REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 153 OF 2013

JOSEPH KATUA KIATU..............................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence in Tawa Senior Resident Magistrate's Court, Criminal Case No. 338 of 2012 by Hon. H.M. Ng'ang'a Resident Magistrate on 25th April, 2013)

JUDGMENT

The Appellant **Joseph Katua Kiatu**, was charged with attempted defilement of a child contrary to **Section 9(1)** as read with **Section 9 (2)** of the **Sexual offences Act No. 3 of 2006.**

It is alleged, in the particulars that on the 13th day of November, 2012 at *[particulars withheld]* village, [particulars withheld] location in Mbooni East District within Makueni County intentionally attempted to cause his penis to penetrate the vagina of **J M M** a child aged 3 years and 8 months.

The appellant also faced an alternative charge of committing an Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars being that on the 13th day of November, 2012 at *[particulars withheld]* village, [particulars withheld] location in Mbooni East District within Makueni county intentionally and unlawfully did an indecent act to **J M M** a child aged 3 years and 8 months by touching her private parts namely vagina with his penis.

The appellant denied the charges and the case was subjected to a full trial after which the trial magistrate found the offence proved and sentenced the appellant to 15 years imprisonment.

Before the proceedings in the lower court commenced, the prosecutor made an application that on account of the tender age of the complainant and for the reason that she could not be in a position to express herself, her mother **R K M** be allowed to give evidence on her behalf and to explain to the court what happened.

The learned magistrate observed that the evidence of the minor *(complainant)* could not be taken on oath

and she could not understand the nature of the oath. He further observed that the complainant being a child of such tender years, she could not be conducted *voir dire* examination.

The court allowed the application and in doing so the trial magistrate was guided by the provision of **Section 31** of the **Sexual Offences Act.**

The court allowed the mother to the complainant to give evidence as an intermediary *(under* ***Section 31 (4) (b)****)* having declared the child as a vulnerable witness on account of her age. The mother testified as PW1.

The prosecution produced four (4) witnesses during the trial. The complainant being a child of tender age did not testify but instead the mother gave evidence on her behalf as PW1 *(R K M)*. In her testimony she told the court that the child was aged 3 years and 10 months having been born on the 23rd February, 2009. She produced a birth certificate which confirms the date of birth. It was marked as exhibit 1.

It was her evidence that on 13th November, 2012 at around 4pm she called the complainant in this case **J M M** to bathe her and while in the process of bathing her, the complainant told her that she was feeling pain and that she wanted to urinate.

PW1 asked the complainant why she was feeling pain and she replied in Kiswahili that *"ameingishwa kasulu na Katua"* Kasulu in Kikamba is penis.

The said Katua used to stay at the neighbour's house and was employed as a herds boy by the said neighbour namely **M K.** PW1 on checking further noted that the complainant's vagina was not normal. She called her mother-in-law **K M** who also upon checking the child confirmed that her vagina was not normal.

PW1 and her mother-in-law asked the complainant when the incident happened and she said the same day at around 2-3pm when the complainant was sent together with K by their uncle to take a heifer to a neighbour. It was PW1's further evidence that the complainant told her that as she proceeded to the uncle's place in company of other children, Katua chased away the other children, took the complainant where he used to sleep and told the complainant to remove her underwear and Katua removed his pants and penetrated her.

After the act, the complainant came out of the bed and followed the other children. PW1 noticed the complainant's vagina though not broken was reddish in colour. She called her husband *(the complainant's father)* one **J M M** who by then was working at *[particulars withheld]* market as a motorbike mechanic. He arrived home within 30 minutes and enquired what had happened and where Katua *(the appellant)* was. He called the appellant who on being asked, denied having done anything to the complainant but when the complainant was asked she repeated what she told her mother (PW1). PW2 the father to the complainant took her to hospital and the appellant was arrested. The complainant was treated at *[particulars withheld]* sub-district hospital and later on she was taken to Makueni district hospital. The complainant was also issued with a P3 form which was filled on 14th November, 2012. She told the court that she did not have any grudge against the appellant.

