



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO.114 OF 2015**  
**JOHN MUASYA MUSYOKA .....APPELLANT**  
**VERSUS**  
**REPUBLIC .....RESPONDENT**

*(Appeal from judgment of the Principal Magistrate Court at Makindu Criminal Case No. 1148 of 2013 by E. M. Muiru Resident Magistrate on 7<sup>th</sup> July, 2015)*

**JUDGMENT OF THE COURT**

1. The appeal arose from the judgement delivered on the 7<sup>th</sup> July 2015, by the Resident Magistrate Hon. E. M. Muiru at Makindu Law Courts. The Appellant had been charged with an offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 and with an alternative offence of indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. He was found guilty, convicted and sentenced to serve Twenty (20) years imprisonment.

2. Not being satisfied with the conviction and sentence, the Appellant filed this Appeal raising the following grounds of Appeal:

*a. That the Hon trial magistrate erred on points of law and fact by holding that the case for the prosecution was proved against the Appellant whereas penile penetration was not adequately proved.*

*b. That the Hon trial magistrate erred on points of law and fact by holding that the case for the prosecution was proved whereas the age of the complainant was not properly ascertained to support the charge and sentence passed.*

*c. That the Hon trial magistrate erred on point of law and fact by holding that the case for the prosecutor was preferred whereas the conduct of the complainant was consistent with that of an adult. The statutory defence as contained under section 8(1) as read with section 8(5) and 8(6) of the Sexual Offences Act No. 3 of 2006 was denied by the trial court.*

*d. That the Hon trial magistrate erred on point of law and fact by holding that the case for the prosecution was proved whereas the expert evidence as adduced was self contradictory, improperly placed in support of the prosecution's case and was not adduced by experts who conducted the forensic examination thereby constituting hearsay evidence which is inadmissible in law.*

3. The Appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

4. The appeal is opposed by the state through the submissions filed herein on 8/2/2017. The prosecution's case is that the trial court did not err in convicting and sentencing the Appellant. The Respondent submitted that the case was proved beyond any reasonable doubt as the evidence tendered was credible, consistent and well corroborated and hence the Appeal be dismissed and the conviction and sentence of the trial court be upheld.

5. It is the Duty of this court as the first Appellate court to re-evaluate and to re-examine the evidence tendered at trial so as to reach its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify but to make an allowance for that (**See OKENO VS R [1972] EA 32**).

## **6. Summary of the prosecution's case**

The complainant (PW1) testified that on 7/9/2013, she had gone to the shop when the Appellant herein who was well known to her pulled her into his room locked the door and forcefully proceeded to have sex with her. She spent the night there and the following morning community policing officers broke down the door and rescued her. She was escorted to Kibwezi Police Station from where she was taken to Kibwezi Sub-District hospital where she was examined by Kevin Maweu (PW5) who noticed the hymen was broken and some whitish discharge from the complainant vagina. The said witness confirmed that there had been sexual penetration and he produced the P3 form. The Appellant was also escorted to Kibwezi Police Station and PC Douglas Ombati (PW6) took over investigations and who recovered a pant belonging to the complainant and which was taken for analysis and which revealed presence of spermatozoa whose DNA later matched with Appellant's blood sample. An age assessment report conducted two years after the incident revealed that she was between 17-18 years old.

## **7. Appellant's Defence**

In his defence the Appellant tendered a sworn testimony and denied committing the offence. He stated that he had woken up and went about his employer's duties only to be requested by a clan elder to accompany him to the police station from where he learnt of the defilement allegations. He maintained that he was arrested while outside his house alone without the alleged complainant but admitted that he knew the complainant who was his employer's neighbour. He also confirmed that he had no grudge with the complainant.

## **8. Submissions**

Parties filed submissions which I have carefully considered. The only issue I raise for determination is whether the case was proved beyond any reasonable doubt.

9. According to the evidence on record the complainant spent the night in the house of the Appellant herein. She knew the appellant before and which the Appellant confirmed in his sworn evidence. The complainant stated that she had gone to the shop when the Appellant forcefully pulled her into his room and forcefully penetrated her. She stated that she screamed but nobody came to her rescue. She stated that Appellant undressed her by force and had sex with her. As the Appellant was well known by complainant, the evidence is that of recognition as opposed to identification of stranger. The Appellant and complainant were forcefully removed from the house the following day by community policing officer and accused's employer and then escorted to Kibwezi Police Station. For the offence of defilement to be established the following ingredients must be demonstrated: age of the complainant, proof of penetration and positive identification of assailant. On the issue of the age, the same was indicated on the charge sheet as 15 years in 2013 and complainant was later examined for age assessment in 2015 and her age found to be 17-18 years as confirmed by the age assessment report produced as exhibit No. 4. Dr. Maweu (PW5) who produced the P3 form as exhibit 1 indicated the age of the complainant as 15 years. The subsequent age assessment which was conducted two years later placed her age as between 17 and 18 years and therefore the complainant's age at the time of the defilement as indicated by the doctor was 15 years. As regards the issue of penetration, the complainant stated that the appellant forcefully undressed her and had sex with her. The doctor (PW5) corroborated her testimony in that upon examination it revealed that the hymen was broken and there was presence of whitish discharge and the doctor

confirmed that there was sexual penetration. On the issue of identification, the circumstances of this case are those of recognition as opposed to that of identification of a stranger. Both the complainant and appellant confirmed in their testimonies that they knew each other. The complainant was rescued from the house of the appellant by community policing officers and village elder as well as Appellant's employer and that the two love birds were escorted to Kibwezi Police Station. Hence, there is no doubt that the Appellant was the one who had defiled the complainant. There was no frame up since the appellant confirmed in his evidence that he had no grudge with the complainant. The appellant has submitted that the forensic analysis from the Government Chemist which confirmed matching between his DNA blood sample and spermatozoa on complainant's underpant should have been produced by an expert and not the investigating officer. Indeed section 77 of the Evidence Act allows the production of a document by another person other than the maker where the attendance of the maker cannot be procured without undue delay. It is noted that the production of the said document by the investigating officer was not objected to by the Appellant. Again, even if the said report had not been produced, I find the complainant's testimony that the Appellant is the one who had defiled her still stands. The Appellant has also submitted that the trial court failed to consider the statutory defence in his favor as provided for under Section 8 (1) as read with section 8 (5) (6) of the Sexual Offences Act No. 3 of 2006. The evidence in the trial court is silent that the complainant deceived the Appellant into believing that she was over 18 years since the Appellant did not present any evidence to the effect that he had taken steps to ascertain the complainant's age. He did not make the provisions of Section 8 (5) of the Sexual Offences Act and it is inconceivable that he expected the trial court to consider the same on its own benefit. The Appellant cannot now raise the issue after the matter had been concluded and is therefore an afterthought. The case had been proved against the Appellant beyond any reasonable doubt.

10. Having carefully considered the appeal herein and the evidence together with submissions, it is the finding of this court that the appeal lacks merit. The Appellant had been sentenced to serve Twenty (20) years imprisonment which was the minimum possible sentence imposed under Section 8(1) as read with Section 8(3) of the sexual Offences Act No.3 of 2006. The Appeal is dismissed.

The conviction and sentence by the trial court is upheld.

**Dated and Delivered** at Machakos this **28<sup>th</sup>** day of **March**.2017.

**D.K. KEMEI**

**JUDGE**

**In the presence of:**

John Muasya Musyoka – Appellant

Machogu for Respondent.....

C/A: Muoti.....