



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CRIMINAL APPEAL NO. 58 OF 2014**

*[Being an appeal in the CM's court at Bungoma No. 2620 of 2011 by Hon. C.L. Yalwala on 22<sup>nd</sup> May, 2014].*

**AGGREY MURIANGA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGEMENT**

1. The appellant was charged in **CMCR Case No. 2620 of 2011** with the offence of defilement of an imbecile contrary to Section 7 as read with subsection 4 of the Sexual offences Act No. 3 of 2006. The particulars of this offence were that on the 26th day of December 2011 in Busia County he intentionally and unlawfully did an act which cause penetration by inserting his penis to the genital organ namely the vagina of **B N** a child aged 15 years.

2. He was also faced with an alternative count of an indecent act contrary to Section 11 (i) of the Sexual Offences Act No. 3 of 2006. The particulars of this count were that on the 20th day of December, 2011 in Busia county intentionally and unlawfully did indecent act by causing his penis to come into contact with genital the organ namely the vagina of **B N**.

3. The appellant pleaded not guilty and the matter went to full trial with the prosecution calling a total of 6 witnesses. At the close of the prosecution the accused was found to have a case to answer and was put on his defence. The trial court found him guilty of the 1<sup>st</sup> count, convicted him and sentenced him to 15 years imprisonment. Being aggrieved by the conviction and sentence he appealed to this court.

4. The grounds of appeal were that, the trial court considered contradictory verbal evidence with no statement which evidence was speculative; the appellant was denied court proceedings and statements and as a result he was not enable to adequately prepare; the case was not investigated to the required standard; the court was given contradictory dates by the prosecution witnesses, **PW2** who was the main witness failed to identify the appellant and lastly the appellant's mitigation was disregarded.

5. This is the first appellate court and it has to consider the evidence afresh, analyze and evaluate the same in order to arrive at an independent opinion see **Okeno Vs. Republic [1973] E.A.**

6. The evidence of the prosecution was as follows;

**PW1 J M** - the father of the complainant **B N**. His daughter is aged 15 years and mentally retarded. Due to her mental condition the complainant disappears and may follow any one who calls her. On 25.12.11 at

about 6.30 p.m he returned from work and was told that his daughter had gone to a crusade nearby. She did not however return. At about 8 p.m in the company of his son **PW3** they searched for her in vain. He then made a report to the police. Later he was woken by his neighbor **PW2** Peter Mutuku who informed him that he had seen his daughter in the company of a boy who was pushing her at Taifa grounds. He accompanied **PW2** and they found the accused and the complainant. The complainant was undressed and the accused was on top of her, defiling her. Members of the public arrived at the scene and started assaulting the accused he left the scene and went to call the police. Both his daughter and the accused were taken to the police station and thereafter to hospital.

On examination the doctor told him that the complainant had been injured in her private parts.

**PW2 Peter Mutuku** – he is known to **PW1** and the complainant. On 26.12.2011 at about mid night toward 1 a.m. he arrived from Uganda, parked his vehicle and was walking home when he encountered a person pulling a girl to a crusade fence. The person was not known to him. He knew the girl and he asked the man where he was taking the girl and he told him that the girl was his wife. The witness then went to **PW1**'s house woke him up and informed him of what he had seen. He accompanied **PW1** and **3** to the scene and they found the girls under pants removed and the person on top of her. **PW1** rushed to the police and they kept watch. The police came and arrested the person and took him to Malaba police station. The place was well lit by electricity from nearby shops.

**PW3 B W**- a minor aged 13 stated that he is a brother to the complaint and that on 24.12.11 they had both attended a crusade on 24.12.11 at about 7 p.m he left to go home. On arrival his sister had not reached home. He went back with his father to look for her but they did not find her. At about 1.00 a.m a friend of his father knocked and told his father that he had seen the accused in the company of the girl. They went to the scene and found the accused on top of his sister and her under pants were aside. His father went to the police, he and **PW2** remained behind. Accused was arrested. The person whom they found on top of his sister was the accused.

