REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA. NO. 8 OF 2018

MUTINDA NDULULU *alias* MWAMBA............................APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Appellant was charged with offence of Defilement Contrary to Section 8(1)(2) on Sexual Offences Act No. 3 of 2006.

2. Particulars being that on the 6th day of February 2014 at Kiboko Location, within Makueni County, intentionally and unlawfully caused his genital or male organ namely penis to penetrate the female genital organ namely vagina of MK being a child aged 9 years.

3. The Appellant was alternatively charged with committing an Indecent Act to a child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

4. Particulars being that on the 6th day of February 2014 at Kiboko Location, within Makueni County, willfully and unlawfully committed an indecent act which caused his genital organ namely penis to come into contact with the female genital organ namely vagina of MK being a child aged 9 years.

5. He pleaded not guilty and matter went into full trial.

6. He was found guilty, convicted and sentenced to serve life imprisonment.

7. Being aggrieved by the above verdict, the Appellant lodged appeal and later supplemented it with grounds namely:-

> *1) **That** the learned trial magistrate erred in both law and facts by holding that case of the prosecution was proved beyond reasonable doubt whereas evidence in record does not support such findings.*
>
> *2) **That** the learned trial magistrate erred in law and in facts by failing to observe that the investigation officer never visited the scene of crime and never identified the house where the offence took place.*
>
> *3) **That** the evidence of PW2, PW3 and PW5 was heresy evidence.*
>
> *4) **That** the learned trial magistrate erred in both law and facts by failing to draw and adverse inference in his favor in view of the prosecution failure to ascertain the sexually transmitted disease (**syphilis**) on the victim.*
>
> *5) **That** the Appellant's conviction on basis of the evidence record was manifestly unsafe.*

8. The directions were given for appeal to be canvassed via submissions. The appellant filed the same but the prosecution relied on the evidence on record.

1ST APPELLATE COURT'S DUTY

9. 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 TENDERED

10. PW1 was the Complainant MK who gave an unsworn testimony upon the court duly conducting a voire dire examination.

11. The minor informed the court that on 06/02/2014, she met with someone at Kathikuni who called her by name and she ran away but the said person followed her and caught hold of her. The said person took her to his house and then lifted her dress. He removed her pant and then removed his and then he put his thing in the middle. (The minor touched her private parts to demonstrate what she meant by the middle). (She further described the said place as the place she uses to urinate).

12. It was her testimony that she felt pain and cried. The said person afterwards removed his thing and did not do the act to her again. She thus left and went home. The minor informed the court that on the next day, she informed her teacher what had happened to her and she was taken to Makindu District Hospital. She stated that the appellant was the person who had defiled her and duly identified him as the one before the court.

13. PW2 was IMM a senior teacher and guidance and counseling teacher at [particulars withheld] Primary School. She testified that on 06/02/2014 at around 3.00 p.m., the lower primary school children were asked to go home and she also later left for home. At around 11.00 p.m., she informed the court that she received a call from MK's father and he enquired where his daughter was since she had not arrived home.

14. On the next day the witness indicated that she went to school and asked for M and was informed that she was in school. She thus called her and she informed her that she had slept at M's house. She indicated that they had slept together and that M had done to her *"tabia mbaya"*.

15. It was the witness testimony that she interviewed her (the minor) further and she pointed at her private parts. She therefore called the child's parents and also duly informed the head teacher who advised her to report the matter to the chief.

16. PW2 informed the court that the appellant was later arrested. She indicated that she did not know the appellant person before but had heard his name and that he was a caretaker at a certain home. She however stated that she later came to know him and identified him as the one before the court.

17. Upon cross examination by the appellant, the witness stated that she believed what the child told her and the child had mentioned the appellant person's name and no one else.

18. PW3 was KK who testified that on 06/02/2014, he was at home and his daughter got lost from school. He thus began to look for her and called her teacher. The teacher told him that she would get back to him on the next day. On the next day, the teacher called him and told him that the child was in school.

19. PW3 indicated that he then learnt from the teacher that his daughter had spent the night at M's house and that he had defiled her. He therefore reported the matter to the police and took the child to hospital. She was issued with a P3 form that was duly filled. He averred that his daughter is 9 years old as she was born in 2005 and identified her notification of birth as the one before the court.

20. Upon cross examination by the appellant, the witness stated that the child also told him that she had been defiled.

21. PW4 was Dr. Esther Musyoki attached at Makindu District Hospital. She testified that on 08/02/2014, she examined the Complainant who had a history of having been sexually assaulted by someone known to her. She was in pain and walking with difficulty.

