REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.68 OF 2012

JEREMIA MUROKI MAT.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence in criminal case No. 3825 of 2010 of the Chief Magistrate's Court at Maua by Hon. J.G King'ori – Chief Magistrate)

JUDGMENT

The appellant, **JEREMIA MUROKI MATE**, was convicted for 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 22nd October 2010 at [particulars withheld] village, Igembe District of the Eastern Province, he intentionally caused his penis to penetrate the vagina of **F.K.I** a girl aged 14 years.

The appellant was sentenced to serve 20 years imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised six grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and in fact by failing to note that high vaginal swab was not taken from the complainant.

2.That the learned trial magistrate erred in law and in fact by convicting on a P3 form that was filled after 3 days.

3. That the learned trial magistrate erred in law and in fact by rejecting the appellant's defence.

4. That the conviction was against the weight of the evidence tendered.

The state opposed the appeal through Mr. Namiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

When the complainant went to the appellant's shop at about 7p.m, he grabbed her and took her to the rear room where he defiled her. When his wife went to the scene, he cut her. He also cut another woman and locked himself in the shop. He was subsequently arrested by police officers who went to the scene after

they were alerted.

In his defence the appellant contended that he was framed up due to a grudge with the complainant's family.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

The evidence of penetration is not necessarily proved by the presence of spermatozoa. The failure to conduct a high vaginal swab to investigate for the presence of the spermatozoa or the absence of the same will affect a case depending on the circumstances. This examination is not the sole evidence for establishing penetration. In the instant case, the failure to take a sample for examination was not prejudicial to the appellant. In any case, there can be penetration without ejaculation.

Examination for the purposes of filling of the P3 form can be done days after the date of the alleged offence. What is usually crucial is the time of the first contact with a medical practitioner after the alleged offence. In the instant case, the evidence of **Lilia Muthuri** (PW6) is that she treated the complainant on the 22nd October 2010 at night. This was on the same night of the alleged offence. This is what **Corporal Robert Amuke** (PW5) testified to. The complainant's evidence was that she was taken to hospital the same night. The complaint that the P3 was filled after 3 days lacks merit.

What was the evidence against the appellant? The complainant testified that when she went to the appellant's shop, she found him at the door of his shop. She informed him that she wanted to buy from his shop. He lifted her and took her to the rear of his shop and placed her on the bed. He warned her not to scream. He drew a knife from under the bed and showed it to her. He undressed her and proceeded to defile her. Her testimony was that she felt pain. She screamed once and he hit her. The wife of the appellant found him in the act. He cut her on the hand. The two fought. The appellant's wife was screaming. Her (complainant's) grandmother entered the shop and removed her from there. The appellant then locked himself inside his shop.

J A (PW2) is the complainant's grandmother. She testified that she was attracted to the appellant's kiosk by screams. she found a crowd of people who informed her that the complainant was locked ina room behind the appellant's canteen. She entered inside the canteen and removed the complainant from therein. The appellant followed her outside while armed with a machete and cut his wife and one Martha. Her granddaughter reported to her that the appellant had sex with her. **V K M** (PW3) testified to the same effect.

When **I M M** (PW4) was called to the scene , he found the complainant having been removed from the canteen. The appellant had locked himself inside and only opened the door when police officers arrived.

The alibi defence of the appellant was found wanting when taken together with the evidence on record. The learned trial magistrate was justified to dismiss it. Equally, the contention that he was framed up was clearly an afterthought. He never challenged the complainant's parents and grandmother with the facts when cross examining them. He raised it for the first time in his defence. It was rightly treated as afterthought.

The complainant's evidence that he penetrated her genitalia was supported by the medical evidence where the clinical officer observed that there was evidence of penetration.

The evidence on record identified the perpetrator and established that there was penetration. Section 8(3) of the Sexual Offences Act provides as follows:

> ***A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

The appellant was given the minimum sentence prescribed by the law. He cannot complain that the sentence was harsh.

The upshot of the foregoing analysis of the evidence on record is that the appeal lacks merit. The same is dismissed.

DATED at **MERU** this **27th** day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE