REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO.33 OF 2016

BETWEEN

MUNIKO MWITA MARWA ..... APPELLANT

AND

REPUBLIC ..... REKSPONDENT

(Being an appeal from original conviction and sentence in Kehancha PMCRC No.652 of 2013 dated on 29th June, 2016 by Hon. P.N. Maina, PM)

JUDGMENT

1. **MUNIKO MWITA MARWA** alias **JOSEPH MUNIKO** (the appellant) was convicted on two charges **(1)** defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No.3 of 2006** that on 27th October 2013 at [**particulars withheld]** village in **KURIA WEST DISTRICT**, he intentionally caused his penis to penetrate the vagina of M.M. a child aged 10 years **(2)** Escape from lawful custody contrary to **Section 123** as read with **Section 36** of the **Penal Code**, being that on 31st October 2013 at **NYAMTIRO** police post in **KURIA EAST** District, he escaped from the lawful custody of No.91979 COSMAS GITHEKA MULI at the said police post.

2. The appellant denied the charges, and prosecution called a total of 5 witnesses, while the appellant was the only defence witness.

MGM (PW1) was a standard 2 pupil at [**particulars withheld] PRIMARY SCHOOL** and recalled that on 27th October 2013 while asleep at their home, the appellant went where she was sleeping and held her hand and took her to his room. He then removed her plants and slept on top of her. She stated:-

> **"...Accused slept on top of me. He came and put his penis into my**
>
> **vagina... I felt a lot of pain ... Accused poured things that look like**
>
> **mucus on me and my clothes."**

3. She explained that the appellant was their neighbour who lived with them and her mother was not present during the incident. When her mother returned in the morning she informed her about the incident.

4. **J S M** (PW2), M.M.'s mother confirmed that she had left her home on 27th October 2013 to visit her sick mother at **GETANGARONA**. She knew the appellant as he lived on the same rented plot at

SENTA.

Upon her return the next day she realized that M.M. appeared sickly but was not forthcoming with what was her problem. After threatening to beat her, M.M. told her about the incident with the appellant. She checked M.M.'s genitalia and noticed that she had a lot of discharge and could not even walk.

5. **RHODA ROBII** (PW3) who lived in the same plot confirmed that PW2 was not at home, and she invited the latter's children to go and sleep in her house. MM declined the offer, but her younger sister obliged. She was present when MM narrated her encounter to her mother.

She further stated that when MM declined her offer, the appellant (who is her brother in-law) supported her and refused to let her take MM away – that is how MM ended up sleeping alone inside her mother's house.

6. MM was examined by **TIMASE ROBERT CHACHA** (a Clinical Officer) who noted that she had a lot of pain in the abdomen and the throat. There was inflammation of the labia and there was no hymen, no discharge nor were there any traces of spermatozoa. However he concluded that intercourse took place **WITHOUT** penetrative sex, and he concluded that the child was defiled.

7. After the appellant was arrested, **PC COSMAS MULI** (PW4) locked him up and handcuffed him to the grills at Nyamtiro police post report office for the night. He later realised that the appellant had cut the handcuffs and escaped. The appellant was later traced to BOREGA trading centre in Tanzania and arrested on 23rd November, 2013. The officer denied suggestions by the appellant that he had been directed by police to walk out of the police post.

In his sworn testimony the appellant maintained that PW4 released him from the cell after spending the night in custody.

8. As regards the claim about defilement, he stated that he had a land dispute with MM's father who is his uncle which was why he even moved from his rural home. Later on his uncle was named by the area Assistant Chief as being among suspected cattle thieves and he ran away to **MWANZA**. The uncles wife (MM's mother) then starting having love affairs with a young man – the appellant was opposed to that – so he was eventually framed up on this matter.

The appellant was inconsistent that there was no way he could have sex with MM who he said was too young and said his uncle's family simply wanted to make him poor and see his young family suffer just because of their social differences.

9. No age assessment was conducted but the trial magistrate stated that the health card produced was bona fides proof of MM's age, and that this was confirmed by the clinical officer who also entered the same age in the P3 form.

10. The trial magistrate held that the testimony of MM was sufficient to prove the case and relied on the provisions to **Section 124** of the **Evidence Act**. He was persuaded that the detailed description by PW1 on what transpired during the sexual act was proof that she was telling the truth.

11. As regards the medical evidence, the trial magistrate noted that MM was taken for medical examination 2 days after the incident and that the clinician had found injuries to the abdomen and right knee and that she looked normal. He also noted that MM could not walk properly. He was persuaded by the explanation given that the inflammation to the labia and the fact that it was wide open was an indication of sexual intercourse without deep penetration. The trial magistrate's finding was that there was partial insertion and that the opportunity to commit the offence presented itself due to **(a)** the absence of MM's mother. **(b)** the parties lived on the same plot and were well known to each other and interacted easily as relatives.

12. The appellant's defence was rejected as an afterthought which was sham and a mere denial. In this

regard the trial magistrate noted that the appellant had admitted having been arrested and placed in custody and that he was later re-arrested, and that the appellant never disputed the claim that he unlawfully left the cells with one part of the handcuffs he had cut, leaving the other part attached to the office grill where he had been held. The trial magistrate noted that the appellant's arrest was well documented in the Occurrence Book (OB) yet there was no such documents concerning his release leading to the conclusion that his departure from the cells was informal or undocumented and therefore unlawful.

13. The appellant challenged the findings on grounds that the trial magistrate failed to consider his defence and no DNA was conducted to establish that the mucus found on the clothes belonged to him and the medical officer was simply called to fill in the gaps left by prosecution.

