



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO 41 OF 2017**

**EARNEST MAINA MBOGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from original Conviction and Sentence dated 31/03/2017 in Murang'a CM Criminal Case No 11 of 2013 – B Ochieng', CM**

**JUDGMENT**

1. The Appellant herein, **EARNEST MAINA MBOGO**, was convicted after trial of **defilement of a child** contrary to **section 8(4) of the Sexual Offences Act, No 3 of 2006**. He was sentenced to 15 years imprisonment. He has appealed against both conviction and sentence.

2. It was alleged in the charge that on 7<sup>th</sup> July, 2013 within Murang'a County, he intentionally and unlawfully caused his penis to penetrate the vagina of one **SWN**, a child aged 14 years.

3. The prosecution called six (6) witnesses. The complainant testified under oath as PW1 after a **voire dire** examination. PW5 was the complainant's mother. PW2 was the local chief to whom the complainant had reported the alleged defilement. PW3 was the local Assistant Chief who arrested the Appellant. PW4 was the investigating officer to whom the initial report of the alleged defilement was made by the complainant and her mother. He booked the report and accompanied both to hospital where the complainant was examined. He also issued the complainant with a medical report form (P3) which was filled at the hospital and returned to him. Subsequently he re-arrested the Appellant from the hands of PW3 and eventually charged him with the offence.

4. The main issue in this appeal is whether the charge against the Appellant was proved beyond reasonable doubt. PW1's testimony was that her mother (PW5) found the Appellant on top of the complainant as he defiled her. She said -

**“It was near home and my mother came to the scene and caught him red-handed in the act on top of me. The accused dashed deep into the maize plantation and my mother told me to dress up (with) my shirt and panties which I had removed.”**

5. The testimony of the mother was different. Her testimony in this regard was -

**“... when I saw it was taking long for complainant to return I decided to go and find out where she was. On my way I heard people talking and I listened carefully and heard the voices of the accused and the complainant. They were in the maize plantation and I could not hear exactly what they were talking about. I raised alarm and complainant came out of the plantation....**

**When I raised the alarm the accused escaped in another direction before the complainant emerged. She was fully clothed.”**

6. From the above testimony of PW5, obviously she never found and saw the Appellant and the complainant having sexual intercourse. What she heard were voices of two people talking. She purported to identify the Appellant and the complainant by those voices, yet she did not hear them well enough to gather what they were talking about. The possibility therefore cannot be excluded that PW5 was mistaken in the identity of the Appellant. It must be borne in mind that when he cross-examined both the complainant and her mother, the Appellant suggested that the complainant had been with her boyfriend in the maize plantation, not him (Appellant).

7. Why did the complainant tell the court that her mother had found the Appellant red-handed defiling her, whereas from the mother's own testimony she had not?

8. Another disturbing aspect of this case is that the mother stated under cross-examination that the complainant had become pregnant with the Appellant's child, and that she had given birth on 3<sup>rd</sup> April, 2014. This was almost exactly nine (9) months after the alleged defilement

on 7<sup>th</sup> July 2013. So, why was a DNA test not carried out to find out if the Appellant was indeed the father of the child?

**9.** On 18<sup>th</sup> February, 2014 the Appellant had applied for recall of the complainant for further cross-examination. He said he had failed to ask her crucial questions

**“Which may assist my defence”.**

The court granted the request. However, the complainant was never recalled for further cross-examination, and I can find no reason on the record for this.

**10.** The three issues I have highlighted raise a serious doubt as to whether the Appellant was the person who had sexual intercourse with the complainant on 7<sup>th</sup> July 2013. Upon my own evaluation of the evidence placed before the trial court, I am not satisfied that the Appellant was convicted upon good and sound evidence. This conviction is not safe and will not be allowed to stand.

**11.** In the event, this appeal is allowed in its entirety. The Appellant’s conviction is quashed and the sentence imposed upon him set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG’A THIS 29<sup>TH</sup> DAY OF MARCH 2019**

**H P G WAWERU**

**JUDGE**