



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**CRIMINAL APPEAL NO. 66 OF 2015**

**R N.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in **Mutomo Senior Resident Magistrate's Court Criminal Case (S. O.) No. 17 of 2014** by **Hon. Z. K. Nyakundi P M** on 10/12/14)*

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

1. **R N**, the Appellant was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. Particulars of the offence being that on the **21<sup>st</sup>** day of **June, 2014** at around **10.00 a.m.** at [**Particulars Withheld**] within **Mutomo District** and in **Kitui County** unlawfully and intentionally caused his penis to penetrate the vagina of **N R** a child aged **9 years old**.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **21<sup>st</sup>** day of **June, 2014** at around **10.00 a.m.** at [**Particulars Withheld**] within **Mutomo District** in **Kitui County** intentionally touched the vagina of **N R** a child aged **9 years old**.
3. Facts of the case were that on the **21<sup>st</sup> June, 2014**, **PW1 N R**, the Complainant, was at home when her mother, **PW2, M R** sent her to look for firewood as she went for a meeting. Her father, the Appellant, told her to return the panga she was carrying. As she was going outside he closed the door, removed her pant and took her to bed. He removed his penis and penetrated her vagina. She started screaming due to the pain but the Appellant threatened to kill her.
4. In the meantime **PW2** returned home to collect flour that she had forgotten. She found the door to the house closed and learnt that the Complainant and Appellant were inside. She knocked the door and opened it. The Appellant who was naked moved out of bed. The Complainant was also naked. When **PW2** confronted the Appellant he pushed her and embarked upon assaulting her. **PW2** instructed **PW1** to call her aunt **C**.
5. **PW3 C N** responded. She found the Appellant assaulting **PW2**. She called the police. **PW4, No. 2007118927 APC Kennedy Chege** and another responded immediately. They arrested the Appellant and took him to the Administrative Police Camp. He escaped from custody but they arrested him the following day. The Complainant was subjected to medical examination by **PW5, Daniel Mulwa**, a Clinical Officer. She had sustained laceration on the labia majora and labia minora and on the vaginal wall. The hymen was broken. A high vaginal swab carried out revealed pus cells. It was concluded that defilement had taken place.
6. When put on his defence the Appellant stated that he married a lady known as **D R** in **2009**. She had three (3) children. They had marital problems. In **2010** she deserted their matrimonial home

- and left him with the children. He went with her eldest child to trace her. She declined to go to his home and she accused him of committing adultery. PW3 went and asked him for a jerician. He refused to give her. She went and alleged that she found him defiling the Complainant.
7. The learned trial magistrate considered evidence adduced and reached a finding that the Appellant defiled the Complainant, a child aged **nine (9) years old**. He convicted and sentenced him to **life imprisonment**.
  8. Being aggrieved by the conviction and sentence thereof the Appellant appealed on grounds that:
    - The language the court used at trial was not indicated which made it difficult for the Appellant to ask questions.
    - Witnesses gave contradictory evidence hence contravening **Section 163(1)(c)** of the **Evidence Act**.
    - The Clinical Officer was not qualified to present evidence of the **P3 form** in court.
    - The case was not proved beyond reasonable doubt.
  9. This being a first appellate court I am duty-bound to re-evaluate evidence adduced at trial afresh and come up with my own conclusions bearing in mind the fact that I had no opportunity of either seeing or hearing witnesses who testified. **(See Okeno vs. Republic (1972) EA 32)**.
  10. In faulting the court to have failed to comply with **Section 214** of the **Criminal Procedure Code** the Appellant quoted the relevant provision of the section that provides thus:

*“where at any stage of trial before the close of the case for the prosecution, it appears to the court that the charge is defective in substance or in form, the court may make such orders for the alteration of the charge by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case.”*

