



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 118 OF 2011

MICHAEL KYALUNGU ..... APPELLANT

VERSUS

REPUBLIC

*(Being an appeal from the conviction and sentence of Hon. S.K. Mutai Resident Magistrate delivered on 9/5/2011 in Mutomo Resident Magistrate Criminal Case No. 38 of 2011)*

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*(Before Hon. B. Thurairaja J)*

J U D G M E N T

1. The Appellant, **Michael Kyalungu**, 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 the 30<sup>th</sup> day of January 2011, in **Ikutha** District within **Kitui** county, defiled W N a child aged **12 years**”.

2. In the alternative, the Appellant was charged with indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars of the charge were that “on the 30<sup>th</sup> day of January 2011, in **Ikutha** District within **Kitui** county, committed an act of indecency with **W N** a child aged 12 years by touching her private parts namely vagina”.

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 **W N**, a twelve (12) year old girl was walking home alone when she came across the Appellant. The Appellant held the complainant and took her to the bush. The appellant then removed her pants, unzipped his trousers, blocked the complainant’s mouth with a handkerchief, then proceeded to defile her.

5. The complainant screamed. The Appellant then gave her Kshs. 5/= . The Appellant then left. The Complainant went home and reported the matter to her parents. The matter was reported to the police. Investigations were commenced. The Appellant was subsequently arrested and charged with the offence herein.

6. In his defence, the Appellant described himself as a casual worker. He termed the case as a frame up due to differences with the complainant's mother over a lost panga.

7. At the conclusion of the trial, the appellant was convicted and sentenced to twenty years imprisonment. The Appellant was dissatisfied with both the conviction and the sentence and appealed to this court on grounds that can be summarized as follows:

- a. **That the prosecution evidence was contradictory, inconsistent and lacked corroboration.**
- b. **That the clinical officer was not a competent witness and no DNA tests were carried out.**
- c. **That the offence occurred at 7.00 p.m. when it was already dark.**
- d. **That the case is a frame up.**
- e. **That the burden of proof was shifted to the appellant.**

8. During the hearing of the appeal, the Appellant relied on written submissions. The said submissions essentially reiterate the grounds of appeal.

9. The appeal was opposed by the state. The learned counsel for the state submitted on the sufficiency of the prosecution evidence.

10. 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**.

11. The complainant (pw1) narrated to the court how the Appellant defiled her, and gave her Kshs. 5/=. The complainant was 12 years old girl then and knew what she was talking about. It clear that the evidence that her clothes were removed and the assailant also unzipped his trousers. The complainant knew the Appellant and gave his name as **Michael**. The complainant identified her blood stained pants and the kshs. 5/= as exhibits.

12. The complainant's mother, PW2 **W N** and the complainant's father, PW3 **M M** gave evidence that confirms that the complainant reported to them what had befallen her. The parent's evidence reflects that he complainant's recognized her attacker and knew him as **Michael**. The parents' evidence shows consistency between the complainant's evidence in court and what she told her parents on the material time. The parents checked the complainant's private parts and confirmed that she had bruises and was bleeding.

13. The evidence of defilement is corroborated by the medical evidence adduced by the clinical officer, Pw5 **Daniel Mulwa**. It was the evidence of the clinical officer that penetration had occurred and the complainant had bruises and the hymen was missing. The clinical officer gave the complainant's age as twelve (12) years.

14. The investigating officer, pw4 CPC **James Oluoch** gave evidence that confirmed that a report was made and investigations carried out before the Appellant was charged. The Kshs. 5/= and the complainant's blood stained pants were amongst the exhibits produced by the investigating officer.

15. The Appellant's evidence that this case is a frame up due to a grudge is not convincing.

The defilement was real, there is no reason why the complainant, the clinical officer and the investigating officer would frame him up in this case. It is also clear from the Appellant's evidence that the parties knew each other.

16. After re-evaluating the evidence in record, I am satisfied that the conviction is based on sound evidence. Although the offence took place at 7.00 p.m, the interaction between the complainant and the Appellant was in close proximity. The Appellant's evidence is that of recognition of person known to her. I am satisfied that the Appellant was positively identified without any possibility of error.

17. The trial magistrate who had the advantage of seeing the witnesses testify and observed their

demeanor believed the complainant. I have no reason to differ with the findings of the trial magistrate.

18. The proviso to section 12 to **section 124** of the **Evidence**

**Act Cap 80 Laws of Kenya 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. On whether the clinical officer was a competent witness to give medical evidence, the answer is found in the Court of Appeal’s dictum in the case of **Kavoi Kiilu –vs- Republic (2010) e KLR the Court of Appeal** where 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. The evidence on record proved the offence of defilement as charged in the main count. The trial magistrate erred when he convicted the Appellant in both the main count and the alternative counts. I correct this to reflect a conviction in the main count of defilement contrary to **section 8 (1) (4)** of the **Sexual offences Act**.

21. I find no merits in this appeal. The sentence is within the law. The appeal 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**