



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NANYUKI**  
**CRIMINAL APPEAL NO. 51 OF 2015**

**MICHAEL KAUGI BENETI.....STATE**

*versus*

**REPUBLIC..... ACCUSED**

*(Being an appeal from the original conviction and sentence in*

*Nanyuki Chief Magistrate's Court Criminal Case No. 600 of 2014*

*by Hon. T. W. Cherere Chief Magistrate on 23<sup>rd</sup> April 2015).*

**JUDGMENT**

1. **MICHAEL KAUGI BENETI** (appellant herein) was convicted before the Nanyuki Chief Magistrate's Court for the *offence of defilement contrary to section 8(1)(3) of the Sexual Offence Act*. On conviction the trial court sentenced him to life imprisonment. He was aggrieved by both the conviction and sentence and as accordingly filed this appeal. The complainant **MK** as stated in the charge sheet is a five year old girl. In giving evidence on 24<sup>th</sup> November 2014. She informed the court that she was six years old. There was no other evidence tendered by the prosecution regarding her age other than that the doctor who filed the P3 form stated that her estimated age was 4 years.

2. **MK** after *voir dire* examination was found to be intelligent but because she did not know the significance of an oath she did not give her evidence under oath. She stated before court that on 22<sup>nd</sup> June 2014 at 1 pm the appellant met her while she was in the company of another four year old girl **MM**. The appellant was known to both her and **MM**. She said that he lived near her home. When the appellant met the two girls they had been sent by **MM**'s mother to go and buy cooking oil. **MK** said that when they met the appellant he told them that he would show them where they could buy cooking oil. She then stated:-

*“He (appellant) held us by his hands. Accused (appellant) took us to his shamba(farm). He undressed me. He lay on me. He removed my underpants. He held me by the neck when I cried. He put his thing used to urinate between my legs ..... MM was seated nearby.”*

**MK** said that the appellant threatened to kill her and **MM** if they told anyone what he had done.

3. **P N (P)** is the grandmother of **MK**. She stated in evidence that on 22<sup>nd</sup> June 2014 at about 1pm she was told by **MM**'s mother that she had sent the girls, that is, **MK** and **MM** to buy cooking

oil but that they had failed to return. This led Peris to go looking for the girls. When she did so she said that she heard cries of children. She asked a neighbour to assist her to look for the girls. It was then that they met the appellant holding the hands of the girls. When the appellant saw her he ran away but the public arrested him when he fell off a fence. P on inspecting MK found that she was bleeding from her private parts.

4. **Judith Mwendwa (Judith)** stated that on the material date and time she heard someone scream and she went to the scene she saw a man running away. She took part in the chasing of the man that was being chased by the public. She stated that it was the appellant who was eventually arrested by the members of the public. She too examined MK and saw that her vagina was red.

6. **M M** mother of MM stated that on 22<sup>nd</sup> June 2014 at 1 pm she had sent her daughter together with MK to go and buy cooking oil. She was concerned when by 1.30 p.m. they had not returned. She went out to look for them. She was unable to find them and she proceeded to inform MK's mother. In their search they saw the appellant with the girls. On being asked where he had been with the girls the appellant ran away. This witness learnt from the girls that the appellant had defiled MK.

7. The P3 was produced by Dr. Tony Oriendo on behalf of the doctor who examined MK and who compiled the P3 form. It was noted in the P3 form that MK's vagina was inflamed (injured) and her hymen was broken. She also was found to have a discharge of pus cells. The doctor who compiled the P3 form indicated that he noted there was **"attempted force penetration"**.

8. The appellant gave a sworn testimony in his defence. He denied defiling MK. He stated that on the day in question he was walking to the market when he met MK mother in the company of another lady. He said that they began to assault him claiming that he had stolen their children. He further stated that they took him to MK mother's home and beat him further and tied him with a rope before taking him to the police station.

9. The appellant faulted his conviction by arguing that the prosecution's case did not meet the criminal standard of proof. He advanced that argument on the basis that MK's evidence was not corroborated; that the sighting of blood in MK's vagina was not supported by evidence of Judith, and by the investigating officer; and that the age of MK was not ascertained.

10. The state was represented by the Principal Prosecution Counsel Mr. Tanui. Mr. Tanui opposed the appellant's appeal. In his submission in opposition to the appeal he stated that MK was five years old. He further submitted that MK was able to narrate before the court how the appellant had defiled her. He further drew the courts attention to the fact that the appellant was known to MK. Further that MK grandmother P also saw the appellant holding the hands of MK and MM. Mr Tanui submitted that the appellant did not raise a defence to the prosecution's evidence. He therefore sought the dismissal of the appeal.

11. This is the first appellant court and as such this court is required to reevaluate the evidence tendered during the trial, draw its own conclusions, yet being mindful that this court did not see or hear the witnesses testify. See the case of **OKENO VS REPUBLIC (1972) EA 32**.

12. I will begin to interrogate the grounds presented by the appellants in this appeal and then consider whether indeed the evidence presented by the prosecution proved the charge that the appellant faced or any other.