22. On examination of her genitalia, the labia majora was swollen and she had vaginal lacerations. Upon conducting urinalysis the same showed pus cells, the HIV test was negative but Syphilis was positive. The doctor indicated that the child appeared traumatized and would require psychological counseling. The degree of injury was classified as grievous harm. She produced the P3 form as EXHB NO. 1.

23. PW5 was the investigating officer Cpl. Joyce Iha attached at Makindu Police Station.

24. She testified that on 07/02/2014 she was at the station when the appellant person and the Complainant in the company of her mother came into the station together with community policing officer.

25. She informed the court that she booked the report which was that the appellant person had defiled the complainant a child aged 9 years old. It was her testimony that she then took the minor to hospital for examination and recorded the witnesses' statements and upon the P3 form being filled, she established the case before the court and charged the appellant person accordingly. She established the age of the minor by obtaining her notification of birth produced as EXHB NO. 2.

26. Upon cross examination by the appellant the investigating officer stated that she believed the child who said that he (the appellant) had defiled her.

27. The prosecution closed its case and the appellant person was put to his defence whereby he opted to give an unsworn testimony.

28. The appellant person informed the court that he did not commit the offence. He indicated that he was arrested on 07/02/2014 and testified that on the said date, he woke up early and went to the shamba where there was a spoilt toilet and he decided to dig another pit and he did that until 1.00 p.m.

29. He had lunch and returned to work and continued to dig until 5.00 p.m. He then went to fetch water and realized his bicycle had flat tyres and thus went to a neighbor in order to add pressure with his pump.

30. It was his testimony that when he left the neighbour's home, he met with a lady community policing officer in the company of another neighbour. They called him and he told them that he was in a hurry and the man held his hand and he asked him why he was doing that.

31. The appellant then stated that since was on the bicycle, he fell and the community policing officer hit him with a wooden stick and they told him that he knew what he had done. They then took him to the Complainant's teacher and he was told to seat on the ground in the teacher's compound.

32. Then the village elder came and he also beat him up instead of enquiring what was wrong. The appellant informed the court that he was later taken to [particulars witheld] and put in the OCPD's vehicle and taken to the station and charged with the offence before which he did not know.

33. He stated that he had never done such an offence and prayed to the court to look into both sides when it delivers it's judgement.

34. **ISSUES**

After going through materials before court and tendered submissions, I find the singular issue**; whether the prosecution proved its case beyond reasonable doubt?**

ANALYSIS AND DETERMINATION

35. In 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.**

36. In the case of **WOOLMINGTON –VS- THE D.P.P (1935) AC 462,** it was held that;

> **"If there is any reasonable doubt created brought forward by the prosecution, the case for the prosecution is not proved and the prisoner is entitled to an acquittal."**

37. The appellant submits that, the prosecution failed to discharge its burden and the learned trial magistrate for his part erred in both law and in facts by holding that the case for the prosecution was proved beyond reasonable doubt whereas evidence on record does not support such a finding.

38. It was the prosecution case that on 6th day of February 2014 at Kiboko Location within Makueni County intentionally and unlawfully caused his penis to penetrate female genital organs namely vagina of MK, a child aged 9 years.

39. In law the prosecution was duty bound to prove by way of evidence as how the Appellant cause his penis to penetrate the Complainant, may it be observed that PW1 gave unsworn statement, she claimed that on 06/02/2014 at 2.00 p.m. she met with someone at Kathikuni and he called her. She ran while the said man ran after her and got hold of her.

40. The man took her to his house and lifted her dress, he removed her pantie and the man put his thing in her middle, the place she uses to urinate.

41. After the episode the man let her go and she went home. There is no evidence as to whether this witness met anybody at home, there is also no evidence as to how long did PW1 stay with the alleged man so as to register his physical features, although PW1 alleged that she knew the Appellant before as she used to meet him at his home, however she said, "**he does not leave near our home.**"

42. PW1 never at any time mentioned the name of her defiler. In his judgement the trial magistrate quite rightly noted this aspect when he stated, ***"The minor identified the appellant person as her assailant although the court noted that nowhere in her evidence did she refer to the appellant person by name."***

43. The above aspect indicates that this was not a case of recognition; the victim did not lead the police or anybody to the alleged house where she was defiled.

44. No identification parade was done in this case to test PW1 ability of identifying the person who defiled her. Pointing him in court as the alleged attacker was mere dock identification of the weakest kind unless supported by some other independent corroborative evidence.

