



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 49 OF 2013**

**BETWEEN**

**MAXWELL MWANGI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from original conviction and sentence by Hon. Susan Mwangi SRM in Vihiga  
PMC CR. Case No. 512 of 2012 delivered on 11<sup>th</sup> March, 2013)**

**JUDGMENT**

**Introduction**

1. The appellant in this appeal was arraigned before the Senior Principal Magistrate's Court at Vihiga on one count of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offence Act No. 3 of 2006. The particulars are that on the 3<sup>rd</sup> day of June, 2012 at Mbale Town, Mbale Sub-Location in Vihiga County within Western Province, he intentionally and unlawfully caused his penis to penetrate the vagina of A.A a child 7 years.
2. In the alternative count, he was charged with the offence of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act No, 3 of 2006. It was alleged that on the same date and in the same place, he intentionally touched the vagina of A.A, a girl aged 7 years, with his penis.
3. The appellant denied the charges. After a full trial during which the prosecution called 8 witnesses, the appellant was found guilty and convicted on the main count of defilement and sentenced to life imprisonment.

**The Appeal**

3. Being dissatisfied with both conviction and sentence, the appellant preferred this appeal on the following summarized homemade grounds;-
  1. The trial Magistrate erred in law and fact in failing to appreciate the contradiction in the prosecution [evidence.]
  2. The trial Magistrate (erred in law and infact) when (he) failed to consider evidence which stated that

the accused in Cr. Case No, 513/2012.....

3. That the learned (trial) Magistrate failed not to observe the single evidence.
4. That the trial Magistrate erred in law and fact by not considering the prosecution [evidence] availed by the primary evidence is stipulated under section.....
5. That the trial Magistrate failed to evaluate that the case was poorly investigated.
6. That failure to avail evidence forensic examination report Discouraged.
7. That the learned Magistrate failed to comply with the provisions of Section 324 as read with Section 329 of the CPC not achieved.

The appellant therefore prays that the appeal be allowed, conviction quashed and the sentence of life imprisonment set aside.

### **The prosecution case**

4. From the 8 prosecution witnesses, the prosecution case is as follows;- the complainant in this case, A.A, a girl aged 8 years and a standard 2 pupil was taken through a vior dive examination before she told the court that she knew the appellant by the name Maxwell. A.A testified as PW1. She stated that the appellant used to live with Aunty and that he would be at Aunty's place during the day and grandmother's place in the evening. On the evening of 03.06.2012, A.A was playing inside the house with her little brother called M.S. As usual the appellant took a shower and left Aunty's place, but in the night, he returned to Aunty's house where both A.A and M.S were asleep. They were all alone in the house since Aunty who used to work as a bar maid had gone to work.

5. A.A stated that the appellant knocked on the door and asked her to open. She did so and then went back to sleep. The appellant then called A.A. by name as he cooked ugali and ate it. Though A.A and M.S had not eaten their evening meal, the appellant did not give them any of the food he cooked. In the morning, A.A woke up and went to school after the appellant had made tea for her. By that time, Aunty was asleep. A.A. came back from school at around lunch time and after lunch, she washed the dishes. By that time her Aunty named Riziki was at home. A.A. bathed her little brother and also took a bath. She went to a nearby shop to play. She returned home in the evening and when the little child went to sleep, she took a book and started reading. Aunty was asleep. The appellant bathed and then left.

6. Then on one evening during the month of July, 2012, Aunty went away with the little child and left A.A alone at home. As she sat on the sofa in the house, the appellant came by, lifted her dress and removed her panty. He pushed A.A on to the sofa, inserted his penis into her vagina lay on top of her and defiled her. With his left hand, the appellant covered A.A's mouth so that she could not scream though she felt much pain during the intercourse.

7. When Aunty came back in the evening A.A told her about what the appellant had done to her. But instead of empathizing with her, Aunty took a hot spoon and burnt her with it. A.A was later taken to hospital by her teachers. She was treated and a P3 form filled for her.

8. During cross examination, A.A reiterated that the appellant defiled her when Aunty was not at home. She also said she could not scream because the appellant had covered her mouth using his left hand.