13. On corroboration it is important to note that contrary to the appellant submissions the prosecution has discretion to call any number of witnesses. See section **143 of the Evidence Act Cap 80**. That section provides that there is no particular number of witnesses that are required to prove any facts. That however being so the prosecution has a duty to call witnesses who are relevant to a case whether their evidence is or is not adverse. See the case of **BUKENYA & OTHERS VS REPUBLIC (1972) EA 549**, the court said at Page 551:-

***“While the director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available, who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of these witnesses, if called would have been tended to be adverse to the prosecution case.”***

14. Appellant was arrested by members of the public one of whom was Judith. She gave evidence relating to that arrest. P was also present when the appellant was arrested. In my view the prosecution had no obligation to call any more witnesses over and above P and Judith. The members of public who assisted in the arrest of the appellant were after all merely responding to the alarm raised by the women who first confronted the appellant. After the arrest by the members of the public the appellant was rearrested by the police. The appellant himself did not deny that he was first arrested by the members of the public. Indeed in his evidence the appellant faulted the prosecution’s case saying that he was wrongly arrested by members of the public as he was on his way to the market. He therefore cannot fault the prosecution for not availing the evidence of other witnesses who were involved in his arrest since he does not dispute that.

15. The appellant also argued that the evidence of P that MK private part was bleeding was not corroborated by Judith and the mother of the MN. That submission in my view has no basis. It has no basis because Judith very clearly in her evidence stated that after the appellant was arrested by members of the public she examined MK and saw that her vagina was red. The mother of MM on the other hand gave evidence of how MM narrated to her how the appellant took her and MK to his farm and defiled MK.

16. In my view P evidence that MK was bleeding or was red in her vagina was well corroborated by Judith and even by the doctor who examined MK. That doctor by the P3 form produced in evidence noted that MK had injury to her vagina.

17. It follows that the submissions by the appellant relating to corroboration or the lack of it is rejected.

18. The appellant was charged with defilement as provided under section 8 (1)(3) of the Sexual Offences Act. Under that section the child referred to is the one who is aged between 12 and 15 years old . Although this is what is provided in the section the prosecution’s evidence placed MK between 5 and 6 years old. However in view of my findings later on in this judgment I will not dwell much on whether MK’s evidence regarding her age was sufficiently proved by the prosecution.

19. The appellant was charged before the trial court with the main count of defilement contrary to section 8(1)(3) of the Sexual Offences Act and in the alternative was charged with the offence of indecent act with a child. Although the charge sheet stated that the alternative offence was contrary to section 4(1) of the sexual offences act the correct section in respect to the offence of indecent act of a child is section 11(1) of the sexual offences act. I do find that error in the charge is curable under **section 382 of the Criminal Procedure Code Cap 75.**

20. Having found that the alternative charge is curable under Section 382 of Cap 75 I do find that the prosecution evidence proved the alternative charge rather than the main charge the appellant face. I base this finding mainly on the evidence of the doctor who examined MK and who filed the P3 form. His finding of that examination was that there was evidence of attempted false penetration. Further P the grandmother of MK stated that MK was bleeding from her private parts. Judith on the other hand stated that MK’s vaginal was red. The doctor found that her vagina was injured but there was no penetration.

21. In my view if indeed MK had been defiled in other words that there was penetration and bearing in mind her age, said to be between 5 and 6 years in mind both parents and Judith would have noted from her gait that she had been defiled. There was no mention by any witness that

MK's manner of walking had changed after the offence was committed by the appellant. Indeed there was no evidence tendered that MK was complaining of pain. It is also important to note MK was not seen by the doctor until 3 days after the incident. It is because of that that I find that the evidence of the doctor that there was attempted penetration to be accurate. What then the appellant ought to have been found guilty of is the offence of indecent act to MK.

22. The trial court found the evidence of MK to be believable. I have no doubt in my mind in the veracity of MK in view of that observation by the trial court magistrate of MK's demeanour. The trial court had this to say in judgment:-

***“The complainant though a minor she amazed me with her intelligence. She could tell that she was in court and although she was only in upper class (sic) could tell that 24.11.14 when she testified was a Monday. She gave evidence surrounding the events of the day very articulately. She did not waiver in her evidence even under intense cross examination by accused and I have no reason to doubt that she is a truthful witness.”***

23. It follows that this court has no basis of doubting the evidence of MK but to the extent that the entire prosecution's evidence only proves that the appellant committed the offence of an indecent act with a child. There is no doubt also that MK was a child because even the trial court which saw her testify first led her through *voir dire* examination. The trial court could not have conducted that examination if MK was an adult.

24. That being so this court quashes the appellant conviction on the main count and sets aside his sentence of life imprisonment. The appellant is hereby convicted of the offence of an ***indecent act with a child contrary to section 11 (1) of the Sexual Offence Act. He is sentence to serve 5 years imprisonment which sentence shall begin from the date of conviction and sentence by the trial court.***

25. It is so ordered.

**DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF MAY 2016.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant – Njue

Appellant: Michael Kaugi Beneti .....

For the State: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**