



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**CRIMINAL APPEAL NO. 200 OF 2011**  
**MULANG'A KILIKU ..... APPELLANT**  
**VERSUS**  
**REPUBLIC**

*(Being an appeal from the conviction and sentence of Hon. S.K. Mutai Resident Magistrate delivered on 16/3/2011 in Kitui Principal Magistrate Sexual Offences Case No. 32 of 2010)*

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*(Before Hon. B. Thurairaja J)*

**J U D G M E N T**

1. The Appellant, **Mulang'a Kiliku**, was charged with the offence of defilement contrary to section 8 (1) (2) (7) of the sexual offences Act No. 3 of 2006.

The particulars of the charge were that “on the 8<sup>th</sup> August 2010 at about 3.00 p.m at **[particulars withheld]** in **Kitui** District of the Eastern Province; unlawfully had carnal knowledge of **S P** a girl aged 13 years”.

2. In the alternative, the Appellant was charged with indecent act with a child contrary to section 11 (1) of the Sexual Offences act No. 3 of 2006.

The particulars of the charge were that “on the 8<sup>th</sup> August 2010 at about 3.00 p.m at **[particulars withheld]** in **Kitui** District of the Eastern Province; committed an act of indecency with **S P** a girl aged 13 years by touching her private parts namely vagina and buttocks”.

3. The Appellant pleaded not guilty. The case proceeded to a full trial.
4. The prosecution case was that at the material time the complainant, (pw1) a 13 year old std 5 student was on the way to the river to fetch water. She met the Appellant. The Appellant held her hand and pulled her to the bush. The Appellant then pushed her down, removed her pants and defiled her. The complainant screamed. This attracted the attention of Pw3 **Patrick Nyamai** who rushed to the scene and witnessed what was happening. That when the Appellant saw pw3 he rose up and run away while holding his trousers. The matter was reported to the complainant's parents. A report was made to the village elder. The Appellant was arrested and escorted to Kitui Police station. The complainant was referred to **Mbitini** Health Centre for examination and treatment. The Appellant was subsequently charged.
5. The Appellant in his defence gave sworn evidence. No witnesses were called. The Appellant

- stated that on the material day, the complainant's father called him to their home for some local brew. The Appellant went and took the brew then went to sleep. After about thirty (30) minutes the Complainant's father went to his house and inquired if the Complainant was there. The Complainant was not at his house. The Complainant's father later returned with the Complainant to the Appellant's house with the allegations herein. The Appellant denied the same.
6. The next day the Appellant went to look for the Complainant's father so that they could go for a medical examination but he did not find him. The Appellant was arrested after six days and charged. The Appellant termed the evidence of the complainant and the eye witness as mere lies and stated that the other witnesses were only informed of the matter. The Appellant further stated that the incident happened during the dry season when there were no crops. He further stated that there was no bush nearby.
  7. The Appellant was convicted in the alternative count of indecent act with a child and sentenced to ten (10) years imprisonment.
  8. The Appellant was aggrieved by the conviction and sentence and appealed to this court on grounds that can be summarized as follows:
    - a. ***That the Charge sheet was defective.***
    - b. ***That the charge was not read over and explained to the appellant.***
    - c. ***That the burden of proof was shifted to the defence.***
    - d. ***That the defence of alibi was not displaced.***
  9. The Appellant canvassed the appeal by way of written submissions which I have duly considered.
  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, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32.**
  12. The Complainant's evidence that the Appellant pulled her to the bush and pushed her down and defiled her is corroborated by that of a neighbour, pw3 **Patrick Nyamai**. According to Pw3 he was attracted to the scene by the Complainant's screams. Pw3's evidence is that he checked what was going on and caught the Appellant red handed defiling the Complainant. The Complainant, Pw3 and the accused all knew each other as neighbours. The offence took place in broad daylight. There is no possibility of mistaken identity.
  13. The evidence of the Complainant's mother, Pw2 **M P** and that of the village elder, Pw5 **Benjamin Ndinia** confirmed that the parties herein are neighbours and that the report of the incident was made and the Appellant arrested.
  14. The evidence of Pw6 PC **Joram Gichuki** confirmed that the report was made at the police station and investigations carried out.
  15. Medical evidence adduced by Pw4 **Festus Kimeu** a Clinical Officer testified that no injuries or any sign of sexual activity was seen on the complainant. It is noted that the Clinical Officer's evidence is that the Complainant was presented to him after 48 hours. The Clinical officer gave the Complainant's age as thirteen (13) years.
  16. Although the Appellant termed the evidence of the complainant and that of the eye witness as lies, no reasons emerge from the record why these witnesses would give false evidence against him. The prosecution witnesses adduced strong evidence that displaces the defence allegations that he was in his house sleeping at the material time.
  17. The Appellant was convicted in the alternative count of indecent act with a child. I agree with the decision of the trial magistrate as no details were given by the complainant which reflect that penetration occurred. Section 2 of the Sexual offence Act defines penetration as follows:

**“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.**

18. The trial magistrate simply recorded the Complainant as having stated that she was “defiled”. It is doubtful whether the complainant uttered such a word. A trial court ought to record as closely as possible, the description of what transpired as per the evidence of the witness and not summarize it

in one word as “defiled”.

19.The charge in the main count of defilement was also defective as it failed to include the essential ingredients of the offence of defilement. As stated in (Sigilani –vs- Republic (2004) 2 KLR, 480;

***“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.***

In the case at hand the particulars of the offence failed to reflect which part of the Complainant’s body was penetrated by which part of the Appellant’s body.

20.There are however no merits on the ground of appeal that the charge was not read out and each and every ingredient thereof explained to the Appellant. The lower court record clearly reflects that this was done on the plea date on 16/8/2010.

21.For all above stated reasons, I find no merits in the appeal. The sentence meted out is within the law. The appeal is dismissed.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Kitui this 23<sup>rd</sup> day of April 2015.**

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**B. THURANIRA JADEN**

**JUDGE**