REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 8 OF 2013

STANELY MUTIE KYALO ……..…… ……...APPELLANT

VERSUS

REPUBLIC ….....….....RESPONDENT

(Being an appeal from the original conviction and sentence in Kithimani Senior Resident Magistrate's Court Sexual Offence Case No. 24 of 2011 by Hon. D.G. Karani, PM on 25/1/2013)

JUDGMENT

1. **Stanley Mutie Kyalo,** the appellant is charged with the offence of **defilement** contrary to **Section 8(1) (4)** of the **Sexual Offences Act No. 3** of **2006.** Particulars are that on the 27th day of January, 2011, in **Yatta District** within **Machakos County,** unlawfully and intentionally caused his penis to penetrate the vagina of **HMN** a child aged sixteen (16) years.

2. In the alternative charge, he was charged with committing an **indecent act** with a girl contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006.** Particulars are that on the 27th day of January, 2011, in **Yatta District** within **Machakos County,** unlawfully and intentionally committed an indecent act by touching buttocks of **HMN** a juvenile girl aged sixteen(16) years imprisonment .

3. He was tried, convicted on the main count and sentenced to serve **fifteen (15) years** imprisonment.

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

   i. The learned magistrate erred in both law and fact in convicting the appellant on contradictory and uncorroborated evidence;

   ii. The charge sheet was defective; and

   iii. The case was not proved beyond reasonable doubt.

5. The case as presented by the prosecution was that on the 27/1/2011 at about 4.00pm, **PW1, HMN** was walking towards the river when she encountered the appellant who requested her to accompany him to his home. She refused but later changed her mind and went with him to his brother's house. They engaged in sexual intercourse. On the **6/2/2011** they had sexual intercourse. She conceived. He offered to assist her procure an abortion. He took her to a doctor at **Ikatini.** They waited in a room

but she changed her mind and left. **PW3, Nicholas Mutua** who got information that the appellant had entered a bar with a school girl, called members of **Community Policing.** Led by their chairman, **PW4, Joseph Muia Kioko,** they arrested the appellant. He was re-arrested by **PW6 No. 52366 P.C. Stephen Kipyegon.**

6. When put on his defence the appellant stated that on the 27th January, 2011 and 29/1/2011 he was on his farm watering his vegetables. At 10.00am he went to **Ikatini** Market. His cellphone was charging at the bar. He went to collect it. He saw the chief talking to a barmaid. Thereafter he was arrested and taken to the Police Station. He was taken to **Matuu District Hospital** for examination. Thereafter he was charged. Further, he stated that the complainant is a daughter to his neighbour whose animal trespassed onto his land. He was framed up because of the disagreement they had over the animals.

7. This being the first appellate court, it is duty bound to re-reconsider the evidence, re-evaluate it and draw its own conclusions in deciding whether the judgment of the trial court should be upheld ***(See Okeno versus Republic (1972) E.A. 32).***

8. To prove the charge of defilement the prosecution was required to prove the age of the complainant. The prosecution would also be expected to prove that the appellant committed an act which caused penetration into the genital organ of the complainant.

9. I have read through the Lower Court proceedings. Evidence adduced by PW1 was that she was aged 17 years old. Her mother, **PW2, ANN** also stated that she was aged 17 years. PW6 the Investigating Officer produced evidence of a child immunization card in respect of a child **Mumo.** She was born on the 7th of July, 1993. An age assessment report was produced dated 14th October 2011 showing that she was 18 years old. This was evidence establishing the fact that as at January, 2011 the complainant was aged 17½ years old hence a minor (vide **Section 2** of the **Children's Act).**

10. The complainant was examined by PW5, **Vincent Mole Khalif** a Clinical Officer on the **29th June, 2011.** She tested positive for pregnancy but no sexual intercourse had taken place on the material date. He recommended a DNA test to be done to ascertain paternity. This was evidence that the complainant had engaged in sexual intercourse previously. In reaching its finding the trial court stated thus:-

> "***Though a DNA test had been conducted the prosecution did not produce test results but even without the same the evidence on record is overwhelming that the accused had had sexual intercourse with the complainant (PW1) around the same time. It is not important whether it had resulted in the pregnancy. It is possible PW1 had had intercourse with other persons besides the accused and only one of them could have been responsible for the pregnancy".***

11. Looking at the proceedings on the 30th April, 2012 the Court Prosecutor notified the court that DNA test results were ready. The court noted that it had seen the DNA results on the 12th July, 2012. The prosecutor decided to close the case without producing the DNA profiling results.

12. The DNA test was intended to ascertain paternity. Whether or not the complainant had sex with the appellant would be PW1's word as against the appellant. The appellant denied having had carnal knowledge of the complaint. The learned trial magistrate appreciated the possibility of the complainant having had intercourse with other persons besides the appellant. That was a doubt that was introduced in the mind of the court which could have called upon the magistrate to interrogate it.

13. The court has the discretion to convict on evidence adduced by the complainant without corroboration, but it ought to have been satisfied – that the complainant was telling the truth. It ought to have believed that the complainant was trustworthy. There should have been evidence beyond reasonable doubt that the defilement was perpetrated by the appellant. (see also ***Geoffrey Kuoji versus Republic***

14. In the case of ***Kassim Ali versus Republic, Criminal Appeal No. 84 of 2005*** – it was stated that:-

> "***The absence of medical evidence to support the fact of rape is not decisive as the fact or rape can be proved by oral evidence of rape or circumstantial evidence."***

The court went on to state that they did not see why the principle in the above mentioned case should be different in a charge of defilement.

15. It is the law that the court can convict without medical evidence as long as there is strong direct evidence or if circumstances of the offence are so cogent and compelling as to leave no ground for reasonable doubt. (see ***Republic versus Omufrejczyk [1955] 1QB 388; 39- Criminal Appeal R.I.).***

16. The complainant stated that she had sex with only the appellant and she went to Ikatini market in order to procure an abortion as proposed by the appellant. She later changed her mind and decided to leave but the motorcycle she boarded took her back to **Ikatini.**

17. **PW2, AN** the mother of the complainant got information that the complainant had been arrested. **PW3, Nicholas Mutua,** the Chief got information that a man had entered the bar with a school girl. When he went to the bar he only found the appellant and a barmaid. He did not see the school girl but later found the complainant at a salon.

18. **PW4, Joseph Kioko** the chairman of the Community Policing Group participated in arresting the complainant. He stated that she was hiding in a nearby forest.

19. On cross-examination the complainant denied an allegation that she was coerced to record a statement at the Police Station.

20. There was no evidence to prove that indeed the appellant went with the complainant to the market and she was made to wait at a particular place.

21. The court having heard the complainant did not state whether or not she was trustworthy or if she was telling the truth. There having been no act of coitus on 27th January, 2011 between the complainant and the appellant, it would have been advisable for the prosecution to produce the DNA results that were withheld. This would have been proof that the appellant was the only man who had known the complainant carnally and having been below the age of 18 years she would have been incapable of consenting to the act.

22. Without such evidence, there was a doubt introduced in the case which would have been to the benefit of the appellant. Consequently, it was unsafe to convict on evidence adduced.

23. In the result, I do quash the conviction and set aside the sentence imposed. The appellant shall be set at liberty unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **22ND** day of **JANUARY, 2015.**

L.N. MUTENDE

JUDGE