



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL NO. 175 OF 2014

BETWEEN

JOHN MUYONGA MUCHOKI.....APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. D.O. Ogembo, PM dated 29th October 2010 at Senior Resident Magistrate's Court at Butere in Criminal Case No. 588 of 2010)

JUDGMENT

1. Before the subordinate court, the appellant, **JOHN MUYONGA**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act***. The particulars were that on 12th September, 2010 at [particulars withheld] Khwisero District he unlawfully caused his penis to penetrate the anus of VAU a child aged 3 years. He was sentenced to life imprisonment and now appeals.
2. In his petition of appeal, the appellant complained that he was convicted on the evidence of a single witness whose evidence was uncorroborated. He submitted that he was framed as a result of an ongoing family dispute. He also attacked the medical evidence as insufficient to establish the case. He further submitted that essential witnesses were not called and that the case was full of contradictions. The respondent's position is that the prosecution proved all the elements of the offence of defilement.
3. At the trial the child, who was aged 3 years old, did not testify as she was declared vulnerable. Her mother (PW 1) stated that she was shy and unable to speak to strangers. PW 1 told the court that on 12th September, 2010 at 6.00pm, her niece, PW 3, came home and told her that she had heard the child crying earlier and when she went to check, a man came out the bush where she found the child. PW 3 told her that the child told her that it was the appellant who assaulted her. PW 3 brought the child home.
4. When the child woke up, she narrated to PW 1 what happened. She told her that the appellant had given her 5/= pulled her into the bush and sexually assaulted her. When PW 1 examined the child's private parts, she noted that there was discharge from the bruised anus. PW 1 told the court that after taking the child to the police station, she went to a funeral where she confronted the appellant about the incident. The appellant agreed that he assaulted the child and offered to treat her.
5. PW 3, a cousin to the child, testified that on 12th September, 2010 at about 5.00pm she was leaving school through a short cut. Along the way she heard the child's voice from the bushes and saw the appellant running away from the same bush. When she went to check, she found the child, examined her and noted that there was a discharged from the bruised anus. She took the child home and told PW 1 what

she had seen. In cross-examination, she stated that she knew the appellant and that she had seen him run away from the bush.

6. A sister to the child, PW 4, gave unsworn testimony that she had seen the appellant many times at their home and on that day, in the evening, she found the child missing. She further stated that she had seen the appellant at their home where he had asked for water from the child before pulling her into the bushes. She heard the child scream and when she went to the bush, the appellant was on top of the child. He ran away thereafter. She reported what she had seen to PW 1.

7. The Clinical Officer who examined the child at Butere District Hospital on 13th September 2010, PW 2 testified that the child had bruises on her anal orifices and her gait had changed though the genitalia were in fair condition. He treated the child and concluded that there was defilement.

8. PW 5, the Investigating Officer, confirmed that he received the report of defilement on 12th September, 2010 at 9.00am at Musalaba Patrol Base. He took statements and issued the P3 form. He testified that the appellant was arrested by members of public and brought to the police base.

9. In his unsworn defence, the appellant stated that he was at a funeral on the night of 12th September, 2010 when after a quarrel with someone over a lady, he was arrested by people and taken to the police post. He denied the charge and stated that his family and the complainant family had differences.

10. I have reviewed the evidence and I am satisfied that the prosecution proved its case. Although the child was not called as a witness, the circumstantial evidence against the appellant was watertight. PW 4 witnessed him sexually assaulting the child. Shortly thereafter PW 2 arrived and she saw the appellant run away. The appellant was not a stranger to the witnesses and was very well known to them. That the child was injured is confirmed by the examination by PW 1 and the Clinical Officer, PW 3, who both noted that the child's anus was injured.

11. I reject the appellant's defence of grudge as the nature of the grudge was not suggested to the witnesses in cross-examination. PW 1 denied it when cross-examined. Moreover, in light of the circumstantial evidence, it is difficult to see how the children could have conspired to frame him. In addition, there is also testimony from PW 1 that when she confronted to the appellant at a funeral, the appellant admitted that he is the one who sexually assaulted the child and was willing to pay for her treatment.

12. The testimony of PW 1, PW 3 and PW 4 was consistent and was not shaken on cross-examination. The totality of all this evidence is that the prosecution proved penetration of the anus by the appellant. It is clear that the age of the child was established and confirmed by the trial magistrate. At any rate she was below the age of 11 years where, under **section 8(2)** of the ***Sexual Offences Act***, a mandatory sentence of life imprisonment is prescribed for a person found guilty of defiling a child below that age.

13. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at KAKAMEGA this 31st day of August 2017.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng'etich, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.