



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 184 OF 2013

EMMANUEL SIKUKU MUTISO APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. Japhet Bii (RM) delivered on 7/8/2013 in Kangundo Principal Magistrate Criminal Sexual Offence Case No. 2 of 2013)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Emmanuel Sikuu Mutiso** was charged with the offence of defilement contrary to section **8 (1) (2)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 10th day of February 2013 within **Machakos County**, intentionally caused his penis to penetrate the vagina of **E M** a girl child aged 6 years.

2. The Appellant pleaded not guilty and the case proceeded to a full trial.
3. The prosecution case was that on the material date, the complainant and her two minor brothers had gone to the river to fetch water. When the brothers returned home, they realized that the complainant was not with them. The complainant was later found at the road crying. The complainant mentioned the Appellant as the culprit. The Appellant was arrested and subsequently charged with the offence herein.
4. When placed on his defence, the Appellant stated that he went for a drink, got drunk and passed out. That the next thing he knew is that he was arrested at about 10.00 p.m. and taken to the police station.
5. The trial magistrate found the prosecution case proved. The Appellant was convicted and sentenced to life imprisonment.
6. The Appellant was aggrieved by both the conviction and sentence and appealed to this court. The grounds of appeal can be summarized as follows:-
 - a. **That the prosecution case was not proved beyond reasonable doubts.**
 - b. **That there was no evidence of identification.**
 - c. **That there was no nexus between the Appellant and the offence.**
 - d. **That the defence evidence was not given due consideration.**

7. Both the counsel for the Appellant and the counsel for the State made submissions which I have duly considered.
8. 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**.
9. The complainant did not testify. The trial magistrate made observations that the complainant, a six year child was afraid and could not speak. The child’s grandmother, PW1 **F M** testified that the child named the Appellant as the culprit. The grandmother’s evidence failed to give details to show how the complainant knew the Appellant and how she had identified him. According to the grandmother, the complainant was found at about 7.20 p.m. It is not clear what time the offence took place and where. It is also not clear if there was sufficient light. If the child was a vulnerable witness, the trial court ought to have so declared under **section 31** of the **Sexual Offences Act**. The evidence adduced on behalf of the child then ought to have given sufficient details on identification.
10. PW2 **M** and PW3 **M**, the minor brothers to the complainant testified. Although the two brothers had gone with the complainant to the river, they only noticed that the complainant was not with them when they returned home. The evidence of the two brothers does not shed any light on the question of identification. The two brothers did not mention the Appellant.
11. The evidence of the Clinical Officer, PW4 **Dominic Mbindyo** and the Investigating Officer, PW5 **Salome Minigu** is on the fact of defilement.
12. The Appellant denied the offence. The prosecution evidence was weak and failed to sufficiently link the Appellant to the offence. A conviction is based on the strength of the prosecution case and of the weakness of the defence case. The Appellant ought to have been given the benefit of doubt. The appeal has merits and is allowed. I hereby quash the conviction and set aside the sentence. The Appellant is at liberty unless otherwise lawfully held.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of July, 2015

.....

B. THURANIRA JADEN

JUDGE