



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.108 OF 2016**

*(An Appeal arising out of the conviction and sentence of Hon. K. Cheruiyot PM delivered on 8<sup>th</sup> January 2016 in Nairobi Milimani CM Cr. Case No. 208 of 2015)*

**JOSEPH MULI MUNYAO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that, on diverse dates between 1<sup>st</sup> January, 2015 and 1<sup>st</sup> February, 2015 at [particulars withheld], in Lang'ata District, within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the vagina of GA, a child aged six (6) years. In the alternative, the Appellant 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 diverse dates between 1<sup>st</sup> January, 2015 and 1<sup>st</sup> February, 2015 at [particulars withheld], in Lang'ata District, within Nairobi County, he intentionally and unlawfully touched the vagina of GA, a child aged six (6) years with his penis.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge of **defilement** contrary to **Section 8(1)** of the **Sexual Offences Act**. He was sentenced to life imprisonment.

In his petition for Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was of the view that the evidence adduced by the prosecution was not sufficient to sustain a conviction. He faulted the trial magistrate for relying on contradictory evidence in convicting him. He was aggrieved that the trial court failed to consider the evidence adduced by the doctor, who stated that there was no penetration on the complainant. He complained that the trial court failed to consider his statement of defence. He faulted the trial magistrate for relying on the evidence that was based on hearsay. He asserted that his sentence was unconstitutional and illegal.

By consent of the parties, the appeal was disposed of by way of written submission. Both parties filed their written submissions. During the hearing of the Appeal, the Appellant averred that PW1 and PW2 gave contradicting evidence. PW1 stated that the Appellant told her to get off his bed. She later told her sister what had happened. The sister in turn told her mother. On the other hand, PW2 stated that he found PW1 on the Appellant's bed. However, on re-examination, he stated that he called her out and she came out of the Appellant's house. The Appellant submitted that the sister ought to have been availed as a witness. The Appellant stated that PW7 and PW8 also gave contradictory evidence. PW7 testified that when he examined the complainant, he found no injuries or discharge in her private parts. PW8, however, said that when she examined the complainant, she discovered injuries and bleeding in her vagina. The Appellant argued that the prosecution's case was riddled with inconsistencies. The trial court should therefore not have relied on the same, in convicting the Appellant. He submitted that the doctor's evidence showed that there was no penetration. He asserted that proof of penetration was one of the ingredients that needed to be established in a defilement charge. The Appellant further submitted that the trial court failed to comply with **Section 169** of the **Criminal Procedure Code**. This is because it failed to set out points of determination and reasons for its decision thereof. He therefore urged this court to allow his Appeal.

Ms. Akunja for the State opposed the appeal. She submitted that the age of the victim was established. The complainant's birth certificate produced in court proved that the complainant was six (6) years old. She averred that the Appellant sent the complainant to the shop to buy cigarettes. On returning, he gave her a sweet and forced her onto his bed and **"did bad manners to her"**. She argued that the doctor produced a P3 form in court which established that the complainant's hymen was broken. PW8 also examined the complainant and produced a post-rape care form in court. The said form established that the complainant had been defiled. With regards to the evidence of identification, Learned State Counsel submitted that the Appellant was well known to the complainant. He was also known to PW2, PW3, PW4 and PW6. She stated that the Appellant admitted that he knew the complainant and her family. They were neighbours. She asserted that the Appellant's sentence was lawful under **Section 8(2)** of the **Sexual Offences Act**. She maintained that the prosecution had proved its case to the required

standard of proof beyond any reasonable doubt.

The facts of the case according to the prosecution are as follows. PW1 in her testimony stated that she was five (5) years of age. She testified that she knew the Appellant. His name was Muli. She said that the Appellant was their neighbour at [particulars withheld]. On the material day, she was playing outside the house with her brother and sister. It was her testimony that the Appellant called her. He sent her out to buy cigarettes. When she came back, he gave her a sweet. He told her to go to his house and lie on his bed. She testified that the Appellant pushed her into his house. He told her to get on his bed. He covered her with a heavy sweater and a blanket. She stated that he did 'bad manners' to her. He then warned her against telling anyone about the incident. He threatened to cut off her neck or hand if she told anyone what had happened. PW1 stated that she told her sister, who in turn told her mother. Her mother later took her to the police station where the incident was reported.

PW2 is the complainant's brother. He stated that on the material day Mama Z sent him to call PW1. She wanted to send PW1 to buy biscuits. PW2 said that he went looking for PW1. He found her on the Appellant's bed. The Appellant was on top of PW1. PW1 was naked. He stated that he told PW1 that she was needed outside. PW1 got off the bed, dressed and left the house. PW2 stated that it was dark. He was not able to see the Appellant. PW1 told him that the Appellant was inside the house. PW1 was sent to buy biscuits. When she came back, she told PW2 that the Appellant had asked her to remove her clothes. He then proceeded to sexually assault her. He testified that the Appellant was their neighbour in [particulars withheld].

PW3 is the complainant's mother. She stated that on 1<sup>st</sup> February 2015, she got a call from the Appellant. It was around 2.30p.m. She was in church. The Appellant claimed that her children were throwing stones at him. She went home. She found her children, together with other children from the neighborhood, at the verandah outside her house. She inquired from them why they had thrown stones at the Appellant. Ivy, her daughter told her that it was because the Appellant had done 'bad manners' to PW1. PW1 told her that the Appellant sent her out for cigarettes. When she returned, he placed her on his bed and defiled her. PW3 testified that she confronted the Appellant. He denied defiling PW1. She took PW1 to the hospital the following day. She was examined. The doctor informed her that she had laceration on her private parts. The doctor also informed her that there was an attempted penetration. The doctor referred her to a Children's Office. PW1 narrated to the Children's Officer how the Appellant defiled her. They thereafter reported the incident at Kilimani Police Station. The Appellant was arrested. PW1 was also examined by another doctor as directed by the police.

PW4, CA, stated that she worked as a businesswoman in [particulars withheld]. She lived in the same neighborhood as PW3. She was in her house sometime in January 2015. She heard PW3 conversing with PW1 outside the house. PW3 was asking PW1 to tell her the truth. She heard PW1 narrate to PW3 how the Appellant sent her to buy him cigarettes. When she came back, he asked her to lie on his bed and proceeded to sexually assault her. PW4 testified that PW3 called her outside and requested her to interview PW1. She narrated the same story of how the Appellant had lured her into his house and defiled her. PW4 asked PW1 to demonstrate what had happened. PW1 went on the sofa and lay on her back. She said that the Appellant went on top of her and sexually assaulted her. PW4 stated that they confronted the Appellant who denied defiling PW1. They sought assistance from the village elders. She confirmed that the Appellant was their neighbour.

PW5, MM, stated that he lived in [particulars withheld]. He was a village elder. He stated that he got a call on 1<sup>st</sup> February, 2015 from PW6. When he got to the apartment, he found PW3, PW6 and the Appellant in the company of other people outside the house. PW3 informed him that the Appellant had defiled PW1. PW5 called another elder, Ali Muhidin. Together they questioned the Appellant. The Appellant maintained that he did not defile the complainant. He only remembered an incident in April, the previous year. He asserted that nothing had happened that year. PW5 stated that he advised PW3 to take the complainant to hospital.

PW6, JKM, stated that on 1<sup>st</sup> February, 2015 at about 4pm, PW3 sent her daughter, Ivy to him. She asked him to go to their house. On arrival, PW6 found PW3, PW1 and the Appellant outside the house. PW1 told him that the Appellant had sexually assaulted her. He interrogated the Appellant who denied sexually assaulting the complainant. He called two elders who came and joined them. PW6 stated that the Appellant lived in that neighborhood.

PW7, Dr. Joseph Maundu, testified that he examined the complainant on 3<sup>rd</sup> February, 2015. The complainant was alleged to have been defiled by a known person. PW7 stated that he examined her vagina. He found no injuries. He stated that her hymen was however recently broken. There was no discharge noted from the vagina. PW7 filled and signed a P3 form which he produced in court. PW7 examined the Appellant as well. He did not find any injuries on the Appellant's penis.

PW8, Florence Maganga, stated that she worked as a nurse at Kibera South Health Centre. She stated that she examined the complainant on 2<sup>nd</sup> February, 2015. She stated that PW1 narrated to her how an old man had sent her for cigarettes before he sexually assaulted her. PW1 told her that her brother then knocked on the door. The old man instructed her not to tell anyone what had happened. PW8 stated that the complainant had injuries on her vagina. She was bleeding. She produced the complainant's post care rape form in court.