When PW2 arrived home, he went to his neighbour where the appellant was working. He requested the appellant to accompany him to his house and when he asked what he did to the child he said he did nothing to her but only took her to his house to prevent her from being beaten by the other children. When the child was asked by her father (PW2) what the appellant did to her she replied that Katua had put "Kasulu" in her and on being asked who Katua was she pointed at the appellant. The child narrated how the appellant laid her on the bed and entered Kasulu into her after chasing the other children.

PW2 told the appellant to board the motor bike and together with the child they went to Mumbuni police station where he reported the matter to the police. The child was examined at *[particular withheld]* sub district hospital on the 14th November, 2012 by **Geoffrey Mutua** a clinical officer in charge of the said

hospital. On examination the child had changed inner clothes but he observed that the vagina was lacerated and there was reddening of the vulva. On doing full haemogram to check injection of the blood, he saw some pus. The doctor in his evidence concluded that there was evidence of attempted penetration of the vagina. The findings as per the evidence of PW3 were that the child was taken to hospital within hours after the attempted defilement and her age was three years at the time. He further noted that the weapon used was blunt. His conclusion that there was attempted defilement was informed by the fact that the vulva was swollen and there was laceration of the vaginal wall. He signed the P3 form which he produced as an exhibit together with the treatment cards for both hospitals where the child was treated.

In his defence, the appellant gave a straight forward denial. He denied having committed the offence. He told the court that on the material day that is on 13th November, 2012 he went to graze the cattle in the hill where he was until 6p.m after which he returned home. On reaching home, the father to the complainant called him and told him to board a motor bike to take vegetable he had bought at the market *[particulars withheld] market).* That they however did not arrive at the market but he was taken to the police by PW2 who reported that he *(the appellant)* had touched his child's private parts. He was then locked in and arrested. On cross-examination he admitted that he knew the complainant and her parents who were neighbours of **M K** who had employed the appellant as a herds boy. He also admitted that the complainant *(the child)* knew him. His defence was just a general denial that he did not commit the offence.

After the trial the appellant was sentenced to fifteen (15) years imprisonment and being dissatisfied with the conviction and the sentence has appealed to this court. He filed his grounds of appeal on the 10th day of June, 2013 with three grounds. The three grounds of appeal are as hereunder:

> *a.* ***That the evidence adduced was not sufficiently trustworthy to have been relied upon as a basis for his conviction.***
>
> *b.* ***That the case for the prosecution was not proved beyond reasonable doubt.***
>
> *c.* ***That the appellant's sworn defence statement was not taken into consideration.***

When the appeal came up for hearing, the appellant informed the court that he was wholly relying on his written submissions which he handled to the court. The state through **Mr. Machagu** made oral submissions in opposition to the appeal. He urged the court to dismiss the appeal and uphold the conviction and sentence by the trial court as the case was proved beyond any reasonable doubt.

The court has carefully considered the evidence on record and the submissions by the appellant and the state with a view to making its own independent conclusion. The duty of this court while sitting on the first appeal is to examine and analyze all the evidence adduced in the lower court afresh but bearing in mind that it did not have the benefit of seeing the witnesses when they testified.

The court now wishes to determine the issues raised in this appeal. Regarding the first ground of appeal the child *(complainant)* through the mother (PW1) gave a good account of how the appellant chased away the other children who were with her, took her where he used to sleep and told her to remove her underwear. The appellant then removed his pant after which he removed his *"kasulu"* a kamba word for penis and penetrated her. It was during the day. The complainant though young, knew the appellant before for quite sometime because the appellant was working for a neighbour to the complainant's parents and he had worked for three (3) months before this incident. The appellant in his evidence admitted that he knew the complainant before the incident *(this was in cross-examination after his defence). (Though earlier on in his testimony he had said he came to know her the day the offence was allegedly committed.)* The complainant told her mother what the appellant did to her, she repeated the same story when she was asked by her father in the presence of the appellant and even pointed the appellant and said he is the one who defiled her.

The appellant in his submissions argues that the evidence of PW1 was hearsay evidence because she was not there where the offence was committed. At the beginning of this judgment I stated that the lower

court allowed PW1 to testify as an intermediary for the complainant whom the court declared a vulnerable witness under **Section 31(b)** of the **Sexual Offences Act Cap 3 of 2006**. Her evidence cannot therefore be said to be hearsay evidence.

