



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 206 OF 2017**

**JUSTUS MWOLOLO NDIWO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**Introduction:**

1. The Appellant was charged with offence of Defilement Contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006.
2. Particulars being that on the 7<sup>th</sup> day of July 2012 in Kibwezi District within Eastern Province, intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of ND a child aged 12 years.
3. The Appellant was alternatively charged with committing an Indecent Act with a child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.
4. Particulars being that on the 7<sup>th</sup> day of July 2012 in Kibwezi District within Eastern Province, intentionally and unlawfully touched the vagina of ND a child aged 12 years.
5. The Appellant pleaded not guilty and matter went to full trial.
6. He was found guilty, convicted and sentenced to 20 years imprisonment.
7. The parties opted to rely on evidence on record and the grounds filed.

**Duty of the first Appellate Court:**

8. The duty of the court of appeal has been established in a long line of cases. The position is that the court ought to subject the evidence tendered in the Trial Court to fresh scrutiny and subsequently determine whether the said court erred in both law and fact in arriving at the impugned decision.

**Evidence Adduced:**

9. PW1 was the Complainant one ND a girl aged 14 years old. The court conducted a *voire dire* examination and the minor was found to understand the meaning of telling the truth.
10. She consequently testified on oath at on 07/07/2012 at 6.00 p.m. in the company of her sister K, they had been sent to the shops by their mother and on the way to the shop they saw the appellant emerge from the bushes. The appellant then caught hold of her sister K but then let her go and caught the Complainant and dragged her to his house.
11. It was her testimony when she got to the appellant's house he removed her pant and then he removed his. She stated that the appellant did not remove her other clothes.
12. Afterwards she informed the court that the appellant threw her on the bed and inserted his thing (she stated that she did not know what it was called into her vagina). It was her testimony that she felt pain and the appellant then threatened to stab her if she weren't quiet. She then heard her sister K outside the house screaming.

13. People then gathered and told her to inform her mother of the incident and subsequently the appellant was arrested. She testified that she was later treated and issued with a P3 form.
14. She stated that on the date of the incident she was wearing a white pant which was duly marked as MFI 1. It was her testimony that she did not know the appellant but he was an employee of one lady by the name Grace. She did identify the appellant in court.
15. Upon cross examination the minor indicated that she did not know the appellant before but she started seeing him building at Grace's home while coming from school. She stated that the appellant spoke to her for the first time on that day when he defiled her. She stated that the appellant caught her at around 7.00 p.m.
16. PW2 was ND a girl aged 8 years old who upon the court conducting a *voire dire* examination testified on oath that 07/07/2012 at 6.00 p.m. in the company of her sister ND they had gone to the market when the appellant caught hold of her hand but let go and then caught her sister and took her to his house. She testified that she did not go into the house however she saw them enter the house but did not hear anything.
17. It was her testimony that she later began to scream and people came to her aid. She indicated that she told the people who came that "jas" had caught ND and one of the people that came was one Munyalo. She stated that later ND came out of the house but did not tell her what happened to her but when they went home she told their mother. She averred that she knew the appellant before as she used to see him at Kiukuni. She confirmed that he was before the court.
18. Upon cross examination PW2 reiterated that the appellant was called Jas and further stated that amongst the people that came to her rescue after she screamed was Munyalo. She testified that she did not enter the appellant's house.
19. PW3 was PC Andrew Mwendwa who is stationed at Utithi AP Post who testified that on 07/07/2012 at about 11.00 p.m., a lady by the name WD went to the police post and reported that her daughter had been defiled by a man known as Mwololo. The witness stated that on receiving the report in the company of his colleague they immediately went and arrested the appellant and took him to Kibwezi Police Station.
20. PW4 was Dr. Shyreen Khalid a medical officer at Makindu District Hospital who testified that on 09/07/2012 she examined a 12 year old girl who had alleged to be defiled. She indicated that on the date she examined the minor she was not wearing the clothes she had when the offence took place and thus could not ascertain if there was presence of tears or wet/dry blood.
21. However upon examination of her genitalia, the doctor testified that her assessment was that there was breakage of the hymen with anterior vaginal wall bruising. She also stated that there was presence of a white discharge. She estimated the age of the girl as 12 years old and assessed the degree of injury as grievous harm. The P3 form was duly produced as Exhibit No. 1.
22. PW5 was PC Emmy Omoke attached at Kibwezi Police Station who testified that on 08/07/2012 at about 1.00 p.m., she received a report from ND in the company of her mother and younger sister. The report was that the appellant herein had defiled the minor and neighbours with the help of administration police led to the arrest of the appellant person.
23. She testified that she booked the report and began her investigations. She took the Complainant to Makindu District Hospital for treatment and the appellant to Kibwezi District Hospital where they were examined, treated and discharged.
24. She further issued the Complainant with a P3 form that was duly filled and recorded witness statements. She then visited the scene of the incident and recovered a whitish pant belonging to the Complainant.
25. It was her testimony that she forwarded blood samples of the appellant, his saliva and the pant since it had not been washed to the government chemist for analysis. The analysis was to ascertain whether the pant had spermatozoa and whether the spermatozoa had any relation to the appellant. Further to ascertain if the pant had seminal stains and if the same had relation to the appellant.
26. The report from the government chemist was negative. The appellant was nonetheless charged with the offence before the court. The pant was produced as Exhibit No. 2, the report from the Government Analyst dated 30/01/2013 and the exhibit memo that accompanied the exhibits to the government analyst were produced as Exhibit No. 3.
27. Upon cross examination the witness indicated that her investigations confirmed that the Complainant had been defiled.
28. The prosecution closed its case and the appellant was thereafter put to his defence where he opted to give an unsworn statement. He stated he was 55 years old and had never been arrested before.
29. He informed the court that he was a mason. He indicated that he had been framed since there was a dispute between him and the mother of the Complainant. He stated that in the month of June 2012 he passed by the Complainant's mother's home since he knew her but did not find her.
30. He testified that he then left for work and when he got to work he realized that he did not have his hammer and since his home is far he decided to go back to the Complainant's mother's home and found the Complainant and her sister and borrowed their hammer.
31. He stated that he returned the hammer on the next day and when he got to the home he found the mother of the Complainant who was not pleased as to why he had borrowed her hammer. He stated that the Complainant's mother thus threatened to take him to court for stealing and/or would frame him for something else. It was his testimony that thereafter on 07/07/2012 he was charged and arrested with the offence

