



KTL.NO.285/2018

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 70 OF 2015

JACKSON MUSYOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original conviction and sentence in Mutomo Senior Resident Magistrate's Court Criminal Case (S.O.) No. 23 of 2014 of by Sandra Ogot R M on 05/02/15)

J U D G M E N T

1. **Jackson Musyoki Mutie**, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **6th day of July, 2014** at about **1.00 p.m.** at **[particulars withheld], Kasaala Location** within **Ikutha District** intentionally penetrated the vagina and the anus of one **MM** a girl aged **14 years** old.

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **6th day of July, 2014** at about **1.00 p.m.** at **[particulars withheld], Kasaala Location** within **Ikutha District** intentionally penetrated the vagina and the anus of one **MM**.

3. Facts of the case were that on the **6th July, 2014** at about **1.30 p.m.** **PW1, MM** was at home when two (2) men approached her. After sitting for a short while one of them carried her to the rear part of the homestead and violated her sexually as the other one stood by holding a panga. His act was interrupted by a person who went to the home. Both of them ran away. She decided to have a bath. While bathing a person held her from behind and penetrated her through the anus. After satisfying his urge he left. In the evening she reported the matter to her grandmother. Her aunt was informed. They reported the incident to the police. She was examined by **PW3 David Mulwa**, a Clinical Officer who found her having sustained tears on the vaginal wall and a broken hymen. He concluded that she had been defiled. The police investigated and arrested the Accused.

4. When put on his defence the Accused stated that he did casual work for **PW2 I K** who did not pay her. When he asked for his money she threatened him. On **21st July, 2014** while asleep in the house with his wife, he heard noise outside. He went out to find **I K** and Police Officers. He was taken to the police station. On **5th August, 2014** he saw **PW2** telling a young girl to state what he did to her.

5. The trial Magistrate considered evidence adduced and reached a finding that Complainant was defiled by the Appellant. She convicted and sentenced him to **fifteen (15) years imprisonment**.

6. Aggrieved by the conviction and sentence he appealed on grounds that:

- Evidence adduced was contradictory.
- The burden of proof was shifted to him.
- The Clinical Officer's evidence was unsatisfactory and confusing.
- The learned Magistrate failed to consider his defence that a grudge existed.

7. This is a first Appellate Court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. **(See Okeno vs. Republic (1973) EA 32)**.

8. This was a case of defilement where the Prosecution was required to prove:

- 1) The age of the Complainant.
- 2) The act of penetration.
- 3) Positive identification of the perpetrator of the act of penetration.

9. The contradiction the Appellant alluded to was in respect of the age of the Complainant. PW1 told the Court that she was fifteen (15) years old. PW2 her aunt did not know her age. She was however taken for an age assessment on **20th November, 2014** where her age was found to be 16½ years. In the case of **Robert Kabwere Kiti vs. Republic (2012) eKLR** the Court of Appeal considered a scenario where evidence of the Complainant varied thus:

“With regard to the alleged defects in the charge itself. If the defect in the charge is attributable to the discrepancy in the age of the victim as stated in the charge sheet 8 years and PW1’s evidence of 7 years, and the P3 from reading 8 years, the said discrepancies are in our view minor and are curable under Section 382 of the Criminal Procedure Code. They have not caused any miscarriage of justice because whether 7 years or 8 years. This age fell in the age bracket for the offence of defilement of a girl below the age of 11 years and the penalty has been clearly allocated in terms of the complainant’s age.”

10. This is a case where the Complainant told the Court that she does not go to school. Therefore she was an illiterate girl. Her aunt who lived with her did not know her age. Her age was established following the assessment done. The contradiction noted was minor. What was established was the fact that she was a child.

11. The Complainant stated that she was violated sexually on the **6th July, 2014**. She stated that the two (2) people found her eating lunch. As she returned the plate her assailant tripped her. She lost balance and fell down. The person seized the opportunity to carry her to the rear part of the compound. The assailant removed her panties having lifted up her dress, unzipped his trouser and penetrated her through the vagina and anus. Subsequently she was examined by PW3 on **8th March, 2014**. The vaginal walls had tears. The hymen was missing and she had vaginal discharge. This was evidence of penetration into her orifice.

12. When the incident occurred the Complainant was alone. It was her evidence that prior to the assailant lifting her up and carrying her to the scene of the incident, she was sitting down eating. When the two individuals arrived they sat with her as she ate and finished her meal. It was in broad daylight therefore nothing inhibited her from seeing and observing the persons. According to her, after they were interrupted and she decided to bathe, the same assailant held her from behind and spoke to her. He told her to bend so that he could penetrate her from behind. He also told her to hold onto the wall. Although the Complainant did not know the Appellant’s name he was familiar to her, having repaired a torch for her grandmother. The fact that the Complainant had seen the Appellant before is not disputed. Therefore she positively identified him.

13. It is submitted by the Appellant that the Complainant stated that there were people who saw them and in particular there was one **John** who saw him leaving the homestead. Indeed, on cross examination the Complainant stated that children of the neighbourhood saw him sexually assaulting her and one **John** saw him leaving his homestead. Circumstances in which these alleged people purportedly saw him were not disclosed. The question would be how the Complainant could tell that they were witnesses to the act. In his argument the Appellant did not state if he believed that failure to call the alleged persons as witnesses was detrimental to the Prosecution’s case.

14. In the case of **Julius Kalewa Mutunga vs. Republic, Criminal Appeal No. 31 of 2005** the Court of Appeal held that:

“..... As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

15. In **Bukenya & Others vs. Uganda (1972) EA 549** the East African Court of Appeal stated that:

“(i) The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

(ii) The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.”

16. In his defence the Appellant alleged that he worked for PW2 the Complainant’s aunt who never paid his wages. That the charges were trumped up when he asked for what was due to him. PW2 denied owing him anything and further denied having told the Complainant to frame him up. Evidence on record proves that the child was defiled. And the Complainant who knew the Appellant positively identified him as her assailant. Evidence of the alleged **John** who purportedly saw the Appellant leaving his homestead would not have been helpful as he did not witness the act of penetration into the Complainant’s genital organ by the Appellant’s male organ. In the premises failure to call him was not detrimental to the Prosecution’s case.

17. In sentencing the Appellant the learned trial Magistrate took into consideration the age of the Complainant following the assessment carried out she analysed the issue of the Appellant having been charged contrary to **Section 8(3)** instead of **8(4)** and found that no prejudice was occasioned. The correct approach would have been for the Magistrate to direct the Prosecution to amend the charge. However, as properly put the Appellant suffered no prejudice.

18. In the premises I find the Appeal lacking merit. The same is dismissed in its entirety.

19. It is so ordered.

Dated, Signed and Delivered at Kitui this 14th day of February, 2018.

L. N. MUTENDE

JUDGE