9. PW2 was S R M (Aunty). She plait peoples' hair. On 03.06.2012 at about 7.30p.m, she went to plait a customer's hair (Ajema) and did not return to her house until 8.00pm. On her return home, she found A.A. looking sick and on asking her what the matter was, she (A.A.) stated she had pains in her back and chest. That when A.A. stood up to walk, PW2 noticed that she was not walking normally and when asked what the matter was, she could not say. PW2 forced A.A to remove her pants, and noticed some pus and discharge. She also said, she noticed AA's breasts had been touched

10. When A.A persisted in her silence as to what had happened to her , PW2 beat her and also singed her with a spoon. A.A finally told PW2 that the appellant (who was PW2's boyfriend) usually sucked her breasts and lips and that he had been defiling her. The appellant and another man called Isaac, a motorbike rider were arrested on allegations that they had both defiled A.A. A.A. was later taken to hospital by her teachers. PW2 identified the appellant who had been her boyfriend for about 4 months.

11. PW3 was Karen Sitawa Simasi a teacher at A.A's school. On 05.06.2012 she received information concerning some alleged defilement of A.A. After investigation by the head teacher of the school, it was established that A.A had been defiled. The matter was then reported to Mbale Police Station before A.A was taken to Mbale Hospital for treatment. When they went to the chief's office with A.A, A.A was able to identify the appellant as the person who had defiled her. A.A also identified one Isaac who was said to have also defiled A.A.

12. F A K testified as PW4. He worked as Associate Pastor at Fire Celebration Centre in Kayole – Nairobi. He is the father to A.A. He testified and that A.A had come to live with Aunty since May 2012. On a date he could not remember, he was informed by PW2 that A.A had been defiled. PW4 also stated that A.A's mother had deserted their matrimonial home some 5 years previously forcing him to take another wife on 17.3.2012.

13. PW5 was Herman Kibunja, senior Chief I of Wamuluma Sub-Location in Vihiga County. On 04.06.2012 he received information to the effect that A.A had been assaulted by Aunty and was also being defiled. PW5 confirmed that he knew Aunty who used to work as a bar maid in one of the local bars. PW5 called one of the teachers at A.A's school and requested her to take A.A to hospital. As the child was being taken to hospital, PW5 looked for the appellant and one Isaac, the appellant's partner in crime against the appellant. The appellant was eventually arrested and handed over to Administration Police Officers. PW5 also confirmed that A.A had been burnt on both thighs. In cross examination PW5 said he knew the appellant before since he (appellant) used to sell things at the chief's Camp.

14. PW7 (though he should be PW6 according to the record) was number 75709 Corporal William Aaron Juma attached to Mbale Police Station. He recollected that on 06.06.2012 while on duty at the office, he was instructed by the OCS to investigate this case. He interrogated the appellant and also interrogated Isaac Adongo who had been arrested alongside the appellant. He also averred that because the complaints against the appellant and Isaac Adongo did not arise from the same occurrence, he charged the two of them separately.

15. Sammy Chelule, Senior Clinical Officer at Vihiga District Hospital testified as PW8. He averred that he was the co-coordinator of sexual and gender based violence clinic at the hospital. He stated that on 05.06.2012 he treated AA on allegations of defilement and assault. He stated that Aunty was convicted of the offence of assault against AA.

16. PW8 testified that A.A had been traumatized by both the defilement and the assault, and on general examination, PW8 made the following findings.

- Torn hymen inflamed and reddening tender to touch.
- Both sides of the vagina were swollen with visible reddening.
- Lower side of the vagina had no tears
- Inner cervix was intact
- Painful digital examination
- Offensive smell and dark-brownish discharge.

Laboratory examination showed that;-

- HIV test was negative
- Urine had pus cells
- Syphilis test was negative
- Hepatitis B was also negative.

17. PW8 concluded that his testimony by saying there was indeed penetration which was not consented to and was forceful, intentional and unprotected that caused injuries to her (PW1's) vaginal organs – positive STD was noted because of pus cells. He also opined that PW1 had been threatened and he concluded that because the appellant was an uncle there was incest. He then signed, stamped and filled the P3 Form on the 06/06/2012 and estimated the age of the patient as 7 years as per the Birth Certificate. He classified the nature of offence as defilement. He produced the P3 form as (Pex12), PRC.(PEXL1). He also produced the Birth Certificate for A.A who was born on 20.6.2004 which was marked as (PEX 3)

18 At the close of the prosecution closed case the trial court in its ruling on 18.1.2013 found that a prima face case had been established against the accused person. Section 211 of the CPC was complied with and the accused stated that he would give an unsworn statement and he had no witnesses to call.

