



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO. 61 OF 2016**

*(Appeal originating from the conviction and sentence by Hon. KACHUODO RM in Nyeri S.O CASE NO. 32 of 2014)*

**SAMWEL GITONGA WAMBUI..... APPELLANT**

**=VERSUS=**

**REPUBLIC..... RESPONDENT**

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

The appellant was charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act no.3 of 2006. The particulars were that on unknown dates between January and July 2014 at chaka trading centre within Nyeri County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of E.M.W a child aged 9 years. The appellant was charged with an alternative charge of indecent Act with a child contrary to section 11(1) of the Sexual Offences Act no.3 of 2006. Particulars of alternative charge are that on diverse dates in January and July 2014 at chaka trading centre within Nyeri County the appellant intentionally touched the vagina of E.M.W. with his penis.

The appellant was convicted of the main charge and sentenced to life imprisonment. He filed appeal on both conviction and sentence. He raised three grounds of appeal, one that the trial magistrate erred on relying on insufficient evidence. Two that the charge was defective and three failing to consider the appellant's defence. On ground one, he submitted that the prosecution failed to prove their case beyond reasonable doubt. He submitted that no voire dire examination was conducted to establish whether the complainant understood the meaning of oath and importance of telling the truth as required under section 125(1) of the evidence Act. He cited the case of M.K vs Republic (2015) eKLR where the court held that voire examination is necessary for a child aged below 10 years. He added that the complainant never mentioned the appellant's penis in her testimony. The appellant submitted that the witnesses contradicted themselves when complainant's mother said that the complainant informed her that appellant used to take her to his house while the other witnesses said she was defiled in mama m's house. He further said that the child mentioned the name Gitonga before the teachers but when asked in the presence of her mother and at home by her parents, she said it was a man she could identify physically. He further submitted that the teacher testified that the girls started exhibiting bad behavior by kissing each other and when the school decided to take them to hospital for checkup, the complainant fabricated a story against him. He added that it is not only defilement which can break the heymen. He submitted that the doctor did not find laceration on the labia, no discharge, no spermatozoa and that the girl was not defiled but was practicing lesbianism. He wondered why the complainant never informed her mother yet the mother said the appellant used to go to her salon for haircut. He submitted that delay in taking the complainant to hospital raises doubt as to whether she could have been defiled on the day she is alleged to have been defiled at

mama m's home a day which is material to this case.

On ground 2 the appellant submitted that the charge is defective for the reason that the date he is alleged to have defiled the complainant is unknown. Secondly he submitted the sections under which he has been charged do not exist in the sexual offences Act. He submitted that the prosecution never amended the provisions cited but the magistrate tried to amend in the judgment by applying section 382 of the criminal procedure code. He submitted that the defect in the charge sheet embarrassed his defence.

Finally he submitted how in his defence he elaborated how he never participated in the alleged offence and how he was approached to pay kshs 20,000 by pw2 the mother of the complainant. He said that he was charged after refusing to pay the money. He faulted the trial magistrate for failing to analyze his defence.

Ms. Mwaniki for the state submitted that the state is contesting the appeal on both conviction and sentence. She submitted that the complainant's evidence was consistent. She said that the complainant testified how a lady by the name mama m lured her into the appellant's house and convinced her to make the appellants bed and how the appellant went in to the room and defiled her. She submitted that the fact that the complainant was defiled was corroborated by pw4 the doctor who produced p3 form and confirmed that the complainant's hymen was broken. She submitted that the complainant was able to properly identify the appellant as she described him as a dark skinned man with dreadlocks who used to work in [particulars withheld] area where they lived. She submitted that this was confirmed by pw2 who said that the girl pointed at the appellant when he passed her place of work. She submitted that her evidence was believable and safe; and that under section 124 of the evidence Act no corroboration is required to evidence of complainant in sexual offences. She submitted the trial court gave reasons for believing complainant's evidence. On the second ground she submitted that section 382 of the criminal procedure code cures the defect in the charge sheet. She submitted that the appellant was aware of the charges he was facing as he actively participated in the trial. On the final ground she submitted that appellants defence was contradictory in that he said he did know pw2 then he says pw2 had a salon in chaka area further he said there was a grudge between him and pw2. She submitted that there can never be a grudge with somebody you don't know. She submitted that the appellants defence was dismissed on ground on contradictions.

On the ground that voire dire examination was not conducted the state counsel urged court to look at page 7 of the proceedings on record which indicate that the minor was examined and the court ruled that she give unsworn evidence and that the appellant was given an opportunity to cross examine her. On ground that she was unable to describe the appellant's organ she submitted that the evidence was very clear as the minor said the appellant put his thing for urinating into her and the thing for urinating is construed as genital organ. She submitted that evidence of all witnesses was clear and corroborated each other. She concluded that the conviction is safe and sentence legal. She urged the court to uphold both conviction and sentence.