14. The appellant relied on his written submissions to argue the appeal saying the evidence by prosecution witnesses was inconsistent and the trial magistrate failed to warn herself about the dangers of relying on uncorroborated evidence. Further that the medical evidence failed to establish how and when MM lost her hymen and whether it was as a result of sexual intercourse. It was his contention that the charge was not proved beyond reasonable doubt.

15. He also questioned the credibility of the evidence in view of the evidence by PW1 who said the appellant had been arrested and was in cells when the report about the defilement was made.

16. In opposing the appeal, MR. KIMANDO submitted that the evidence proved MM was a minor and had been defiled and there was no reason for the minor to frame the appellant.

17. I will not belabour the issue regarding MMs age as it was not contested. The main issues for consideration in this appeal are:-

> *a) Was the offence of defilement proved?*
>
> *b) Was there proof that the appellant escaped from lawful custody or was he irregularly released by PW4?*

18. Defilement is defined under **section 8(1)** of the **Sexual Offences act No.3 of 2006** as:-

> **"8(1) – A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

19. Where the victim is a child aged eleven years or less then upon conviction the only sentence available is life imprisonment. Penetration is a crucial ingredient in proving the offence, and is defined under **Section 2** of the **Act** to mean **"the partial or complete insertion of the genital organ of a person into the genital organs of another."**

20. Although the trial magistrate stated that medical findings had established injuries in MM's abdomen and throat, the evidence or record attributed to the clinical officer (TIMASE) only noted a lot of pain in the abdomen and thorax and knee joint. He did not say what had caused the pain. Infact he said **"... there were no visible injuries on the knee joint. Her urine showed she had bacterial infection –could this be the source of abdominal pain?**" The labia did not have visible injuries but appeared reddish – a sign of inflammation and the hymen was missing but there were no spermatozoa seen. He then concluded that intercourse took place but <u>without penetrative</u> sex. So the view of the medical person was that there was no penetration.

21. So what did the clinical officer mean that intercourse had taken place but no penetration? **Black's Law Dictionary Ninth Edition (Garner B.A) (ed) 2009 page 883** defines intercourse for purposes of this case as:-

> **"Physical sexual contact especially involving the penetration of the vagina by the penis."**

22. From this definition coupled with the definition under the Act – penetration is crucial and must be established. There can be no speculation or guesswork as to whether penetration may have occurred when the medical officer stated otherwise. All he said was the hymen was missing and it was open – he did not say that means there had been penetration.

23. What was established by the evidence presented at the trial was that MM's genital organs came into contact with either someone or something which did not penetrate but either rubbed, caressed or otherwise fiddled with her genitals as to lead to the conclusion that it resulted in the inflammation – to my mind that is the most normal hypothesis. To this end then the scenario here would fit what is defined under **Section 2 (a)** of the **Act** as an Indecent Act.

24. That would explain why an alternative charge of committing an Indecent Act with a child contrary to **Section 11 (1)** of the **Sexual Offences act** and the particulars stated that the appellant intentionally touched MM's vagina with his penis against her will.

25. Did the evidence show that the person who used his penis to touch MM's vagina against her will was the appellant? I think on this I need not delve much – the trial magistrate noted how the opportunity presented itself by virtue of the absent mother and younger sister. It would seem from the evidence of PW3 there must have been some improper deals between the appellant and MM – hence her reluctance to go and spend the night in PW3's house, and the appellant's zealous support for her reluctance – but she was a minor child under 15 and would not have the capacity to consent.

26. The appellant was well known to her as a relative – I am persuaded she did not scream to alert the other people within the plot **NOT** because she was rigged but because this was an arrangement (albeit illegal) between her and the appellant. I am satisfied with the trial magistrate's evaluation of the evidence regarding identification of the culprit. The defence about a family grudge was an afterthought never raised in cross examination.

27. Consequently I find that the evidence did not disclose the offence of defilement but established the alternative offence of charge of committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act**. The conviction is thus quashed on the main charge and substituted with a conviction on the alternative charge.

The offence attracts an imprisonment term of not less than 10 years; and consequently the life sentence is set aside and substituted with an imprisonment term of 10 (Ten) years.

28. With regard to the escape from unlawful custody, the offence took place on the night of 27th October 2013, a report was made to police on 29th October 2013 and according to PW4 it was PC GICHAGA who received the report. It is not clear on what date the appellant was arrested but according to PW4, on the night of 30th and 31st October 2013 he was already in police custody. It is also not clear when the appellant's wife made the report leading to his initial incarceration, but by 29th October 2013 when the report about the incident herein was made – according to PW4.

> **".... It was while in cells that MM 10 year old child was brought in by her mother and they reported a case of defilement ....I did not receive you and book you in the cell. I found you in the cell."**

29. Whatever arguments may be raised – the appellant was in lawful police custody. The trial magistrate properly analyzed and concluded that there were no formal records showing that the appellant was lawfully released. I find no reason to interfere with the trial magistrate's findings on this charge – the conviction on the charge was safe and I uphold it. The sentence was held in abeyance, because he had been sentenced to life imprisonment. Now that the scenario is different, he shall serve 12 months imprisonment on this count – the sentence shall run concurrently with the one of count 2 and both sentences run from date of conviction.

Written and dated this 18th day of January, 2017 at Homa Bay

H.A. OMONDI

JUDGE

Delivered and dated this 31st day of January, 2017 at Migori

A.C. MRIMA

JUDGE