### **Defence case**

19. In his defence (DW1) MAXWELL KINUTHIS MWANGI from Mbale Kegoye Sub-Location told the trial Court that he knew the charges facing him. He testified that he was called on the 5.6.2012 at around 10.00am when he was working at Chama Agrovet by the Chief. The chief asked him if he was Maxwell and S (PW2's) friend. He was told by the chief that he had done something wrong but he claimed he did not know what the chief was referring to.

20. The appellant also stated that the chief called one of the AP's who took him to the children's Office where he found the District Children Officer (DCO), A.A's teacher and A.A. A.A was asked if DW1 was the one who had defiled her A.A denied and said that it was Isaac the bicycle mechanic but the teacher insisted that it was him (DW1) yet there was documentary proof of the same. The District Children Officer called another AP who went and arrested Isaac and brought him to where they were and AA identified him (Isaac) and even told them how Isaac's house looked like.

21. The appellant further testified that though they were told they were bring taken to hospital by the police, it was also AA who got to the hospital, while the appellant and Isaac were but they were taken to the police station. The next day 6/6/2012 the Chief Herman Kibunja booked them in the O.B and they were taken by the investigating officer to hospital for tests but no results were even given to him. He was subsequently charged with defiling A.A but he denied the charge before the trial court and insisted it was the teacher who pushed on the same yet she did not have sufficient proof as she is not a doctor.

### **Judgment of the trial court**

25. In its judgment delivered on 11/03/2013, the learned trial Magistrate was satisfied that A.A was a candid and credible witness. The learned trial Magistrate also found that the other prosecution witnesses had given equally credible evidence which showed that penetration had taken place. The trial Court also found from the Birth Certificate produced in court as PExhibit 3 that A.A was below 10 years of age.

26. Regarding identification of the appellant, the learned trial Magistrate was satisfied that the appellant had been positively and clearly identified by A.A. Being thus satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt, the learned trial Magistrate found the appellant guilty of the offence of defilement, convicted him and sentenced him to life imprisonment as by law provided.

### **The duty of this court**

27. As the first appellant court this court is under a duty to rehear the appellant's case to the full by reconsidering and evaluating that it does not have the opportunity of seeing and hearing the witnesses as did the trial court. This court has to make allowance for that as it decides whether or not to uphold the conclusion reached by the trial court. see **Okeno – vrs – REPUBLIC (1972) EA 32 and Koech – vrs – Republic (2004) 2KLR 322** among others.

### **Hearing of the appeal**

28. When this appeal came up before me for hearing, the appellant wholly relied on his written submissions. In the said submissions, the appellant contended that the learned trial Magistrate failed to properly analyze the evidence that was placed before her, as a result of which she reached the wrong conclusion. That the ingredients of the offence of defilement had been proved. The appellant contended that there was no evidence to link him to the commission of the alleged offence, and more particularly so because the treatment notes on which the P3 form was based were not produced. The appellant also complained that the PExhibit 1 was a photocopy and no reason was given for relying on the same. The appellant also challenged the result of the medical examination done on A.A by the clinical officer because the said examination was done some 3 days after the alleged offence

29. The appellant also submitted that the evidence on record was so contradictory, that it could not sustain a conviction against him. He was particularly concerned about the discrepancy in the date of alleged offence and that it was not clear whether the alleged incident took place on 03/06/2012 or 05/06/2012. He submitted that A.A's evidence does not show clearly whether she was defiled at once by two individuals or whether the alleged defilements were consecutive. In summing up his submissions, the appellant averred that the testimony of PW2 was hearsay and that the trial court should have dissected such evidence with caution. In his view, the person who defiled A.A was Isaac Odongo who was arrested alongside the appellant but later released. The appellant urged this court to allow his appeal.

