REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 329 OF 2013

PETER NTHUSI MUSYOKA.....APPELLANT

VERSUS

REPUBLIC ….....….... RESPONDENT

(Being an appeal from the original conviction and sentence in Kithimani Principal Magistrate's Court Sexual Offences Case No. 37 of 2012 by Hon. M.A.O. Opanga, SRM on 12/19/2012)

JUDGMENT

1. **Peter Nthusi Musyoka,** the Appellant, was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3** of **2006.** Particulars thereof being that on the 16th day of November, 2012 at **Mwala District** within **Machakos County,** intentionally caused his penis to penetrate the vagina of **MWM,** a child aged seven years.

2. In the alternative he was charged with the offence of committing an **indecent act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act No**. **3** of **2006.** Particulars thereof being that on the 16th day of November, 2012 at **Mwala District** within **Machakos County,** intentionally touched the vagina of **MWM** by brushing his penis on it without her will.

3. Facts of the case were that on the 16th November, 2012, **PW2, JNM** sent her daughter, PW1, **MWM** to her uncle's home. She was in turn sent to purchase tomatoes. On her way back she encountered the appellant. In the meantime **PW5, Tabitha Mukonyo** was on her way home when she saw the appellant running from the thicket. She went to check only to find PW1. She had a blood stained dress. She asked her what happened. She hesitated but later said it was the appellant who was responsible.

4. PW5, informed PW2 about the incident. She went to where they were. She took her to hospital for treatment. **PW4, Philip Jaramba** a Clinical Officer examined PW1. She had sustained a swelling on the neck that was tender. The labia minora was reddish and her hymen was freshly torn. He concluded that the minor had been defiled. **PW6, No. 69220, Corporal Betty Kigen** investigated the case and charged the appellant.

5. In his defence the appellant stated that he was arrested by the **Community Policing Agents** as he went to get a letter that would enable him obtain an identification card. He was identified by the complainant's father. He denied having defiled the complainant.

6. The trial magistrate evaluated evidence adduced and reached a finding that the complainant was

defiled. She convicted the appellant and sentenced him to life imprisonment.

7. Being aggrieved with the conviction and the sentence thereof he appealed on grounds that:-

i. It was erroneous on the part of the trial magistrate to convict basing on the evidence of PW5 an independent witness without warning herself;

ii. PW6 was allowed to testify in a language that the appellant did not understand which was in violation of his rights.;

iii. Evidence of PW6 that an eye witness ran away was overlooked; and

iv. The burden of proof was not discharged.

8. At the hearing of the appeal the appellant canvassed the same by way of written submissions.

9. In response thereto, the State through **Mr. Mwangi**, State Counsel, opposed the appeal. He submitted orally that though the complainant was declared a vulnerable witness, she did state that the person who defiled her was the appellant. The age of the complainant was proved and PW5 saw the appellant running away from the thicket. Stating that It was a case of recognition, he called upon the court to find that the defence was a mere denial. He sought confirmation of the conviction and sentence imposed.

10. This being the 1st appellate court my duty is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial cour*t.* ***(See Okeno versus Republic (1972) E.A. 32).***

11. Evidence of the age of the child was adduced by PW2, her mother. She produced a child health card as an exhibit which showed that she was born on the 27/7/2005. It was proof that the complainant was a seven (7) years old. Her age is therefore not in dispute.

12. PW1 was a child aged 7 years. Her mother PW2 stated that she was a child who was slow in her speech. She rarely spoke up. In court she was declared a vulnerable witness because she was apprehensive. But this was after she had stated that while coming from the shop she encountered the appellant who held her hand and told her to leave the things that she had. He then removed her clothes. She identified him in court, as a person she had known previously. It was the evidence of PW2 that the appellant used to work at her brother-in-law's home.

13. The evidence of the child that the appellant was with her is supported by that of PW5. It is argued that the evidence of PW5 was not corroborated. It is stated in the grounds of appeal that PW5 was an independent witness whose evidence was not corroborated which called upon the court to warn itself prior to basing the conviction on her evidence. In considering what corroboration is, in the case of ***Mutonyi versus Republic [1982] KLR 2012*** the court stated;-

> ***"an important element of the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime; confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it****…"*

14. PW5 saw the appellant running away from the thicket where she shortly thereafter found PW1. It was the evidence of PW1 that the appellant did remove her clothes. Evidence was adduced by the Clinical Officer of a high vagina swab that was done. It showed the presence of a form of spermatozoa and torn hymen. This was proof of the act of penetration. The evidence of PW5 was circumstantial in nature. In the case of ***Teper versus Republic [1952] at page 489-Lord Normand*** said:-

"Circumstantial evidence must always be narrowly examined,…if only because evidence of this kind may be fabricated to cast suspicion on another… it is also necessary before drawing the inference of

the accused's guilt from circumstantial evidence to be sure that there are no other

15. PW5 found the appellant running away from the scene where PW1 was found. Although in his defence he denied having defiled the complainant he was known by witnesses who testified. There were no circumstances that weakened the fact that he was the person who did the act. Therefore, the evidence of PW5 which connected him to the crime confirmed that of PW1 that he was the culprit. In the circumstances her evidence did not require any corroboration and the trial court did not have to caution herself of the danger of relying on such evince.

16. PW6 testified in English a language that the appellant did not understand. However the Court Clerk, **Ms Catherine Nyagah** was in attendance as the court interpreter of the day. The core duty of the interpreter is to render interpretation services which she must had discharged. (see ***Said Hassan Nuno, [2010] eKLR).*** In the premises that ground of appeal must fail.

17. Evidence adduced by PW6 was very clear. She stated that there was an eye-witness. It is the appellant who was stated to be at large. PW5 was the eye witness and she testified.

18. The trial Magistrate analyzed evidence adduced and reached a finding that the appellant did defile the complainant. She considered the defence adduced by the appellant which she found to be a mere denial. Having re-considered evidence on record, I find no basis of interfering with the decision of that court. For that reason the appeal has no merit. The sentence meted out is the one provided by the law. In the premises, I dismiss the appeal in its entirety.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **29TH** day of **JANUARY, 2015.**

L.N. MUTENDE

JUDGE