11. It is argued that the learned magistrate having observed the relationship that existed between the Appellant and Complainant should have made orders that would have paved way for amendment of the charge. This is a case where the police and in particular the Prosecuting Officer used his discretion to charge the Appellant with the offence of Defilement. Evidence adduced by the Prosecution suggested that the relationship between the Appellant and the Complainant was of a biological father and daughter. In his defence the Appellant stated that indeed the Complainant was his step-daughter.
12. In the case where an individual is charged with the offence of Incest, a father includes a half father. **(See Section 22 of the Sexual Offences Act No. 3 of 2006)**. Had the Accused been charged with the offence he would have been liable to life imprisonment considering the age of the Complainant. **(See the proviso to Section 20 of the Sexual Offences Act No. 3 of 2006)**.
13. In the instant case the Appellant was charged with the offence of Defilement which similarly attracts a penalty of life imprisonment. The Prosecution used its discretion to charge the Appellant with the offence having taken into consideration its ingredients of the charge, therefore the Appellant would suffer no prejudice. In the premises, **Section 214** of the **Criminal Procedure Code** was not breached.
14. Looking at the court record, right at the outset, when the charge was read to the Appellant the language used was indicated as **“kamba”**. Thereafter, the language was not expressly indicated but a court interpreter was present in court throughout. In the case of **Hassan Nuno vs. Republic (2010) eKLR** the Court of Appeal held that:

*“we take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused or even to the court where it does not understand the language of the accused; or witnesses to the case.....”*

15. The Appellant was offered interpretation services by the court clerk. Contrary to his allegation that he was not in a position to cross-examine, he did cross-examine witnesses and even adduced evidence in his defence. He was not prejudiced as alleged.
16. The P3 was filled by a Clinical Officer who examined the Complainant. It is argued that he was

not a Doctor therefore not competent to fill the P3 form. **Section 2** of the **Clinical Officers Act (Training, Registration and Licencing Act, Cap 260 (k))** defines a Clinical Officer as:

*“A person who, having successfully undergone a prescribed course of training in an approved training institution is a holder of a certificate issued by the institution and is registered under the Act.....”*

**Section 7(4)** of the Act states:

*“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes this section by the Minister by Notice in Kenya Gazette.”*

17. Further in the case of **Raphael Kavoi Kiilu vs. Republic, Criminal Appeal No. 128 of 2008** it was held that this is an area of competency of a Clinical Officer and there is no requirement in the **Sexual Offences Act** that a P3 form must be produced by a medical officer.
18. In the circumstances the ground of appeal fails as the Clinical Officer was competent to fill the P3 form.
19. **Section 163(1)(c)** of the **Evidence Act** provides thus:

*“(1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him—*

*(c) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted;”*

No evidence was called to impeach the witnesses who were called by the Prosecution. The grounds of appeal that remains unsubstantiated must fail.

20. This therefore brings us to the issue whether the charge was proved to the required standard.
21. To prove the charge of Defilement in the instant case the Prosecution was required to show beyond any reasonable doubt that:
  - i. The Appellant committed an act that caused penetration of the Complainant.
  - ii. That the Complainant was a child aged **nine (9) years old**.
22. The Complainant described vividly how the Appellant inserted his penis into her vagina after removing her pant. Penetration is defined as partial or complete insertion of the genital organ of a person into the genital organ of another person (**See Section 2 of the Act**). PW2 found the Appellant and the Complainant naked. She interrupted them, an act that made them come off the bed. The Complainant was taken to **Mutomo District Hospital** soon after the act. A Post Rape Care form was filled which duly guided the Clinician who filled the P3 form. Ultimately, a P3 form was filled. On examination it was established that the Complainant sustained injuries as a result of the act. The labia minora and majora, the vagina wall were lacerated and the hymen broken. This evidence confirmed that the Complainant was penetrated. This was proof that the Appellant did an act that caused penetration of the Complainant.
23. PW2 the Complainant's mother testified as to her age. She stated that she was **nine (9) years old** a fact not disputed.
24. In his defence the Appellant gave an explanation which suggested that he disagreed with PW2. He alluded to having denied PW3 a water container an issue that made her allege that she was defiling the Complainant. In light of cogent evidence adduced by the Complainant and her mother that was corroborated by medical evidence, alleged denial of PW3 some water could not make the witnesses trump charges against him.
25. In the result I find the Prosecution having proved the case against the Appellant to the required standard. The sentence imposed by the trial court is the one provided in law. Therefore, the appeal is devoid of merit. Consequently, I affirm the conviction and sentence meted out.

26.It is so ordered.

**Dated, Signed and Delivered at Kitui this 15<sup>th</sup> day of March, 2016.**

**L. N. MUTENDE**

**JUDGE**