



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.147 OF 2013**

*(An Appeal arising out of the conviction and sentence of Hon. L.D. Ogombe - RM delivered on 12<sup>th</sup> August 2013 in Kiambu CM. CR. Case No.483 of 2013)*

**MARTIN EHUNYA MASINDE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Martin Ehunya Masinde was charged with the offence of **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 12<sup>th</sup> March 2013 at [Particulars withheld] Village in Kiambu County, the Appellant committed an act with his genital organs namely penis which caused penetration into the genital organ namely vagina of L M, a girl child aged 13 years. In the alternative, he was 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 intentionally and unlawfully touched the breasts and vagina of L M, a child aged 13 years using his penis and hands. When arraigned in court, he pleaded not guilty to the charges. The prosecution called five (5) witnesses. The Appellant was put on his defence. After full trial, the Appellant was convicted on the main charge 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 petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted yet the trial magistrate had failed to consider his defence. He took issue with the fact that he had been convicted on the basis of evidence that did not establish his guilt to the required standard of proof beyond any reasonable doubt. He was of the opinion that the evidence of the prosecution was inconsistent and not credible. Finally, the Appellant was aggrieved that no medical evidence was produced linking him with the offence. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant made an oral submission in support of his appeal. He urged the court to allow his appeal. He submitted that he was framed with the charge. Ms. Kimiri for the State opposed the appeal. She made an oral submission to the effect that the prosecution had adduced sufficient evidence to establish its case on the charges brought against the Appellant to the required standard of proof. She urged the court to dismiss the appeal and confirm the conviction and sentence of

the trial court.

### **What are the facts of this case?**

The complainant in this case is L M (PW2). She was at the material time aged thirteen (13) years. Her age was confirmed by her mother PW1 H W M who produced her birth certificate. The birth certificate was produced as ***Prosecution's Exhibit No. 2***. The birth certificate indicated that the complainant was born on 30<sup>th</sup> September 2000. The complainant recalled that on 12<sup>th</sup> March 2013 at around 7.00 p.m. she went to the toilet. It was outside their house. On her way back from the toilet, she saw the Appellant who was her neighbour. She testified that the Appellant grabbed her and dragged her inside his house and locked the door. He removed his trousers and the complainant's clothes. He pushed the complainant on his bed and had unprotected sex with her. She felt pain. When he finished, he continued to detain the complainant in his house.

The complainant's father arrived home in the evening and could not find her. He went to the market where PW1 operated a business to look for her. They returned back home to inquire from the neighbours on the complainant's whereabouts. A neighbour PW3 Isaac Maina Njoroge directed PW1 to the Appellant's house as he had heard the complainant's voice from the Appellant's house. PW1 went to the Appellant's house to inquire from the Appellant where the complainant was. The Appellant told her that the complainant was not in his house. PW1 stormed into the Appellant's house and found the complainant trembling inside the house. She suspected that the complainant could have been defiled. PW1 therefore locked the Appellant's house from outside and raised alarm. She then ran to Thindigua Police Station where she reported the incident. Meanwhile, the Appellant managed to escape from his house and also ran to Thindigua police station where he was detained and later taken to Kiambu Police Station. The complainant was taken to Kiambu District Hospital where she was examined by Dr. Hindu. The medical treatment notes and P3 form were produced into evidence on behalf of Dr. Hindu by PW4 Dr. Linda Nguru. The doctor noted that the complainant's underwear was stained with blood. Her vagina was red in color. Her hymen was broken. The medical report and P3 form were produced as ***Prosecution's Exhibit Nos. 2 and 3***.

PW5 Sergeant Martha Oyugi was assigned to investigate the case. After concluding his investigations, he formed the opinion that a case had been made for the Appellant to be charged for the disclosed offences. PW4 produced the complainant's bloodstained underpants as ***Prosecution's Exhibit No. 4***. When the Appellant was put on his defence, he denied assaulting the complainant. He insisted that he was framed with the charge due to an existing grudge between the Appellant and PW1 over bicycle that belonged to the Appellant which the Appellant alleged had been damaged by the complainant.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (**See Njoroge - vs- Republic (1987) KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

Upon re-evaluating the facts of this case and the submission made by the parties to this appeal, this court is of the firm view that the prosecution did indeed prove its case to the required standard of proof beyond any reasonable doubt on the charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act**. To establish a case of defilement, the prosecution was required to prove that the Appellant caused his sexual organ to penetrate the sexual organ of the child. Under **Section 2(1)** of the **Sexual Offences Act**, the definition of a child is the one assigned thereto in the **Children Act**. This means that any person of less than eighteen (18) years of age. In the present appeal, the age of the complainant was established by her birth certificate which was produced into evidence. It showed that the complainant was born on 30<sup>th</sup> September 2000. The prosecution further adduced evidence which established that the complainant was penetrated. The evidence of PW4 indicates that the complainant was examined by a doctor who confirmed that indeed she had been penetrated. Her hymen was broken. The identity of the Appellant was

proved. The complainant testified that the Appellant had sexually assaulted her. He was a neighbour of the complainant. PW1 found the complainant inside the Appellant's house. The evidence adduced by the prosecution was cogent, consistent and corroborated each other on all material respects. The Appellant's assertion that he had been framed with the offence does not hold. The Appellant's defence does not displace the otherwise strong evidence adduced by the prosecution witnesses.

In the premises therefore, the appeal lacks merit and is hereby dismissed. The conviction of the Appellant is upheld. The sentence of the Appellant was lawful. It is similarly upheld. It is so ordered.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2015**

**L. KIMARU**

**JUDGE**