



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Appeal 182 of 2008

EPHANTUS MUTURI GITHINJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Ephantus Muturi Githinji was charged with the offence of defiling a girl under the age of 8 years contrary to section 8(3) of the Sexual Offences Act. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the same Act. He was tried before the Principal Magistrate, Nyahururu and was convicted on the main charge. He was sentenced to life imprisonment and now appeals against both conviction and sentence on the grounds that:

- 1) *He was convicted on insufficient evidence.*
- 2) *The learned trial magistrate erred in law and fact in convicting him on the strength of the evidence of a single identifying witness.*
- 3) *The trial magistrate erred in law and fact in not considering the appellant's defence.*
- 4) *His mitigation that he was in poor health, being HIV positive, was not considered by the trial court when passing sentence.*
- 5) *That the sentence is harsh and excessive.*

The appeal was opposed by the State which was represented at the hearing by the learned State Counsel Mr. Mugambi. The appellant having opted to have the State submit first, in answer to the grounds of appeal, the learned State Counsel told this court that the appellant's conviction was based on sound and reliable evidence of the minor complainant's companions PW2 and PW3 who saw the appellant entice the complainant to go with her into the maize plantation where the act of defilement was committed. The complainant later told them what the appellant had done to her as soon as the two emerged, carrying maize cobs that the appellant gave to the complainant. That being the case, Mr. Mugambi submitted that there can be no doubt that it is the appellant who defiled the complainant as was confirmed by the medical evidence adduced at the trial. Responding to the State's submissions, the appellant told this court that all he sought from this court was a reduction of the sentence. He did not say anything regarding other grounds of appeal.

As appearing in the charge sheet the particulars of the offence in respect of which the appellant was convicted were that; on the 3rd day of November 2007 in Laikipia West District of the Rift Valley Province, had carnal knowledge of C. W.G a girl under the age eleven (11) years.

My review of the proceedings of the lower court reveals that a total of six witnesses testified for the prosecution. The complainant was disqualified from testifying on grounds of lack of capacity. Her mother, **M.W.I** testified as PW1. She told the trial court how on 3rd November 2007 the minor, who had been grazing with her brothers, PW2 and PW3, told her how the appellant had removed her pants and "put her on his pants" she questioned her two young sons who said that the appellant, whom they all referred to as "baba Wangari" or Thirikwa, had told the complainant that he would give her some maize and both he and the complainant went into the plantation. After confirming this information with the complainant, PW1 sought the advice of a neighbour who counselled her to take the minor to hospital. That was done on 4th November 2007. The medical examination performed on the complainant revealed that she had some discharge in her vagina (private parts). She was referred to Nyahururu District Hospital where she was treated and referred for counselling. A P3 issued to PW1 was completed by a doctor. Testifying under cross-examination by the appellant PW1 denied holding any grudge towards him. **PW2 Gilbert Githua** testified under affirmation and described the appellant as someone he knew well. He also told the court how, on the material date, he was grazing with the complainant and his brother. The appellant found them and the complainant asked for some maize. The

appellant walked on briefly then returned saying that he had forgotten (*something*). He then went with the complainant into the maize plantation and later they both emerged together carrying 5 maize cobs. The appellant then left.

The complainant then told PW2 how the appellant had removed her pants and put her “*on his trouser*”. Under cross-examination by the appellant PW2’s evidence was not shaken and he stated that the appellant emerged carrying three maize cobs and the complainant 2.

PW3 John Kiare Gitonga gave similar testimony to that of PW2 and therefore corroborated the same, adding that the appellant was well known to PW3 since he came to their house everyday to collect milk.

PW4, Paul Munge Mwaura testified that on 12th December 2007, he received a report of a defilement case and also that a meeting had been convened at the home of the complainant’s grandfather. He attended the meeting where the matter was discussed and the appellant arrested. PW4 knew the appellant well as a neighbour of his.

PC Daniel Chege testified as PW5. He told the court that upon being informed of the defilement of the minor by the appellant he proceeded to Umoja village on 20th December 2007 and arrested the appellant, who was pointed out to PW5 by the complainant’s father. The appellant was later charged with the offence herein.

The doctor who examined the complainant testified as PW6 and produced the P3 form which she had completed showing that the complainant had reported to the doctor that she had been defiled by a man known to her – a neighbour. The examination of the complainant revealed that her hymen was perforated “*with healed margins*”.

The appellant’s unsworn defence was that on the material date, he was engaged in his own usual daily activities and that he had a witness who could confirm that. He however did not call that witness to support his alibi.

The evidence adduced against the appellant points to him only as the person who committed the offence with which he was charged, tried and convicted. He did not properly demonstrate the grudge he alleged PW1 harboured towards him. His cross-examination of PW2 and PW3 left no doubt that he was with the three children on the material day and that he did go into the maize plantation with the complainant. The fact that he defiled her is confirmed by the medical evidence adduced at the trial. The age of the complainant was stated by the doctor to have been 4 years, a fact the appellant never challenged. Considering the above, I am of the view that the charge was proved to the required standards and the conviction was proper.

The sentence passed against the appellant before me is a minimum sentence prescribed under **section 8(2)** of the **Sexual Offences Act**. Given the age of the appellant a presumption is hereby made that the reference to section 8(3) of the Act was a typing error. That being the case, this court has no discretion in the matter and cannot therefore reduce it as requested by the appellant.

Accordingly, the appeal fails and is hereby dismissed.

Dated, signed and delivered at Nakuru this 2nd day of July 2009

M. G. MUGO

JUDGE

In the presence of:

Mr. Njogu - for Sta