30. In response to the appellant's submissions, Mr. Ng'etich counsel for the respondent submitted that contrary to the appellant's contention, the prosecution evidence was contradictory submitted that the prosecution evidence was consistent and fully corroborated and that the same proved all the ingredients of the offence of defilement. Counsel further submitted that the medical evidence proved that there was penetration and that A.A was 10 years old. Regarding the appellant's complaint that the learned trial Magistrate did not consider the provisions of Sections 324 and 329 of the Criminal Procedure Code, Counsel submitted that the appeal stage was not the proper time for the complaint to be raised; that the appellant should have raised such a complaint during the trial. Mr Ng'etich asked the court to dismiss grounds 1 through 5 of the petition of appeal and to sustain the conclusion reached by the learned trial court.

31. Finally Mr. Ng'etich submitted that the charge against the appellant was not defective simply because of a discrepancy in the date stated in the charge sheet and the date given in evidence by A.A. In any event, counsel submitted, such defect if at all it existed would be cured by the provision of Section 382 of the Criminal Procedure Code which reads as follows;-

“ 382. (copy from Cap 75).”

### **Analysis and findings**

32. In defilement cases where sentences imposed by courts are determined by the age of the victim, the prosecution is under a duty to prove the age of the victim. In the instant case, a Birth Certificate, P Exhibit 3 was produced to prove the age of A.A, which was found to be below 10 years. A.A was said to be 7 years as at the time of the alleged incident.

33. While the appellant has not disputed the age of A.A, he has submitted that the evidence adduced by the prosecution was too contradictory to sustain the charge against him. He has questioned the name of PW2 wondering whether she is S K or S R, and whether the said witness worked as a Jua Kali artisan or whether she worked as a bar maid.

34. Upon careful analysis of the evidence on record. I am satisfied that the offence herein occurred on 03/06/2012 as stated by both A.A and PW2. In this regard, I find the appellant's complaint that the charge is defective to be baseless and dismiss it altogether.

35. I also find that the other alleged contradictions are trivial and do not thus go to the root of the issue at hand namely whether A.A was defiled or not, and if she was so defiled whether it was the appellant who defiled her.

36. On the appellant's complaint that the learned trial Magistrate did not properly analyse the evidence on record. I find that the complaint is misplaced. In my considered view, and from the record, the learned trial Magistrate was meticulous in her analysis of the evidence on record. I also find that the learned trial Magistrate exercised proper caution in defining and determining the offence of defilement under Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The learned trial Magistrate also clearly set out the issues for determination and in doing so identified the ingredients of the offence.

37. In the first place, the learned trial Magistrate was satisfied, just as I am satisfied that there was penetration of the child. The evidence of penetration was given by PW1, PW2 and PW8, the Clinical Officer. The age of A.A was also proved to be below 10 years. The identity of the appellant was also not in doubt. Infact, the record shows that for over 4 months, the appellant, PW2 and A.A had shared the same house.

I am therefore satisfied that A.A was defiled and that it was the appellant who defiled her in the circumstances given by AA. I have myself considered the defence tendered by the appellant but the same does not shake the prosecution evidence against him. It was of course easy for the appellant to shift the blame to Isaac Odongo whom he knew did not have a chance to defend himself. I dismiss the defence raised by the appellant as being escapist.

38. It is to be noted that the evidence upon whether the trial based the appellant's conviction was that of A.A as the only eye witness. I am satisfied that pursuant to the provisions of Section 124 of the Evidence Act, Cap 80 Laws of Kenya, A.A's evidence did not need corroboration. After reading the record, which includes the voir dire examination carried out on AA by the court, I am satisfied, that AA was telling the truth. The trial court thus properly considered and accepted AA's evidence. AA's allegation of having defiled was corroborated by PW8 who gave medical evidence showing a torn hymen and both sides of the vagina having swollen and visible reddening.

### **Conclusion**

In the premises, I find and hold that the appellant's grounds of appeal lack merit and the same are dismissed. In effect, the appellants appeal has not legs to stand on. The same be and is hereby dismissed on both conviction and sentence.

I confirm the conviction and sentence of other learned trial Magistrate. The appellant has a right of appeal to the court of appeal within 14 days from today

Orders accordingly,

**Judgment delivered, dated and signed in open court at Kakamega this 31<sup>st</sup> day of July 2015**

**RUTH N. SITATI**

### **JUDGE**

In the presence of ;-

Present in person.....for the Appellant

Mr. Omwenga .....for the Respondent

Mr. Lagat.....Court Assistant