45. The house where the incident took place was not disclosed or visited by the IO for investigation. PW1 talked of the event of 06/02/2014

and does not mention about having slept at the defiler's house. she stated;

> ***"He afterwards removed his thing and did not do that to me again. I then left and went home. I told my teacher on the next day."***

46. Although PW1 claimed that the incident took place on 06/02/2014 at 2.00 p.m., her teacher PW3 claimed that the students were told to go home at around 3.00 p.m.

47. PW2 testimony in regard to where she stated that,

> ***"I recall 06/02/2014 at around 3.00 p.m., the lower primary school pupils were told to go home and later left home. At about 11.00 a.m., I got a call from M King'ola's father and enquired where M had gone since she had not arrived at home. On the next day M's mother came to my home and asked about her daughter. I went to school and asked for M and was told that she was in school. I called her and she told me she slept at M's house."***

48. PW1 did not identify the alleged M or M's home to PW2. It was necessary for such identification evidence to have been availed more so in view of PW2 utterance that,

> **"I did not know M but I had heard the name severally that he was a caretaker at a certain home and that he lived alone."**

49. The above testimony bears witness to appellant contention that it was necessary for PW1 to have been told to identify the said M to PW2 so as to confirm to PW2 that PW1 meant a certain caretaker at a certain home by that name. The Appellant's name as per the charge sheet are indicated as MUTINDA NDULULU ALIAS M.

50. There was no prove established to identity of the alleged M, the court identification of the Appellant was mere dock identification and the witness were made to believe that the person arrested was the culprit but that may not be the case.

51. PW5 the investigating officer informed the court that PW1 father had reported about the missing child, no evidence was led to prove that the child spent the night at appellant house.

52. PW5 never visited the scene of crime, why? No reason was advanced. If the child slept at appellant house and defiled therein, then PW5 ought to have collected bed sheets from the alleged house for forensic examination or visited to examine the scene of crime. This was not done.

53. The doctor, PW4 examined the child on 08/02/2014 which is two days after the incident.The child had sexually transmitted disease namely Syphilis. Who infected her? What was the origin of the same? In her testimony, pw5 stated that,

> ***"On examination of her genitalia, her labia majora was swollen and vaginal lacerations specimen were taken for examination, analysis shows pus cells. HIV tests was negative and Syphilis test positive."***

54. The above testimony clearly indicates whoever defiled PW1 tested positive to Syphilis. Who is he? The trial magistrate on this particular aspectstated;

> **"The court however wondered why no medical examination was carried out on the appellant person noting that the child tested positive to Syphilis which is a highly contagious sexually transmitted disease."**

55. Its opined that investigations especially in defilement cases should be thorough so that there is no shadow of doubt as to who committed the offence.

56. Medical evidence is critical and should be ordinarily be obtained to back up the evidence, nevertheless the court opines that there has been sufficient evidence to sustain a conviction as the essential ingredients in a defilement case was sufficiently proved.

57. The court had apparently lingering doubt as to identification of culprit on account of pw1 not mentioning appellant name and failure to examine him yet it forgot that,It is again said that the prosecution must prove a criminal charge beyond reasonable doubts, and any doubts must be interpreted in the appellant favor.

58. The omission to subject the Appellant to medical examination,IO to visit scene and pw1 to identify appellant other than in court,inter-alia were a gap on the prosecution case which rendered the case for prosecution not proved beyond reasonable doubt. See **Woolmington –Vs- The D.P.P (1935) AC 462,**suppra.

59. This is a case where adequate investigations were not conducted. PW1 a minor and her evidence was unsworn. Nobody witnessed the commission of the offence charged. The child was reported missing and slept outside her home. Nobody bothered to visit the alleged scene of crime.

60. The evidence of PW2 and PW3 was mere hearsay evidence that the child informed them that the appellant had defiled her and they believed her as she never confirmed same in court.

61. The court has analysed the evidence on record and the case before the court and the submissions and comes to conclusion that on element of identification, the evidence on identification of the attacker was not water-tight. The other ingredients of offence were proved beyond reasonable doubt. See **High Court at Machakos Criminal Appeal No. 296 of 2010, Fappyton Mutuku Ngui –Vs- Republic suppra.**

62. There was no basis for the trial court to believe the minor's testimony in terms of the proviso of **section 124 of Evidence act.**

63. Thus court finds merit in appeal and makes the following orders;

> **a. -Appeal is allowed, conviction is quashed and the sentence is set aside and appellant is set at liberty unless otherwise lawfully held.**

SIGNED, DATED AND DELIVERED THIS 31ST DAY OF MAY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE