



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 9 OF 2014

MWANZIA MUNYAO APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. Sandra Ogot Resident Magistrate delivered on 17/01/2014 in Mutomo Senior Resident Magistrate Sexual Offence Case No. 37 of 2013)

(Before Hon. B. Thurairaja J)

J U D G M E N T

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

The particulars of the charge were that “on the unknown date between February and March 2013, in **Mutomo** District within **Kitui** county intentionally and unlawfully caused his penis to penetrate the vagina of **K N** a girl aged **14 years**”.

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

The particulars of the charge were that “on the unknown date between February and March 2013, in **Mutomo** District within **Kitui** county committed the act of indecency with **K N** a girl aged **14 years** by touching her private parts namely breasts, vagina and thighs”.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.
4. In support of their case, the prosecutor called 7 witnesses. The prosecution case was that the complainant, pw1 NK a std six girl was staying at her uncle’s home. That at the material time she put off the light and went to sleep. The Appellant who was a domestic employee at the said home pushed the door of the house open and went to the complainant’s bed, held her, lay on top of her and told her not to mention the matter to anybody otherwise she would not have anything to eat as he was the store keeper. The Appellant then removed the complainant’s clothes and defiled her.
5. The Appellant left shortly thereafter. The complainant did not tell anybody what had transpired. The next day she went to school as usual. However, the complainant later realized she was pregnant. After the complainant gave birth, the Appellant went to see her at her aunt’s home. It was then that the complainant identified the Appellant to the aunt as the father of the baby. The

- aunt mobilized the youth and the Appellant was arrested and escorted to the police station. The Appellant was subsequently charged with the offence herein.
6. In his defence, the Appellant gave unsworn evidence and called one witness. The Appellant described himself as a farmer. The Appellant stated that he was working at **K** home when the allegations that he had impregnated a girl cropped up. The Appellant wondered why the complainant did not name him as the culprit until after the birth of the baby. The Appellant was working for a relative, Dw2 Jane Nzoki at the time of the arrest.
 7. The Trial Magistrate was satisfied that the prosecution had proved their case beyond reasonable doubt. The Appellant was convicted for the offence of defilement and sentenced to 20 years imprisonment.
 8. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:
 - a. *That the date of plea was not reflected on the record.*
 - b. *That the appellant's constitutional rights were violated for being held in custody for two days.*
 - c. *That there was delay in the making of the report.*
 - d. *That the medical evidence was insufficient.*
 - e. *That the burden of proof was shifted to the appellant.*
 - f. *That the prosecution evidence was contradictory, lacked credibility and could not sustain a conviction.*
 - g. *That the trial magistrate failed to reflect the conviction and sentence on the record.*
 - h. *That the appellant was not given opportunity to give his mitigation.*
 9. During the hearing of the appeal, the Appellant relied on his written submissions. The same essentially expound on the grounds of appeal.
 10. The appeal was opposed by the state. The learned counsel for 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 (pw1) gave her age as 14 years. Although the offence took place at night, the complainant's evidence was that she knew the Appellant's voice very well and recognized the same when the Appellant talked to her telling her not to tell anybody or she would not have anything to eat as he was the store keeper.

As stated in **Dishon Litwaka Libambula –vs- Republic (C.A Criminal Appeal No. 140 of 2003 (Kisumu)** unreported;

“Normally evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused person's voice, that the witness was familiar with it and recognized it and that conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”

I am satisfied that the complainant knew the Appellant's voice and recognized the same.

13. The complainant's evidence that she was 14 years old and was defiled and became pregnant was corroborated by that of the clinical officer pw2 **Benjamin Mwanzia** of **Mutha** Health centre. According to the clinical officer, the **complainant's** had an infant who was about one month and one week old at the time he examined the complainant.
14. Further corroboration of the complainant's evidence is found in the evidence relating to the arrest. According to the complainant's aunt, pw4 **T M** and two of their neighbours, pw5 **Erastus Kavuke Mwakavi** and Pw6 **Mwanake Wambua**, the Appellant had gone to see the complainant and the baby at her aunt's (pw4) house when he was arrested and taken to Mutha Police Station. The Area Assistant Chief Titus Mbithuka and Pw7 investigating officer PC Korir testified on the arrest. The investigating officer testified on the investigations carried out before the Appellant was

charged.

15. The Appellant in his defence case questioned the long delay before a report was made to the authorities. However, the trial magistrate who had the benefit of seeing the witnesses testify and observed their demeanor believed the complainant. I have no reasons to differ with the findings of the Trial Court.
16. 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.”

17. Dw2's evidence is on the question of arrest. However, the Appellant's evidence and that of Dw2 adds credence to the complainant's evidence that the Appellant had worked at **J K N**, the uncle to the complainant.
18. I have looked at the complaint by the appellant that the date of plea and the conviction and sentence were not reflected on the record by the trial court. There is no merit in the same as the original record reflects the said date. If there was any such error, the same is curable under **section 382 CPC**. The conviction and sentence is clearly reflected on the record by trial court.
19. On the issue of delay in police custody, the Appellant's remedy this in civil suit (*See for example, Julius Kamau Mbugua –vs- Republic (Criminal App. No. 50 of 2008)*).
20. Having re-evaluated the evidence on record, I am satisfied that the conviction was based on sound evidence. The sentence is within the law. The appeal has no merit and I dismiss the same.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Kitui this 29th day of January 2015.

B. THURANIRA JADEN

JUDGE