Vs REPUBLIC [2004] 2 KLR 81**)

The first question is whether the age of the complainant was properly established. In her evidence the complainant stated that she was 16 years old. No document e.g birth certificate, vaccination and school document or baptism card was produced in court to prove her age. No other prosecution witness gave evidence regarding the complainant's age.

**PW4 PC FAITH NAIMODU** who was the investigating officer testified that an age assessment conducted on the complainant found that she was 16 years old. However that age assessment report was **not** produced as an exhibit in this case. **PW4** stated that it was left in the file presented to the children's court and thus was not available. What was the difficulty in **PW4** retrieving that report for production in the Criminal Case. The witness did not describe what efforts (if any) she had made to retrieve either the report or a copy of the same. I can only put it down to pure laxity as the reason why this proof of age was not submitted to the trial court.

As things stand the complainant's assertion that she is 16 years old remained unproven. In charges brought under the Sexual Offences Act, 2006, the age of the victim is a crucial matter – one which requires proof beyond reasonable doubt. Failure to tender proof of the victim's age renders the charge of defilement unproved.

Secondly there must be proof that the complainant was in fact defiled i.e. that penetration occurred. In this case the complainant alleges that she was defiled by two men in turns. The person who was with her at the time and who could confirm that two men broke into their room was her friend called Chepkurui. This Chepkurui did not testify as a witness in this case.

Be that as it may **PW2 BENJAMIN TUM** a clinical officer attached to the Narok District Hospital testified that he did examine the complainant. He noted bruises to her genitalia, torn hymen and slight bleeding from the vaginal walls. These are physical manifestations which prove forcible penetration. **PW3** concluded that there was evidence of penile penetration. He filled and signed the P3 form which was produced in court as an exhibit **Pexb 1**.

This was expert medical evidence which was not controverted at all. On the basis of this medical evidence I am satisfied that there exists proof of penetration and I find that the complainant was indeed defiled as she had alleged.

The final and crucial question is whether sufficient evidence exists to point at the appellant as one of the two men who defiled the complainant on the night in question. The complainant gave the names of her assailants as '**Sango**' and '**Moses**' [the appellant herein]. The incident occurred at night. The complainant made no mention of any light source in the room which enabled her to see and identify the two men.

As stated earlier the complainant had testified that when the room was broken into, her friend '**Chepkurui**' was present but managed to run away. This '**Chepkurui**' was not called to corroborate the evidence that their room was indeed broken into and to confirm if she saw the attackers. Further the complainant stated that after the incident she went to sleep at a friend's house. This friend was also a crucial witness to confirm the testimony of the complainant. Failure to call these two witnesses severely weakens the prosecution case.

As it is the only person who is able to identify the appellant was the complainant herself. The circumstances pertaining at the time i.e. the fact that it was dark would hinder a positive and reliable identification. A mistaken identity cannot be entirely ruled out. In the circumstances, I would award the benefit of doubt to the appellant. The appellant conviction was in my view unsafe. As such I quash that conviction and I set aside the 15 year sentence imposed by the trial court.

This appeal succeeds. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and delivered in Nakuru this 10<sup>th</sup> day of February, 2017.**

Appellant in person

Mr. Chigiti for State

**Maureen A. Odero**

**Judge**