**PW4 Samuel Kibet** stated that on 26.12.11 at about 4.10 a.m. he examined the complainant who had a history of being mentally retarded while she was in the company of her father and a police officer. He found that both knee joints had bruises, her both labia were torn and painful on touch. On perfuming urinalysis the urine had epithelial and pus cells. He found evidence of penetration and confirmed that the girl was an imbecile and had been defiled.

He also produced a P3 form of the accused that was filed by a colleague who no longer worked at Kocholia hospital and whose hand writing and signature was known to him. The form gave a history of the accused having been assaulted, he had soft tissue injury was not HIV. Urinalysis produced results of white blood cells and pus cells similar to what was detected from the complainant.

**PW5** – produced the age assessment although this was objected by the appellant.

**PW6 – Esnas Asiyu** a teacher at [particulars withheld] special primary she confirmed that the complainant was a student at their school.

**PW7 Sgt. Lilian Onsongo** – she recalled that on the 26.12.11 at about 4.00 a.m. While on duty she received a call from a man who informed her that his daughter had disappeared the previous day. He asked for assistance as the girl had been seen at the Taifa grounds in the company of a man PC Swale Badi and the witness proceeded to the place and found a young man who had been assaulted by members of the public as the young man was said to have been found defiling the girl. They intervened and took the young man to Kocholia. The girl was examined and it was confirmed that she had been defiled. Age assessment was done and she was confirmed to be 15 years old.

6. The appellant gave an unsworn statement and did not call a witness. He denied the offence and alleged that they had a disagreement with **PW1** over a debt. And that on the day of his arrest, was arrested on suspicion of having stolen from a shop in the morning of the 25<sup>th</sup> December, 2011. He alleged to have been framed.

7. The issues for determination are as follows

- (a). Whether the prosecution has proved to the required standard that the complainant was 15 years.
- (b). Whether the complainant was mentally retarded.
- (c). Whether there is evidence to the required standard that the appellant defiled the complainant.

8. **PW1** the father of complainant informed the court that the complainant was 15 years having been born in December 1995, there was also an age assessment report confirming the age. He also informed the court that the complainant was mentally retarded. **PW4** & **PW7** all confirmed the state of the complainant. I therefore do concur with the finding of the trial magistrate who had the occasion to see and assess the mental status of the complainant that she was indeed aged 15 years and mentally retarded.

9. Was there evidence that the child was defiled and the defiler was the appellant to the required standard.

**PW1, 2 & 3** categorically informed the court that on arriving at the scene they found the appellant on top of the complainant defiling her having removed her pant. **PW4** a clinical officer confirmed that upon examination he found injuries on the libia minora and majora of the complainant which were torn which was a sign of forced penetration a kin to defilement. He also detected pus cells which were also found on the appellant and that although there was no spermatozoa found this he said is usual where there has been no ejaculation. **PW6** confirmed that they found the accused at the scene having been assaulted by members of the public for having defiled the minor.

10. In my view based on the above evidence the prosecution had proved beyond all reasonable doubt that the complainant a mentally retarded child of 15 years had been defiled by none other than the appellant and once more I cannot fault the trial court for having arrived at the said conclusion. I am in total concurrence. Although no voire dire is recorded for **PW3** it appears that he made an unsworn statement which was consistent with that of **PW1** & **2**.

11. In his sentencing the Magistrate did consider the mitigation and found it right to jail the appellant 15 years.

12. From the proceedings whenever the appellant asked for a statement or for copies the proceedings the same were supplied and at all instances he confirmed that he was ready to proceed and the ground therefore where he alleges that he was not given copies of statements and proceedings is unfounded and the same must fail.

13. All in all the appeal is found to be unmerited and dismissed.

**Dated at Bungoma this 1st day of August 2016.**

**ALI-ARONI**

**JUDGE.**