



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 48 OF 2013

JULIUS KING'OO MUMO..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in **Kajiado Principal Magistrate's Court Criminal Case No. 698 of 2012 by Hon. P. A. Olengo, PM on 3/4/13**)*

JUDGMENT

1. **Julius King'oo Mumo**, the Appellant was charged with the offence of **defilement** contrary to **Section 8(1)(3)** of the **Sexual Offences Act, No. 3 of 2006**. Particulars of the offence being that on the **1st** day of **July, 2012** at [Particulars Withheld] Village in Loitokitok District within Rift Valley penetrated the vagina of **V K** a child aged 12 years.
2. In count 2, which should have been an alternative count, 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 of the offence being that on the **1st** day of **July, 2012** at [Particulars Withheld] in Loitokitok District within Rift Valley Province, intentionally touched the breast and vagina of **V K** a girl aged 12 years with his penis.
3. The facts of the case were that on the **1st** day of **July, 2012** PW3, **V K**, the Complainant, was sent to collect some burning charcoal. The Appellant seized the opportunity to put her on his bed. He lay on top of her and penetrated her. Thereafter, he gave her the burning charcoal. She returned home but did not tell anybody. One of her aunts got information of what had transpired. She was taken to hospital on the **3rd** of **July, 2012**. On examination by PW4 **Dr. Opiyo Kennedy**, her labia majora had a skin exfoliation and the vagina had blood clots. She had a bacterial infection. There was evidence of forced penetration. The Appellant was arrested and charged.
4. When put on his defence the Appellant denied having defiled the Complainant.
5. The learned trial magistrate considered evidence adduced and reached a finding that the Appellant had defiled the Complainant. He found him guilty, convicted him and sentenced him to serve 20 years imprisonment.
6. Being aggrieved by the conviction and sentence the Appellant appealed on grounds that:
 - *The learned magistrate made an error both in law and fact and misdirected himself by failing to consider the medical evidence adduced and never addressed himself to the fact that the Complainant had been infected by a venereal disease.*
 - *The charge sheet was defective in failing to describe/disclose the means of penetration into the Complainant's vagina.*

- *The Appellant was prejudiced as he did not know which object was used to penetrate the Complainant's vagina.*
 - *Section 150 of the Criminal Procedure Code was violated as witnesses like Amina and Monica were not summoned to give evidence.*
 - *The age of the Complainant was not ascertained.*
7. At the hearing of the appeal, the Appellant relied on written submissions. The State through **Mr. Shijenje** learned State Counsel opposed the appeal. He stated that the age of the Complainant was proved by the Health Card that was adduced in evidence. Penetration was proved and the Complainant contracted an infection. He called upon the court to disregard the defence put up which did not challenge evidence adduced. He prayed for dismissal of the appeal.
 8. This being the first appeal my duty is to re-evaluate evidence adduced in the lower court as a whole and re-submit it to a fresh and exhaustive examination, then come up with my own conclusions bearing in mind that I neither saw nor heard witnesses who testified. (**See Okeno V. R (1972) EA 32**).
 9. The Prosecution adduced evidence of a child health card in the name of V K daughter of K which is proof that she was born on the **16th February, 2000**. This was proof of her age. As at **1st of July, 2012** she was 12 years old.
 10. The particulars of the offence disclose the type of thing used to penetrate the vagina of the Complainant. It is stated to be a penis.
 11. Medical evidence adduced by the Prosecution established the fact that the Complainant was infected at the time of examination. The Doctor opined that the foul smelling discharge was suggestive of a venereal disease. On cross examination he stated that the Appellant was also examined but he did not have the venereal disease. He could not tell who infected the Complainant the venereal disease.
 12. There is no doubt that the Complainant was defiled. However, the court was duty bound to interrogate if indeed it was the Appellant who violated her sexually. In his judgment the learned trial magistrate stated that the Complainant said it was the Appellant who defiled her and he saw no reason why she could lie against the Appellant. What he failed to consider is how come he was not infected with the infection that the Complainant had? This was an issue that should have introduced some doubt in his mind. In the circumstances, the case was not proved beyond any reasonable doubt.
 13. Consequently, it was not safe for the trial magistrate to convict on evidence adduced.
 14. The appeal therefore has merit. The same is allowed. The conviction is quashed and sentence passed set aside. The Appellant shall be released forthwith unless otherwise lawfully held.
 15. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 24TH day of JUNE, 2015.

L. N. MUTENDE

JUDGE