The case was investigated by PW9, Police Constable Pauline Tundu from Kilimani Police Station. She testified that she was on duty on 4<sup>th</sup> of February, 2015. She received instructions from her superior to investigate a defilement case involving a six (6) year old girl. The complainant had been examined by the doctor based at the police station. PW9 recorded statements from the prosecution's witnesses. From her investigations, she discovered that the Appellant had lured PW1 to his house after sending her out to buy him cigarettes. The Appellant proceeded to defile PW1 when she came back to the house. PW1's brother came looking for her. He found PW1 naked in the Appellant's house, on his bed. PW1's mother later found out what had happened. She took PW1 to the hospital for examination. PW9 stated that she interviewed the Appellant. She later took her to the doctor for examination. PW9 produced the complainant's birth certificate in court. She also availed a report from the Children's Office.

The Appellant was put on his defence. He gave a sworn statement. He stated that he lived in [particulars withheld]. He was a driver. He denied sexually assaulting the complainant. He stated that people showed up at his house. He was then arrested and taken to the police station.

This being a first appeal, this Court is mandated to re-evaluate the evidence afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge –vs- Republic (1982 – 88) 1 KAR 1134** stated this on the duty of the first Appellate court:

***“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”***

In the present appeal, the issue for determination is whether the prosecution established the charges of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case.

**Section 8(1)** of the **Sexual Offences Act** provides that:-

*“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.*

The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant. On the age of the complainant, PW1 testified that she was five (5) years old. Her birth certificate was produced in court which confirmed that she was five (5) years of age at the time of the alleged sexual assault. The complainant’s birth certificate constitutes sufficient proof of age. The court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act.

This court now turns to the ingredient of penetration. Section 2(1) of the Sexual offences Act defines penetration as:

*“the partial or complete insertion of the genital organ of a person into the genital organs of another person.”*

In the present appeal, PW8 stated that the complainant was examined at Kibera South Health Centre on 2<sup>nd</sup> February, 2015. She had injuries on her vagina. She treated the complainant and gave her drugs. She availed the complainant’s Post-Rape Care form in court. PW7 examined the complainant on 3<sup>rd</sup> February 2015. He stated that he found no injuries on her vagina. There was no discharge. However, her hymen had recently been broken. The Appellant in his submission contends that PW7’s testimony proved that the element of penetration was not established by the prosecution. This court is however of the view that the ingredient of penetration was established. PW7 stated that the complainant’s hymen had recently been broken. The complainant stated that she had taken a shower before the medical examination was conducted. Even without medical evidence, what the court requires is proof of facts that the offence was committed. The complainant narrated to the court how the Appellant sent her to buy cigarettes. When she came back, he lured her into his house. He covered her mouth with a heavy sweater. He then proceeded to sexually assault her. The complainant stated that:

*“He did manners to me...I felt pain in the part I use to urinate. Muli took his ‘dudu’ and put it in mine. I felt pain...”*

The complainant deposed that the Appellant took his penis and inserted it into her vagina. Taking into consideration the P3 form and Post Rape Care form produced in court, as well as the complainant’s testimony, this court is of the view that the prosecution did establish the element of penetration.

The third issue is whether the penetration was done by the Appellant. The complainant testified that she knew the Appellant. He was their neighbour. She referred to him by his name, “Muli”, during her testimony. She narrated in detail how the Appellant sexually assaulted her. There was no doubt that the complainant properly identified the Appellant as the perpetrator of the sexual assault. PW2 stated that the complainant was in the Appellant’s house when he went looking for her. The Appellant also testified that he had known the complainant since she was born. He knew the complainant’s family. The Appellant’s defence that he had been framed with the charge does not hold. In this court’s assessment, the complainant was telling the truth. In the case of **J.W.A. v Republic [2014] eKLR**, the Court of Appeal observed:-

*“We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.”*

This court is of the view that the defence put forward by the Appellant does not dent the otherwise strong and cogent evidence adduced by the prosecution witnesses connecting him with the offence. His guilt was established to the required standard of proof beyond any reasonable doubt. The Appellant’s appeal on conviction lacks merit and the same is hereby dismissed.

As regards the sentence, Section 8(2) of the Sexual Offences Act provides a sentence of life imprisonment for any person convicted of defiling a child of less than twelve (12) years. The complainant was assessed to be five (5) years old at the time the offence was committed. The trial court sentenced the Appellant to life imprisonment. The sentence is legal. The appeal on sentence is similarly dismissed. It is so ordered.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF FEBRUARY 2019**

**L. KIMARU**

JUDGE