



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.160 OF 2013**

*(An Appeal arising out of the conviction and sentence of Hon. Olando - RM delivered on 12<sup>th</sup> August 2012 in Kibera CM. CR. Case No.3325 of 2012)*

JOHN DABURU KAMAU.....  
**APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, John Daburu Kamau was charged with **defilement** contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act**. The particulars of the offence were that on the 26<sup>th</sup> day of June, 2012 at Kangemi, Dagoreti Division, within Nairobi County, the Appellant unlawfully and intentionally committed an act by inserting his male genital organ (penis) into the female genital organ (vagina) of E O M which caused penetration into the said child aged 14 years. He was alternatively charged with the offence of **committing an indecent act with a child** contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant unlawfully and intentionally committed an indecent act by touching the female organ (vagina) of E O M, a child aged 14 years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main count of **defilement**. He was sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his amended grounds of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he was convicted on the basis of evidence adduced in court which, according to him, did not support the offence he was charged with. He faulted the trial magistrate for not affirming the complainant prior to her testifying in court. He faulted the trial magistrate for relying on the prosecution's inconsistent and contradictory evidence to convict him. He took issue with the fact that his defence had not been considered before the trial court reached the decision to convict him. For the above reasons, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Ngetich for the State opposed the appeal. She submitted that the prosecution had adduced consistent and credible evidence which connected the Appellant with the offence. She stated that the complainant's evidence was corroborated by the evidence

of PW2. Medical evidence established that indeed the complainant had been defiled. She was of the view that the sentence imposed on the Appellant was legal. For the above reasons, the State urged the court to find the appeal without merit and dismiss it.

The facts of the case are as follows: the complainant, E O M (PW1) was said to be aged fifteen (15) years at the time of the incident. The birth certificate of the complainant was produced as **Prosecution Exhibit No. 3**. The birth certificate indicated that the complainant was born on 16<sup>th</sup> November 1997. The complainant recalled that on the material evening of 26<sup>th</sup> July, 2012 at around 7.00 p.m., she had come home from school. She changed her clothes then went to a toilet that was outside their home. The Appellant followed her inside the toilet. She recognized the Appellant. She knew him prior to the incident as she had known the Appellant to be the person who usually cleaned the toilet. She testified that the Appellant held her mouth and threatened to throw her into the water if she made noise. The Appellant then dragged her to the bathroom where he removed the Appellant's underpants and severally sexually assaulted her until 11.00 pm. The complainant testified that when the Appellant was through, she put on her clothes. She testified that she felt pain and was bleeding from her vagina.

The Appellant then dragged her and handed her over to another man. The said man took her to a house where he locked her up. She remained detained in the house with her hands tied and mouth gagged using a piece of cloth. She testified that the said man brought her milk and mandazi every day for lunch and dinner. She managed to escape from the house a week later when the said man forgot to lock the house. The complainant's mother, B L (PW2) testified that on the material date of 26<sup>th</sup> July 2012 she had sent the complainant to buy paraffin but she did not return back. She reported her disappearance to Kabete Police Station. She testified that on 7<sup>th</sup> July 2012 she received a phone call informing her that the complainant had been found. She was asked to get to the house immediately. When she arrived at the house, she found the complainant sitting outside a shop. She had blood stains on her clothes.

The complainant reported to her mother that she had been defiled by the Appellant. She reported that the Appellant had handed her over to another person who had locked her in a house for the time went missing. A report was made to Kabete Police Station. The police advised PW2 to take the complainant to the hospital for medical examination. The complainant was taken to Nairobi Women's Hospital where she was examined by Dr. Dimeka. The medical examination was done on 7<sup>th</sup> July 2012. The medical treatment notes and the P3 form were produced into evidence on behalf of Dr. Dimeka by PW3 Dr. Duncan Sarunya. The medical report revealed that the doctor carried out a vaginal examination on the complainant and found that there was a foul smelling mucous. The complainant's hymen was torn. The doctor formed the opinion that indeed the complainant had been defiled. He signed the P3 form and produced the same as **Prosecution Exhibit No. 1**.

After the matter was reported at Kabete Police Station, Inspector Ezekiel Oundo investigated the case. He referred the complainant to the police doctor for medical examination. The complainant and the Appellant were seen by Dr. Kamau based at the police surgery. This was on 12<sup>th</sup> July, 2012. He found that the complainant's hymen was broken. He signed a P3 form which was produced into evidence on his behalf by Dr. Joseph Maundu as **Prosecution Exhibit No. 2**. After concluding his investigations, PW3 formed the view that indeed a case had been established for the Appellant to be charged with the present offence. When the Appellant was put on his defence, he denied sexually assaulting the complainant.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial court so as to enable it to reach its independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to always have in mind the fact that it never saw nor heard the witnesses as they testified and therefore cannot make any finding regarding the demeanor of witnesses. (See **Njoroge versus Republic (1987) KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution established the charge of defilement contrary to **Section 8(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

For the prosecution to establish its case on the charge of defilement, it is required to establish the following three (3) elements: The first element is penetration. In the present case, it was the complainant's

testimony that that the Appellant followed her inside the toilet and dragged her to the bathroom where he removed her underpants before he sexually assaulted her on a mattress that was in the bathroom. In the words of the complainant;

***“He then removed all my clothes. He removed my bra and the innerpant. He then removed his trouser and the innerpant. He then pushed me on the mattress. He then came and laid on me. I was lying on my back and he started to rape me. He raped me. He inserted his penis into my vagina and started to rape me. This was my first day to have sex. He went on for a long time”.***

It is obvious from the above description that the prosecution had indeed established that the Appellant penetrated the complainant. The complainant's testimony in that regard was corroborated by the doctor's evidence. The complainant testified that after the sexual assault she bled. It was her first time to have sexual intercourse. When the doctor examined her, he saw that she had a broken hymen. This confirmed the complainant's testimony that she had indeed been defiled.

The second element that the prosecution is required to establish is the identity of the perpetrator. The Appellant was known to the complainant prior to the incident. The complainant testified that she has on several occasions found the Appellant manning the toilet used by the complainant. This court holds that the prosecution did indeed establish that it was the Appellant who was the perpetrator of the crime. The Appellant's defence, other than explaining the circumstance of his arrest, did not dent the credible and cogent evidence adduced by the prosecution witnesses.

The third element that the prosecution is required to establish is the age of the complainant. In defilement cases, the age of the complainant is critical in the determination of the sentence to be imposed upon the conviction. In the present appeal, the age of the complainant was established by the birth certificate that was produced. The complainant was indeed aged fourteen (14) years at the time of the sexual assault. The prosecution established the age of the complainant to the required standard of proof beyond any reasonable doubt.

The prosecution therefore established all the elements of the offence of **defilement** to the required standard of proof beyond any reasonable doubt. The upshot of the above is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The conviction of the trial court is upheld. The sentence imposed on the Appellant was lawful. It is similarly upheld. It is so ordered.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF SEPTEMBER 2015**

**L. KIMARU**

**JUDGE**