



REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL NO. 11 OF 2018

BETWEEN

SAMSON MUBAA MURIGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence dated 19th July 2017 in Criminal Case No.1164 of 2016 at Thika Chief Magistrates Court before Hon. B. J. Bartoo, RM)

JUDGMENT

1. The appellant, **SAMSON MUBAA MURIGI**, was charged and convicted of defilement contrary to **section 8(1) and (2)** of the *Sexual Offences Act*. It was alleged that on 26th February 2016 within Muranga County, he intentionally caused his penis to penetrate the vagina of PWW, a child aged 15 years. He was sentenced to serve 20 years' imprisonment.

2. He now appeals against conviction and sentence on grounds set out in this amended grounds of appeal and the written submissions. The thrust of this appeal is that the prosecution failed to prove its case beyond reasonable doubt.

3. The order to prove the offence of defilement, the prosecution must prove that the accused committed an act that caused penetration with a child. "*Penetration*" under **section 2** of the *Act* means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

4. The principal witness in this matter, RWW (PW 1), testified that she was 16 years old and she knew the appellant. She added that on 26th February 2016 about 1.00pm, she was at a neighbour's place when the appellant came and engaged her in a discussion about her studies. As she was going back home, he called her to his house and she narrated what took place as follows:

I was sitting in the house, the accused was alone in the house. I sat about 30 minutes. Accused removed my clothes skirts and panty. He also removed his pant and had sex with me. I did not make noise.

5. At about that time PW 1's mother, PW 2, came to the appellant's house looking for PW 1. He called her out and the appellant opened the door and when he saw PW 2, he shut the door.

6. PW 2 recalled that on 24th February 2016, she was called by her friend who told her to go to her place as PW 1 was in a boy's house. When she went to the appellant's door, she knocked and the door was

locked. She called the chief who then called two policemen who arrived and flushed out the appellant and PW 1 out of the house.

7. The doctor who testified, PW 3, produced a report prepared on behalf of his colleague under **section 77** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. He confirmed that PW 1 was seen four days after the incident. There were no tear or laceration on the genitalia although the hymen was broken and there was a foul smell from the vagina. On cross-examination, PW 3 stated that even though there was delay in examining PW 1, the evidence of penetration would remain even after a week.

8. The testimony of PW 1 is clear that there was penetration. In terms of the proviso to **section 124** of the *Evidence Act*, it was sufficient to support the conviction. In this case, the appellant and PW 1 were found in the appellant's house at daytime and were arrested together leaving no doubt that it is the appellant who sexually assaulted PW 1.

9. The appellant complained that the prosecution did not call essential witnesses. The prosecution did not call Mary who had been with PW 1 before she went to the appellant's house and the investigating officer. The law is that it is not necessary to call a multiplicity of witnesses to prove a fact. Mary would only have testified that the appellant was with PW 1 earlier and in view of the fact that PW 2 found the appellant with PW 1, her testimony was not necessary. Likewise, the Investigating Officer would only give an overview of the investigation process and in light of the evidence I have outlined, his evidence would neither add nor subtract to the prosecution case.

10. In light of the credible testimony of PW 1 and PW 2, the appellant's defence that he was away from home and was involved in an accident while going home does not raise any reasonable doubt. He was found with the PW 1 in his house and he was bound to give some reasonable explanation as to what he was doing with PW 1, that being a matter within his knowledge. No explanation was forthcoming.

11. The age of a child is a question of fact and it proved by the testimony of PW 1 and PW 2 while PW 3 estimated her age to be 15 years. There was no suggestion that she was an adult. The sentence imposed was the mandatory minimum sentence under the bracket where the child is aged 15 years under **section 8(3)** of the *Sexual Offences Act*.

12. The totality of all this evidence is that the prosecution proved its case. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at KIAMBU this 13th day of February 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kinyanjui, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.