REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 125 OF 2007

PIUS MUTHAMA ………………….…………..…………………… APPELLANT

VERSUS

REPUBLIC …................…...RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 1479 of 2007 by Hon. S.A Okato, SRM on 29/6/2007)

JUDGMENT

1. **Pius Muthama,** the appellant was charged with the offence of **defilement** of a girl contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act, 2006.** Particulars of the offence being that on the 26th day of April, 2007 in **Machakos District** within **Eastern Province** intentionally and unlawfully had carnal knowledge of **CK** a girl aged 13 years.
2. In the alternative, the appellant was charged with the offence of committing and **indecent act** with a juvenile contrary to **Section 11(1**) of the **Sexual Offences Act, 2006.** Particulars of the offence being that on the 26th day of April,, 2007 in **Machakos District** within **Eastern Province** indecently and unlawfully assaulted **CK** by touching her private parts namely vagina.
3. Facts of the case were that **PW2, CK,** the complainant was outside the house washing utensils when the appellant emerged and asked for water. She went into the house to draw water for him. After drinking water he asked her for the day's newspaper. As she bent to pick it, the appellant held her shoulder and wrestled her and threatened her with a knife. He undressed her and penetrated her with his male organ. On completion of the act he offered to give her a cake and soda and asked her not to tell anyone.
4. She reported the incident to her parents thereafter. She was taken to hospital for treatment. On being subjected to examination, her hymen was torn. Hence the case.
5. When put on his defence, the appellant stated that he knew nothing about the case.
6. The trial court evaluated the evidence adduced and made a finding that the appellant did defile the complainant. He convicted him and sentenced him to **20 years** imprisonment.
7. Being aggrieved by the conviction and sentence thereof appealed on grounds that:-

i. The complainant was not accompanied by the police at the stage of examination;
ii. There was no corroboration of evidence adduced especially the Doctor's report regarding the date of examination;
iii. There was no independent witness; and
iv. The defence of the appellant was not considered.

8. The appeal was canvassed by way of written submissions that I have duly considered.
9. This being the first appeal, I do remind myself of the duty to re-consider the evidence, evaluate it and draw my own conclusions in deciding whether the judgment of the trial court should be

upheld. (*See* ***Okeno versus Republic [1972] E.A. 32).***

10. The complainant herein stated that she was 13 years old. She was examined by **Doctor Mutunga** who indicated that she was 13 years old. **PW3, EK,** her mother stated that she was 13 years old having been born on 23/12/1993. In the case of ***Francis Omuroni versus Uganda – Supreme Case No. 22 of 2001-*** it was held that:-

> "***In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by a birth certificate, the victim's parents or guardian and by observation and common sense"***

No birth certificate was produced in evidence but the victim's parent testified in respect of her age which is not in dispute. This was proof that the complainant herein was aged 13 years.

11. The trial court has been faulted for relying on evidence that was not corroborated especially the medical evidence. Corroboration was defined in the case of ***Mutonyi versus Republic[1982] KLR 203*** as;-

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

> (Also see ***Republic versus Manilal Ishwelal Purohit [1942]9 EACA 58, 61).***

12. The complainant was examined by **Dr. Okaru C.N.** on the 26th April, 2007. He filled the Post Care Rape Form that was produced in evidence. There is evidence that a **Doctor Okaru** also treated the complainant on the 27/4/2007 at **Kenyatta National Hospital.** Thereafter on the 30/4/2007 she was also seen by **Dr. Njiru** of **Kenyatta National Hospital**. The medical report (P3) was filled at **Machakos District Hospital** on 8/5/2007 by **Dr. Mutunga.** The P3 form was produced by a Clinical Officer, PW1, **Robert Kilonzo** who stated that he worked with **Dr. Mutunga.** The procedure adopted by the trial magistrate per the record clearly show that the appellant was not given opportunity of considering whether or not he had any objection to the documents being produced by a person who did not author them.
13. That notwithstanding, this is a case of defilement, medical evidence is not a prerequisite ingredient. In the case of ***Kassim Ali versus Republic Criminal Appeal No. 84 of 2005(Mombasa)*** the Court stated:-

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

And in the case of ***Mohammed versus Republic [2006] 2KLR 138*** it was stated:-

> ***"It is now settled that the courts shall nolonger be hamstrung by requirements of corroboration where the victim of a sexual offences is a child of tender years if it is satisfied that the child is truthful."***

14. The trial court had the opportunity of hearing the complainant and observing her demeanor complied with the proviso to **Section 124** of the **Evidence Act.** It stated thus ;-

> ***"… in the instant case, I am satisfied that the complainant told the court the truth, because she knew the accused before… the accused defiled her in broad daylight…"***

Corroboration of the fact of defilement by the appellant was therefore not a requirement. Similarly, evidence of an independent witness was not necessary. That ground of appeal must

fail.

15. It is argued that *voire dire* rules were not followed. It is the duty of the court to ascertain and record whether or not a witness in proceedings before it is a child of tender yeas. (see ***Ayieyo versus Republic [2008] 1KLR G&F) 684). Prior to 2001*** a child of tender years for purposes of **Section 19** of the **Oaths** and **Statutory Declaration Act,** in the absence of special circumstances, was taken to be a child under the age of fourteen years ***(see Kabageny versus Republic[1959] E.A. 92).*** However, the law is now clear; **Section 2** of the Children's Act defines a *"child of tender years" as a child under the age of ten years"*.
16. The trial court having observed the complainant and also considered her age as stated in the particulars of the offence was not duty bound to carry out the preliminary objection in the circumstances.
17. **PW5, No. 66154 P.C. Christine Lesoi** was the officer who re-arrested the appellant. She recorded statements of witnesses, referred the complainant to hospital, issued her with a P3 form and later charged the appellant. She indeed investigated the case. It cannot be stated that the Investigating Officer did not testify. Failure to outrightly state that she investigated the case in her testimony does not defeat the role she played in the matter
18. It is alleged that the defence of the appellant was not considered. In his defence the appellant stated thus:-

    "…***I am nolonger employed. I know nothing about this case"***

    The trial court considered the defence, found it to be wanting and of no probative value hence dismissed it.

19. The complainant stated that the appellant was known to her previously. Her mother stated that her husband had hired him to work on their farm. This was therefore a case of recognition. The act happened in broad daylight therefore the complainant could not be mistaken as to his identity.
20. From the foregoing, it is apparent that the learned trial magistrate evaluated the evidence and applied the law correctly. I therefore have no basis for interfering with his decision. The appeal has no merit. It is dismissed in its entirety.
21. The days the appellant served prior to being released on bail pending appeal shall be taken into consideration in regard to the sentence meted out.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **20TH** day of **JANUARY, 2015.**

L.N. MUTENDE

JUDGE