



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 178 OF 2011**

**K M ..... APPELLANT**

**VERSUS**

**REPUBLIC**

*(Being an appeal from the conviction and sentence of Hon. B.M Mararo Senior Resident Magistrate delivered on 29/9/2011 in Kyuso Principal Magistrate Criminal Case No. 42 of 2011)*

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*(Before Hon. B. Thurania Jaden J)*

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

1. The Appellant, **KM**, was charged with the offence of defilement contrary to section 8 (1) (4) of the sexual offences Act No. 3 of 2006.

The particulars of the charge were that “on diverse dates between **November 2010** and **2<sup>nd</sup> March 2011** in Tseikuru District within **Kitui County** intentionally and unlawfully caused his penis to penetrate into the vagina of **J M P** a child **aged 10 years** without her consent”.

2. In the alternative, the Appellant was charged with indecent act with a child contrary to section 2 (1) of the Sexual Offences act No. 3 of 2006.

The particulars of the charge were that “on diverse dates between **November 2010** and **2<sup>nd</sup> March 2011** in Tseikuru District within **Kitui County** intentionally touched the vagina of **JMP** a child under the of **age 10 years** with his hands against her will”.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.
4. The prosecution case was that at the material time. The complainant, **pw1 JM**, a ten (10) year old standard 2 girl was collecting firewood. She was with her younger sister F. The Appellant who was her grandfather was grazing goats. The Appellant fell the complainant to the ground, removed her clothes then removed his own clothes and slept on the complainant while covering her eyes with hands.
5. The complainant’s mother was informed by F what had transpired. The mother questioned the complainant. It turned out that was not the first such incident. That the Appellant had done the same previously but had threatened to kill the complainant who kept it a secret. The matter was reported to the authorities. The complainant was taken to the hospital for an examination. It was

confirmed that the complainant had been defiled.

The appellant was arrested and subsequently charged with the offence herein.

6. In his defence, the Appellant denied the offence. He described himself as a farmer. It was the Appellant's case that this is a cooked up story due to a dispute over land documents.
7. At the conclusion of the trial, the Appellant was convicted and sentenced to life imprisonment.
8. The Appellant was dissatisfied by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

- a. **That the case was defective as the Appellant ought to have been charged with incest.**
- b. **That the prosecution case was not proved beyond reasonable doubt.**
- c. **That the complainant's age was not ascertained.**
- d. **That the clinical officer was not competent to adduce medical evidence.**
- e. **That crucial witnesses were not called to testify.**

9. During the hearing of the appeal, the Appellant relied on written submissions. The submissions essentially reiterated the grounds of appeal.
10. The appeal was opposed by the state. The learned counsel to the State submitted on the sufficiency of the prosecution evidence.
11. This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences— **See Okeno –vs- Republic (1972) EA 32.**
12. The complainant's evidence is that of recognition of the Appellant. The offence took place in broad daylight. It was the complainant's evidence that the Appellant removed her clothes and slept on her. The complainant evidence on what transpired is corroborated by the medical evidence.
13. The clinical officer, pw3 Eunice Kiema gave the complainant's age as ten years. The clinical officer further testified that the complainant's hymen was missing and she had pains when walking. The clinical officer's conclusion was the complainant had been defiled.
14. The complainant's mother (pw2) gave evidence that shows consistency between what the complainant told her at the material time and the complainant's evidence in court.
15. The evidence of Pw4, **PC Paul Macharia** the investigating officer confirmed that a report was made to the police and investigations carried out. The investigations confirmed the complainant's report. The Appellant was then arrested and charged.
16. The Appellant's defence that this case was framed up on him is not convincing. The defilement was real and confirmed by the clinical officer. There are no reasons that emerge from the record why the complainant, the Clinical Officer and the Investigating officer would frame up the complainant with this case.
17. Having evaluated the evidence on record afresh, I see no reasons to differ with the findings of the trial court. The trial magistrate who had the benefit of seeing the witnesses testify and observed their demeanor believed the complainant.
18. The proviso to section 124 of **the Evidence Act** stipulates as follows:-

**“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

19. A clinical officer is competent to give evidence.

In the Court of Appeal's dictum in the case of **Kavoi Kiilu –vs- Republic (2010) e KLR the Court of Appeal** it was stated as follows:-

**“Under section 2 of the Clinical Officers Act (Training, Registration and Licensing Act Cap 260 (LOK) a clinical officer means:-**

***“a person who, having successfully undergone a prescribed course of training in an***

*approved training institution, is a holder of a certificate issued by that 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 of this section by the Minister by Notice in the Gazette.”*

The Act goes further to provide that such officers may engage in private practice *“in the practice of medicine, dentistry or health work for a fee.”* It follows that the clinical officer did testify in this case on his area of competence.”

20. On whether some crucial witnesses were not called by the prosecution to testify, the answer is found to in the case of **Bukenya & Others –vs- Uganda EA 549, at page 550** where the Court of Appeal for East Africa stated:-

*“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the director is not required to call a superfluity of witnesses; if the 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 those witnesses, if called, would have been or would have tended to be adverse to the prosecution.”*

21. Was the charge sheet defective? What constitutes a defective charge sheet was spelt out in the case of Yosefu and another –vs- Uganda. The East Africa court of Appeal held:-

*“The charge was defective in that it did not allege an essential ingredient of the offence.*

And in Sigilani –vs- Republic (2004) 2 KLR, 480 it was held that:-

*“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.*

22. On the other hand, Section 134 of the Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitute as follows:-

*“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.*

I have seen no defects in the charge sheet herein. The evidence supports the particulars of the offence.

23. I am satisfied that the conviction was based on sound evidence. The sentence is within the law. The appeal has no merit and is dismissed.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Kitui this 29<sup>th</sup> day of January 2015.**

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**B. THURANIRA JADEN**

**JUDGE**