



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAPENGURIA**

**CRIMINAL APPEAL NUMBER 14 OF 2017**

**CORAM: S. M. GITHINJI**

*(From original conviction and sentence in criminal case number 3  
of 2017 of the Principal Magistrate's Court at Kapenguria)*

MOSES MUYAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGEMENT**

MOSES MUYAN, the appellant herein was charged in the lower court with the offence of **Defilement, Contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006.**

The particulars of this offence are that on Tuesday, 3<sup>rd</sup> day of January, 2017 at around 7.30pm, in [particulars withheld], within West Pokot County, the appellant intentionally caused his penis to penetrate the vagina of P K, a child aged between 12 and 15 years.

The appellant faced an alternative count to the main one, of committing an **Indecent Act with a Child, Contrary to Section 11(1) of the Sexual Offences Act no. 3 of 2006.**

The particulars hereof being that on the 3<sup>rd</sup> day of January, 2017 at around 7.30pm in [particulars withheld], within West Pokot County, the appellant intentionally touched the vagina of P K, a child aged 14 years, with his penis.

The prosecution case is that on 3.1.2017 at 2.00pm PW-3 sent his three daughters namely P (the complainant), S and D to have a haircut. On their way back home, the appellant who is their neighbour approached them. He was riding on a motorbike and was carrying his brother namely B. The appellant singled out the complainant of the three girls, and offered her a ride back home. The complainant turned down the offer at first, stating she was getting into the next shop. However she later agreed. She boarded and they went ahead leaving the other two sisters behind, walking towards home. Ahead, the appellant dropped his brother B and instructed him to go home. They were only the three of them at the place. After Boniface left, the complainant remained with the appellant. She boarded the motorbike. The appellant told her he was going to get fertilizer. They went up to riverside where he stopped. There was nobody else at the place. It was at a forested area. He grabbed her and fell her down. He removed his trouser and panty.

He then removed her panty. He asked her not to cry or else he'll beat her. He put on a condom and using his penis, penetrated her vagina. He thereafter released her to go home, and instructed her to meet him later in the night. Meanwhile the complainant sisters had proceeded home without her. Along the way, near the forested area they had seen the appellant's motorbike parked with no one at site. When they got home they told their mother and father that the complainant was left with Mose who picked her on a motorbike. Later on the complainant got home. The mother asked her what had happened and she told her.

After everybody had gone to sleep, in the middle of the night, the appellant called her along the road. She woke up and went to meet him. He had his motorbike. He requested her to go with him to his house at [particulars withheld]. She agreed and they went. She lived with him in his single rented room. That night they had sex, where he used a condom. She was there till Thursday morning when he told her to go back home so as to attend school. She went to her grandmother's place, and her uncle W called her father, telling him that she was there. The father had been looking for her. He proceeded there and got her. He interrogated her as to where she was. He took her to hospital in Kabichbich. The appellant pursued him there and threatened him. The father (PW-3) called OCS Kabichbich who sent police officers to the place. They managed to arrest the appellant.

The complainant was seen at Kapenguria Referral Hospital on 9.1.2017. The medical officer who examined her noted that her hymen was broken. Tests done for STD's were negative. PRC form which had been filled earlier indicated the birth canal was bruised and perforated. Age assessment was done and she was found to be 14 years old. The appellant was then charged.

His defence is that on 3.1.2017 he was at home from 7.00 to 9.00pm. The following day he went to the shamba. On Thursday he went to the market. He was arrested on Sunday and charged. He denied the commission of the offence.

The trial court evaluated the evidence, found him guilty of the offence in the main count, convicted him and sentenced him to serve 20 years imprisonment.

The appellant discontented with the said conviction and sentence, appealed to this court on the grounds that:-

1. He pleaded not guilty during trial.
2. Crucial witnesses did not offer evidence
3. His fundamental rights were breached by the prosecution.
4. His defence was rejected for no cogent reason.
5. The prosecution case was contradictory and in want of merit.
6. His plea for case to start afresh was rejected.
7. The evidence was insufficient to warrant a conviction.

He urges this court to quash the conviction and the sentence, and set him at liberty.

The state does not oppose this appeal on the account of uncertainty of the evidence in relation to the age of the victim.

It was submitted by Madam Kiptoo that the particulars of the offence in the main count discloses that the victim was between 12 and 15 years old. However the alternative count indicates she was 14 years old. While the girl (PW-1) in her evidence stated she was born in the year 2000 and was 15 years old, the father indicated she was born in the year 2003. The age assessment showed she was 15 years or below, and was therefore not specific.

I have reweighed the entire evidence, looked into the charges, judgment of the lower court, submissions and grounds of appeal. It is true as submitted by the state prosecutor that the age of the victim was not properly established. The victim said in her evidence in chief on 8.3.2017, that she was born in the year 2000, 8<sup>th</sup> of June, she said she had a birth certificate but did not produce it or show it to the court. The father gave evidence on the very same day as PW-3. He said she was born in the year 2003 but could not remember the month. He said the birth Certificate got burnt in the house on 3.1.2017 at 2.00pm. The trial magistrate while taking complainant's evidence indicated, "**A female adult, sworn and states as follows in Kiswahili: -**"

PW5, who gave evidence on behalf of a clinical officer namely Clement Libei, who had filled the P-3 form and did an age assessment on the complainant stated, "**on 9.1.2017 received a patient namely Pamela 16 years old...**" Towards the end of his evidence he stated, "**....age assessment was also filled inspected by the same person on 7.6.2017 found to be 14 years old.**"

The main charge disclosure that the complainant was between the age of 12 years and 15, shows that the investigating officer was not able to establish her actual age and that is why he gave a range. The alternative charge put it at 14 years of which is specific and contradicts the particulars in the main count. When the trial court swore PW-1 as an adult, it suggests that she physically looked like an adult. It is doubtful why the complainant never produced the birth certificate if she had it with her in court while giving evidence. Her father confused the issue further when he said she was born in 2003, a different year from the one stated by the complainant of 2000, and when he said the Birth Certificate got burnt in the house. Definitely the contradictions shows either one of them was not truthful, or both. The age assessment does not reveal the examination that was done to establish it. It is just stated as 14 years.

Such evidence cannot be trusted. I have looked at the original P-3 form. The age given on the front page appears to have been 16 years, of which was later changed to 14. On page 3, part c, it is given as 14 years. This could be the reason why PW-5 gave both ages in his evidence. The trial magistrate in his judgment settled at 14 years. As this court had observed in **Criminal Appeal number 13 of 2017, of Romanos Mwetich versus Republic**, of which case had almost similar facts on age of the victim as this one, the trial court had no sufficient grounds to hold that the complainant was 14 years old. "What one may ask at this point is, given the evidence on record, what makes it certain that she was not below 12 years and above 15 years? Surely there is nothing. It is crucial for the prosecution to ascertain the age of a Sexual Offence Victim as the age differentiates between the offence of rape and defilement and the sentence which the offence should attract. Failure by the prosecution to do so is fatal to their case. In this case the evidence suggests the complainant consented to having sex with the appellant. If she was an adult, that is 18 years and above, consent would be an available defence to the appellant, and the offence would have been of rape. Failure by prosecution to establish the age of the victim form the Achilles heel in their case. I for the reason find the appeal merited; it's allowed; conviction and sentence are quashed and the appellant is set free unless otherwise lawfully held.

S. M. GITHINJI

**JUDGE**

**14.3.2018**