



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**TITUS KITHEKA MUINDI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(Being an appeal from the original conviction and sentence in Tawa Resident Magistrate's Court Criminal Case No. 78 of 2013 by Hon. H.M Nganga, RM on 15/8/2013)

**JUDGMENT**

1. **Titus Kitheka Muinde**, the Appellant was charged with the offence of defilement of a child contrary to **Section 8(1)** as read with **subsection (2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars thereof being that on 1<sup>st</sup> day of April, 2013 in **Mbooni East District** within **Makueni County**, intentionally and unlawfully caused his penis to penetrate the vagina of **FMN** a child aged 6 years and 7 months.
2. In the alternative charge the appellant was charged with 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 1<sup>st</sup> day of **April, 2013** in **Mbooni East District** within **Makueni County**, intentionally and unlawfully did an indecent act to **FNM** a child aged 6 years and 7 months by touching her private parts namely vagina with his penis.
3. He was tried, convicted of the main count and sentenced to life imprisonment.
4. Being dissatisfied by the conviction and sentence thereof he appealed on grounds that the learned trial magistrate erred in both law and fact by holding that the case was proved beyond reasonable doubt; medical evidence adduced was unsatisfactory as it was adduced by a clinical officer who was not a medical office, **Section 169 (1)** of the **Criminal Procedure Code** was not complied with; evidence was obtained in contravention of **Article 50(4)** of the Constitution and in violation of his fundamental right to a fair trial.
5. The facts of the case were that on the 1<sup>st</sup> April, 2013, **PW1, FNM** was at home when their worker, the appellant, took her to his uncle's bed, removed her inner clothes and knew her carnally. **PW2, MS** her grandmother found her crying. She told her what had befallen her. They reported the matter to **PW5, No. 790519 Sergeant Dina Muita** a Police Officer at **Mbumbuni Police Station**. **PW6, Dr. Mulwa Andrew** assessed her age as 7 years. **PW7, Geoffrey Mutie**, a Clinical Officer examined her and filled the P3 form. On physical examination of the genitalia there was reddening of the labia minora and laceration bilaterally. The hymen was broken but not fresh. A high vaginal swab done revealed the presence of spermatozoa. He also examined the appellant but no abnormalities were detected.
6. In his defence the appellant denied having raped the complainant. He said he was fencing on the

- material date..
7. At the hearing the appellant canvassed the appeal by way of written submissions. In response thereto **Mrs Saoli** the learned State Counsel opposed the appeal. She stated that the appellant an employee of the family was well known to the complainant. The complainant was found crying soon after the act and the examination carried out proved the act of defilement. She called upon the court to confirm the conviction.
  8. This being the first appeal, my duty as a court 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 court. (*See Okeno versus Republic (1972) E.A. 32*).
  9. Medical evidence was indeed adduced by a Clinical Officer. This is their area of competence hence no injustice was occasioned ( see *Raphael Kavoi Kiilu versus Republic Criminal Appeal No. 198/2008; Section 2 of the Clinical Officers Act( Training, Registration and Licencing) Act, Cap 260 (Laws of Kenya)*).
  10. **Section 169(1) of the Criminal Procedure Code** Provides:-

*“Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it”.*

11. It has been submitted that the appellant’s defence was rejected but the trial court did not give a cogent reason why it did not do so. It also failed to state points for determination. The provision of the law alluded to is couched in mandatory terms and it should be adhered to. A perusal of the judgment shows that although points for determination were not outlined the magistrate considered issues that came up for determination. Therefore failure to comply with the requirement was not fatal to the case. The appellant was not prejudiced.
12. The appellant faulted the learned magistrate for not adhering to the laid down procedure which seemed to indicate that the cross –examination was guided by the court prosecutor. The procedure alluded to reads:-

*“Sworn in Kiswahili states in Kiswahili – examination- in-Chief by the Court Prosecutor”*

This was a peculiar way of capturing the fact of the witness having been sworn as required by the law, the language he used and the officer of the court who led him in giving his testimony. There was no subversion of justice.

13. Was the charge proved beyond any reasonable doubt? The age of the child was proved. She was a minor aged about 7 years old per the age assessment report. There was evidence of penetration into the complainant’s genitalia. Spermatozoa was found in her genitalia. The appellant worked for the complainant’s family. He was well known to the complainant. She described the act of penetration as it happened vividly. Just as found by the learned trial magistrate the recognition in question of the assailant was not questionable. The learned magistrate observed the demeanour of the complainant as she testified and believed her pursuant to the requirements of **Section 124 of the Evidence Act**.
14. From the foregoing, it is apparent that the case against the appellant was proved to the required standard. Therefore the appeal fails. The same is dismissed in its entirety.

**DATED, SIGNED and DELIVERED at MACHAKOS this 15<sup>th</sup> day of JANUARY, 2015.**

**L.N. MUTENDE**

**JUDGE**