REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.15 OF 2013

HASSAN MUTWIRI ..... APPELLANT

VERSUS

REPUBLIC ……..……. RESPONDENT

(From the original conviction and sentence in criminal case No. 325 of 2011 of the Chief Magistrate's Court at Meru by Hon. D.W Mburu – Senior Resident Magistrate)

JUDGMENT

The appellant, **HASSAN MUTWIRI**, was convicted for the offence of defilement contrary to section 8 (1) (2) of the Sexual Offences Act.

The particulars of the offence were that on 20th April 2014 in Imenti North District of Meru County intentionally caused his penis to penetrate the vagina of **F.M** a child aged 4 1/2 years.

The appellant was found guilty of the offence and sentenced to serve life imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in facts by failing to make a finding that there was no medical evidence that connected him to the offence.

2.That the learned trial magistrate erred in law and in facts by failing to find that the prosecution did not adduce sufficient evidence to convict him.

3. That the learned trial magistrate erred in law and in facts by failing to consider the appellant's defence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the case were briefly as follows:

the appellant lured the complainant into some napier grass where he defiled her. she cried due to pain and attracted the attention of her mother. she raised an alarm and members of public arrested him.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither

saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32.**

The charge was wrongly drafted. It ought to have read:

"... contrary to section 8 (1) as read with section 8 (2) ..."

I however find that the appellant was not prejudiced for he understood the charge against him.

The appellant contended that since he was not medically examined, this was fatal to the prosecution case. The High court in the case of **JOHN OTIENO MUMBO v REPUBLIC [2011] eKLR** said:

Complaint was also raised about failure to medically examine the appellant in order to confirm his involvement in the commission of the offence. Indeed medical examination of an accused person is vital in proceedings where offences such as the one appellant faced in the lower court and is still facing an appeal are involved, but where such a procedural step has not been undertaken, it is not to be taken as being fatal to the entire prosecution's case, because if it had been undertaken then the resultant medical evidence would have been additional to any other evidence adduced and relied upon by the prosecution as either incriminating or exonerating the appellant in relation to the commission of the crime. In the absence of such evidence, the court has no alternative but to go by the evidence on the record.

I concur with the learned judge.

When the complainant cried because of pain, her mother was attracted. She went out and raised an alarm. Members of public arrested him as he fled from the scene. This corroborated the complainant's contention that the appellant was the culprit. The learned trial magistrate went further and invoked the proviso to section 124 of the Evidence Act. I am satisfied that the evidence on record showed that there were all the reasons to believe the minor.

The learned trial magistrate considered the defence of the appellant before dismissing it. The weight of the evidence tilted in favour of the prosecution case.

The upshot of the foregoing analysis is that the appeal must fail. The same is therefore dismissed.

DATED at Meru this 19th day of December, 2016

KIARIE WAWERU KIARIE

JUDGE