



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 97 OF 2015**

**PETER MWANZIA MAKAU..... APPELLANT**

***VERSUS***

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**J U D G M E N T**

1. The appellant was dissatisfied with the judgment of Siakago Senior Resident Magistrate delivered on 1/12/2015 where he was convicted of the offence of defilement contrary to Section 8(1) of the Sexual offences Act and sentenced to serve thirty (30) years imprisonment.
2. In his petition of appeal the appellant relied on grounds of appeal which can be summarily stated:-
  - (i) That crucial witnesses were not called to testify including the medical officer;
  - (ii) That the evidence adduced was not voluntary and that Section 211 of the Criminal Procedure Code was not explained to him;
  - (iii) That evidence was full of contradictions and was uncorroborated;
  - (iv) That the case was not proved beyond any reasonable doubt.
3. The appellant argued his appeal by way of written submissions while the State made oral submissions.
4. The appellant raised other grounds in his submissions which I hereby briefly state:-
  - (a) That the evidence of the complainant and that in the medical document, namely P.3 form was not reliable.
  - (b) The investigating officer was not qualified to produce the P.3 form.
  - (c) That the key witnesses were a mother and her child which should not have been taken as credible.
  - (d) The arresting officer is the same one who investigated the case which is not allowed by the law.
  - (e) That the charge sheet is defective due to contradiction in the details of the occurrence book reports as to the date in the charge sheet and P.3 form.
  - (f) That the appellant was never medically examined.

5. The appeal was vehemently opposed by the State in its oral submissions presented by State Counsel Ms. Nandwa. It was argued that the appellant did not point out any evidence in the proceedings to show that the evidence of the prosecution witnesses was not voluntary.

6. Further that under Section 143 of the Criminal Procedure Code, the prosecution has the discretion to call any number of witnesses it finds appropriate. The evidence of the doctor was produced under Section 77 of the Evidence Act by the investigating officer.

7. On Section 211 of the Criminal Procedure Code, there is evidence borne by the record that the section was explained to the appelland and he elected to give an unsworn statement.

8. The State further argued that the court used the language of the appellant's choice to conduct the proceedings. There is nothing to indicate that the accused did not understand the procedure of the court. No inconsistencies were brought out by the appellant and that the issue of corroboration of evidence was well addressed by the prosecution. The state concluded by stating that the case was proved beyond any reasonable doubt and the appeal ought to be dismissed.

9. The facts of this case are that the complainant PW1 a nine (9) year old girl; that the appellant who was known to him as an employee of her neighbour called John, was at his employer's home. He used to mend shoes aside his other work. On the material day, PW1 took some shoes for mending to the appellant. It was at that juncture that the appellant pulled PW1's hand and took her to his house where he defiled her.

10. PW1 screamed for help but was threatened with death if she continued shouting. When she was finally released, she went home but feared to inform her mother that day. The following day the matter was reported to the police and the appellant arrested as PW1 was taken for medical examination and treatment.

11. The appellant gave an unsworn statement in his defence. He merely denied the offence by saying that the case was framed against him for a reason not known to him. From the evidence of PW1, she described in detail the incident which led to the commission of the offence. She knew the appellant as the employee of the neighbour and that he used to mend shoes as a side job.

12. The complainant testified that she was seized and sexually assaulted when she took shoes for mending. Due to the threats she received from the appellant, she did not tell her mother what had happened on the material day. It was the following day that the mother learnt of the unfortunate incident and took the necessary action.

13. The identity of the appellant was not in question as the trial magistrate put it. The incident occurred during the day and in the house of the appellant and there was no possibility of mistaken identity.

14. The evidence does not contain any indication that the evidence of the key witnesses PW1 and PW2 was not voluntary. The appellant did not point any such indications and this renders the ground of appeal base- less.

15. I have perused the record and noted that the court recorded the following as pertains to Section 211:-

*Section 211 of the CPC is explained to the accused in Kiswahili*

The accused replied:-

*I shall give an unsworn statement and call one witness. I request for a date to avail my witness.*

16. The record is sufficient proof that the section was clearly explained to the appellant and his response demonstrates his good understanding of the contents.

17. The appellant attacked the producing of P.3 by the investigating officer. Section 77 of the Evidence Act provides:-

*77(1) In Criminal proceedings any document purported to be report under the hand of a Government analyst, medical practitioner or ballistic expert, document examiner or geologist upon any person, matter or things submitted to him for examination or analysis may be used in evidence.*

*77(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistic expert, document examiner, and medical practitioner or geologist, as the case may be and examine him as to the subject matter thereof.*

18. If the appellant was not satisfied with investigating officer producing the P.3 form, he had the option of applying to the court to summon the doctor for cross- examination. I find that the P.3 form was properly tendered before the court under Section 77 of the Act.

19. Section 143 of the Criminal Procedure Act mandates the prosecution to call the witnesses it finds appropriate in proving its case. The omission to call the Assistant Chief who arrested the appellant does not affect the case of the prosecution. PW3 explained that the appellant was arrested by other people and handed over to him at Kiritiri police station.

20. There is no missing link on how the appellant was arrested and how he reached the police station. The prosecution therefore acted within its mandate in lining up its witnesses. It is trite law that proving a criminal case does not depend on the number of witnesses called but on the quality of the evidence tendered.

21. As for the key witnesses being a mother and a daughter, I find that there is no law preventing blood-related witnesses from testifying in a case. A witness is a witness provided he/she either witnessed the incident or has other evidence material to the case. The court is concerned with the credibility of a witness more than whether he is related to the complainant.

22. The investigating officer was not the arresting officer. Members of public arrested the appellant and handed him over to PW3 who received him at the station and was later mandated to investigate the case contrary to what the appellant claimed.

23. The only contradiction pointed out by the appellant is on the date and number of the occurrence book report. This is an immaterial contradiction and what matters to the court is the content of the report. PW3 confirmed in his evidence that a report of defilement was made by PW2 at Kiritiri police station against the appellant which was duly recorded and investigations commenced. The date of the offence was not in issue in this case.

24. In his submissions, the appellant seemed to doubt the magistrate's finding that the complainant's evidence was credible. I have perused the evidence of PW1 and find it candid and detailed, with no contradictions. For this reason, I find that the magistrate who had the opportunity of assessing the demeanor of the witness cannot be faulted for taking the evidence as totally credible.

25. The age of the complainant in this case was proved as nine (9) years from the evidence of PW1 and PW2 and the tendering of the birth certificate in evidence.

26. The P.3 form corroborated the evidence of PW1 in that penetration occurred. The magistrate clearly analyzed the evidence of the complainant that the appellant's male organ penetrated the complainant that the appellant's male organ penetrated the complainant's female organ and took judicial notice that the word "thing" meant the sexual organ. In the P.3 form, the doctor found the hymen perforated which was an evidence of penetration.

27. I find that the ingredients of defilement were proved as provided by Section 8 of the Sexual Offences

Act. The conviction was supported by cogent evidence.

28. As for the sentence, Section 8 provides for life imprisonment where the victim is aged eleven (11) years or less. The appellant was sentenced to 30 years imprisonment which is not provided by the law. Under Section 349 the Criminal Procedure Act, this court has the power to correct the sentence. I therefore set aside the 30 years jail term and substitute it with life imprisonment.

29. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF JANUARY, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Appellant present**

**Ms. Nandwa for respondent**