of defilement.

**ISSUES:**

32. After going through the evidence on record I find the issues are; ***whether prosecution proved its case beyond reasonable doubt?***

**Analysis and Determination:**

33. In the case of the **HIGH COURT AT MACHAKOS CRIMINAL APPEAL NO. 296 OF 2010, FAPPYTON MUTUKU NGUI –VS- REPUBLIC** the court held that, ;

***“the ingredients to look out for in a defilement case are; The first is whether there was penetration of the Complainant’s genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.”***

34. The court has analysed the evidence on record. It is the Complainant’s testimony that the appellant defiled her. She informed the court that the appellant removed her pant only and then threw her on the bed and put his “thing” into her vagina. It was her testimony that she felt pain and that she remained quiet since the appellant threatened to stab her.

35. Upon cross examination she maintained that the appellant defiled her. She stated that the appellant first grabbed her sister but let her go and proceeded to grab her and dragged her to his house. The evidence is duly corroborated by her sister.

36. PW2 informed the court that she was in the company of her sister when the appellant caught hold of her but let go of her and proceeded to grab her sister ND. PW2 did state that she followed the appellant who had grabbed her sister to his house and saw them enter the house and she remained outside.

37. She did state that she did not hear anything when her sister got into the appellant’s home. She then screamed and people came to her rescue and then her sister came out of the house.

38. The appellant in his unsworn testimony informed the court that he had been framed by the Complainant’s mother since they had differences between them and the Complainant’s mother had vowed to get back to him. The appellant proceeded to inform the court that the difference between him and the Complainant’s mother was that he had borrowed her hammer without her consent and thus the same had angered her.

39. It was trial court opinion that the alleged disagreement between appellant and victim’s mother if any would not warrant the mother of the Complainant to frame the appellant with such a serious offence. This court agrees with the holding.

40. Further the appellant ought to have availed evidence to substantiate/corroborate his allegation.

41. The court finds that the minor’s evidence was unambiguous and was duly corroborated by her sister. The court duly noted that the Complainant’s mother was not among the prosecution’s witnesses in spite that PW3 and PW5 did state that she reported the incident to the police.

42. Nonetheless the trial court did believe the evidence of the minor at the hearing she was at pains to explain what the appellant had done to her. She was evidently deeply hurt and angered by the appellant.

43. The P3 form produced dated 9<sup>th</sup> July 2012 does further proved that the minor was defiled as on examination there was breakage of the hymen with anterior vaginal wall bruising.

44. ND informed the court when conducting *voire dire* examination that she was 14 years old. However the doctor who filled her P3 form opined that she was a girl aged 12 years old and even the investigating officer upon carrying out her investigations informed the court that the minor was aged 12 years old. One thing is certain that indeed the victim was a child.

45. The minor informed the court that the appellant defiled her. He took her to his house and defiled her. Her sister K saw the appellant drag her sister to his house.

46. She was however not certain what the appellant did to her sister inside the house. The identity of the assailant was consequently not in dispute.

47. In the ***High Court at Machakos Cr. Appeal No. 296 of 2010, Fappyton Mutuku Ngui –vs- Republic***, the court held that the ingredients to look out for in a defilement case are;

***1) Whether there was penetration of the Complainant’s genitalia.***

***2) Whether the Complainant is a child.***

***3) Whether the penetration was by the Appellant.***

48. In regard to the foregoing, the court humbly opines that the ingredients to sustain a conviction on defilement were proved beyond reasonable doubt.

49. Thus the court find that that appeal has no merit, and thus makes the following orders;

*i. The appeal is dismissed, conviction is affirmed and sentence confirmed.*

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31<sup>ST</sup> DAY OF MAY, 2019.**

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**C. KARIUKI**

**JUDGE**