This being the first appellate court I have a duty to reevaluate the evidence adduced before the trial court and come up with my own conclusion. While doing that I have in mind the fact that I never had the opportunity of taking evidence first hand and observing the demeanor of witnesses. I refer to the case of **OKENO VS REPUBLIC [1972] EA 32** where it was stated as follows:-

***“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”***

Record show that the complainant testified one mama mutitu the owner of the salon her mother worked in took her to her house and asked her (the complainant) to make the bed. She (mama m) called the

appellant whom she referred to as Gitonga. She testified that the appellant went to the house removed complainant's clothes including pant then removed his trouser and innerwear and put his thing for urinating into hers. She said that the said mama m warned her against telling her mother and that she feared to tell her mother as mama m was with her in the salon. She said while at school the teacher asked if any of the girls had slept with a man. She told the teacher what Gitonga had done to her. She said her mother was called to school and before the teacher she informed her it was Gitonga.

Pw2 the complainant's mother confirmed being called to complainant's school by her teacher who revealed to her that her daughter confessed that she had been defiled.pw2 said she went back home and informed her husband. Together with her husband they asked the complainant who defiled her. She said the complainant did not speak. They later asked her and she disclosed that a certain young man had been taking her to his house and defiled her. She said that they asked the complainant if she knew him by name but she said she did not know though she could identify him by appearance; she said the girl described him as a person who carries load and wears dreadlocks. The father suspected Gitonga the appellant herein.pw2 testified that the child later pointed out at the appellant when he passed near her salon carrying loads. She said that the complainant told her that mama m used to take her to her house where she would meet Gitonga. She said that her daughter revealed to her that when she sent her to mama m in the middle of second term in the year 2014, she found Gitonga in the house and he defiled her. She said that E N also known as mama m was arrested together with the appellant but she does not know why the said mama m has not been arraigned in court. She produced birth certificate showing that the complainant was born on 28<sup>th</sup> December 2005.In cross examination pw2 said that the appellant used to go the salon for hair cut.pw3 the complainant's teacher confirmed that the complainant confessed that someone had been defiling her but did not give a name when asked in the presence of her mother in school.pw4 a doctor who produced p3 filled by his colleague testified that the child's heymen was broken though she had no bruises or laceration on her labia minora and there was no spermatozoa. In cross examination the doctor said that it is not only defilement which breaks the heymen. He confirmed that the child was defiled.pw5 arrested the appellant and n .pw6 the investigating officer said that on interrogating the child she said she had been defiled severally at mama m. He said the woman said she was not aware that the child was being defiled in her house. He said that she escaped and has never been arrested to date.Pw6 said that the child gave his description.

The appellant adduced sworn evidence. He denied having committed the offence and said that he did not know the complainant and her mother. He said pw2 asked him to pay 20,000 which he refused and that another person who was also in the cells paid kshs 20,000 and she was released.

On perusal of the record I note that the examination was done on the minor before the court indicated that she gives unsworn evidence. The responses of the child have been recorded and from the response it clear that the child knew the importance of saying the truth, the appellant was given opportunity to cross examine her. Appellant submitted that the charge was not proved beyond reasonable and penetration not proved .pw2 said that the complainant did not give the appellants name to her. From the proceedings it is evident that the complainant had been threatened against speaking about the incident which made her to go through it repeatedly without telling her mother. I believe repeated incidences of defilement done broad daylight gave the complainant sufficient opportunity to identify the appellant. Evidence show that the child was finding the appellant at mama matuti's house. I do not see contradiction on where the incident took place. By the child saying appellants place does not portray a different scene from mama m's house. It's clear that she meant the house the said mama m took her to. On penetration pw4 confirmed breakage of heymen. He however said there were no laceration or bruises the exact day of defilement was not given. There is a possibility that the bruises could have healed as exact dates of defilement have not been given. On description of the genital organ, complainant talked of the suspect's thing for urinating which clearly mean genital organ. Lastly the section defining the offence and penalty section were put together. The prosecution should have amended the charge sheet but failure to do so is not fatal to the proceedings before the trial magistrate as the record show that the appellant fully participated in the trial and knew the charges he was facing. The defect is curable under **section 382 of the criminal procedure code which provide as hereunder:-**

**"...no finding, sentence or order passed by a court of competent jurisdiction shall be reversed**

**or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.”**

From the foregoing if find that there is no inconsistency in the evidence adduced by the prosecution witnesses, defilement was proved beyond reasonable doubt and there is no mistake in identification of the appellant by the complaint. I therefore find the conviction safe and sentence imposed legal. The appeal is hereby dismissed.

**Dated, signed and delivered at Nyeri this 19<sup>TH</sup> day of JULY,2017.**

**RACHEL NGETICH**

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**HIGH COURT JUDGE**