The appellant also raised the issue of corroboration of evidence of minors and that the evidence was not corroborated by an independent witness. With regard to this, the court is guided by the provisions of **Section 12** to **Section 124** of the **Evidence Act Cap 80 Laws of Kenya** which stipulates as follows;

> ***"provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth"***

In any event the evidence of the complainant through PW1 was corroborated by the medical evidence of PW4 the clinical officer.

PW4 the clinical officer who examined the complainant told the court that the child was okay and was mentally stable. She was not afraid. She talked well and said she could identify the person who defiled her. The evidence of the child was corroborated by medical evidence of PW4 who confirmed that there was evidence of attempted penetration of the vagina. With regard to that ground of appeal, I hold that the complainant's evidence through her mother was trustworthy and the lower court was right in relying on it to convict the appellant.

The appellant however, in his submissions took issue with the fact that the clinical officer (PW4) is not a medical officer and therefore he was not competent to produce the medical report and relied on the case of **Reuben Kiplangat Kirui vs Republic H.C.A Appl.No. 139/2006** at Nakuru where it was held;

> ***"A clinical officer was not authorized in law to produce any medical report in evidence in a trial before a competent court".***

He argued that the same position was reiterated in the High Court Criminal Appeal No. 183 of 2009. The court has looked at the clinical officer Act. (Training, Registration and licensing Act Cap 260 Laws of Kenya and the definition of a clinical officer is given as follows:-

"A person who, having successfully undergone a prescribed course of training in an approved training institution is a holder of a certificate issued by that institution and is registered under the Act… **Section 7(4)** of the **Act** states

> ***"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the gazette"***

The Act also provides that such an officer may engage in private practice in any the practice of medicine, dentistry or health work for a fee. It therefore follows that a clinical officer is a competent to give evidence and produce a medical record. The court also notes that nowhere in the **Sexual Offences Act** does is there a requirement that a P3 form must be produced by a medical doctor. The court has also been guided by the case of **Kavoi Kiilu vs Republic 2010 eKLR** where the Court of Appeal held that a clinical officer is competent to produce medical evidence.

PW4 filled the P3 form for the complainant and produced it as evidence together with the medical documents for [particulars withheld] and Makueni Hospitals. Under **Section 77(2)** of the **Evidence Act.**

> ***"The court may presume that the signature to any such documents i.e inter alia a medical report under the hand of medical practitioner is genuine and that the person signing it held the office and qualifications which he professed to hold at the time he signed it"***

The appellant did not object to the production of the medical documents by PW4 and both having been produced under **Section 77** of the **Evidence Act**, the court finds that no prejudice was caused to him.

On the second ground of appeal, its my view that the case was proved beyond any reasonable doubt and I say so for the following reasons;

> *a.* ***The complainant through her mother was able to narrate how the appellant attempted to defile her in his house on his bed after he had chased away the other children.***
>
> *b.* ***The complainant knew the appellant who was their neighbour's employee for three months before this offence was committed and she knew him well. Even the appellant himself admitted that the complainant knew him well before the date of the offence. Infact he knew him by name.***
>
> *c.* ***The offence was committed during the day according to the evidence on record and the complainant was able to see the appellant well and in any case he knew him before then.***
>
> *d.* ***The medical evidence adduced corroborated the evidence of the complainant as testified by PW1 and therefore that ground must also fail.***

On ground 3 of the appeal that the appellant's defence was not taken into account, the record by the lower court is very clear and on page 30 of the same, the trial court considered the defence by the appellant and found it not plausible but a mere denial. It is not therefore true that the lower court failed to consider the appellant's defence. The complainant through her mother was truthful and the account on how the appellant attempted to defile her as narrated to her mother, her father and the clinical officer was same.

The appellant attempted to defile the child who was aged three (3) years at the time as per the birth certificate which was produced in court as exhibit 1 which shows that she was born on the 23rd February, 2009.

After carefully considering the facts of this case, the conviction and the sentence that was imposed upon the appellant, I find no merit in this appeal on both conviction and the sentence. The same is therefore dismissed.

It is so ordered.

Dated and **Delivered** at **Machakos** this 24th day of July, 2015

LUCY NJUGUNA

JUDGE