



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 28 OF 2014**

*(An appeal from the Orders of the Senior Resident Magistrate, Siakago in SPMCR. Case No. 447 of 2013 dated 9/5/2014)*

JUSTUS MUTHUI MBATHE..... APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

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

This is an appeal against the judgment of Siakago Senior Resident Magistrate in Cr. Case No. 447 of 2013 which was delivered on 9/5/2014. The appellant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act with an alternative charge of committing an indecent Act with a child contrary to Section 11(1) of the Act. He was sentenced to serve life imprisonment for the offence of defilement.

In his petition and in his submissions the appellant put forth the following grounds:-

1. *That the magistrate erred in convicting him on a defective charge.*
2. *That the magistrate relied on inconsistent and uncorroborated evidence.*
3. *That the magistrate relied on verbal evidence to convict him that was not backed by medical evidence.*
4. *That the appellant was not medically examined.*
5. *That the magistrate erred in convicting him without considering that there was a grudge between him and the complainant's mother.*
6. *That his defence was rejected by the magistrate without good reasons.*

The appellant submitted that the prosecution failed to prove the case beyond any reasonable doubt. He alleged that the charge was defective in that it gave the wrong Occurrence Book (OB) number which contradicted the date that the complainant reported the matter at the station. It was further contended that the case consisted a lot of doubts in that it was reported two days after the occurrence of the offence and that some witnesses were not called to testify. The appellant argued that he ought to have been medically examined in order to connect him with the offence.

It was further argued that the appellant was denied a chance to cross examine the complainant and his brother. Further that no medical evidence was adduced to support the evidence of the prosecution on the commission of the offence. It was argued that the age of the complainant was not proved. He alleged that the magistrate failed to consider that there was a grudge between him and the complainant's mother. He stated that the magistrate did not consider his defence.

The appeal was opposed by the State. The State Counsel Ms. Musango argued that the prosecution proved their case beyond any reasonable doubt. She submitted that the evidence of the key witnesses PW2 and PW3 was consistent and was corroborated by medical evidence. It was not necessary to take the appellant for medical examination as he claimed. The error on the charge sheet on the date of the OB is curable under Section 382 of the Criminal Procedure Code. PW4 produced the P3 form which consisted of sufficient medical evidence to corroborate the evidence of PW2 and PW3.

The State said that the appellant gave an unsworn alibi which the magistrate considered and found that it did not shake the prosecution's case. The age of the complainant was proved through tendering the birth certificate by PW5. The conviction was therefore safe and the sentence lawful.

The evidence of the prosecution consisted of five prosecution witnesses. The complainant's mother PW1 testified that on the 10/6/2013 she returned home and found the complainant unwell. She was informed by the minor that on the previous day she had been defiled in the bushes by the appellant whom she knew well. PW1 examined her private parts and found some whitish substance and also noticed that the complainant was passing urine uncontrollably. The matter was reported at Kindaruma police station and the girl treated at Riagina Health Centre. She was referred to Kiritiri Health Centre and thereafter to Mbeere District Hospital.

The complainant who was aged 9 years gave unsworn evidence. She stated that on the 10/6/2013, the appellant found her collecting firewood in the bushes on her way from school. She was accompanied by her brother PW3 at the material time. The appellant gave her KShs.20 and warned her not to tell anyone or else he would kill her. She reported the incident to her mother the following day and was taken to hospital.

PW3 the brother of the complainant who was a nursery school pupil gave unsworn evidence. He told the court that on the material day he was coming from school with his sister PW2. As they were collecting firewood in the bushes, the appellant came and got hold of PW2. He removed her underwear and slept on her. He saw the appellant apply something like saliva on the part that he was later to lie on. The complainant cried and the appellant walked away. PW3 said the incident happened during the day and in his presence.

The clinical officer from Mbeere District Hospital PW4 testified that he examined the complainant. She had been treated in two other health centres before she went to hospital. She gave a history of having been defiled by a person well known to her on 10/6/2013 at around 2.00 p.m. On examination, there were mild vulva lacerations and the hymen had been perforated. There was vaginal discharge and PW4 reached a conclusion that there was forceful vaginal penetration. The P3 form was produced in evidence.

The investigating officer PW5 testified that the report was received at the station on 12/6/2013 at 14.30 hours from PW1 the mother of the complainant. She reported that the complainant had informed her she had been defiled by the appellant. The P3 form was issued and the complainant taken for treatment. He told the court that PW1 handed over the birth certificate of the complainant to him which he produced in evidence.

The appellant gave an alibi to the effect that he had left his home to attend a funeral. He further stated that he returned home on 10/6/2013 at 5.00 p.m.

The duty of the first appellate court was explained by the Court of Appeal in the case of **KARIUKI KARANJA VS REPUBLIC [1986] KLR 190** where the court held:-

*On the first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have been decided to admit".*

The appellant was convicted of defilement contrary to Section 8(1) as read with 8(2) of the Sexual

Offences Act. The section provides:-

*8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

*8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

The appellant alleged that he was convicted on a defective charge sheet which indicated the number on the top left corner as OB No.5/12/2013 while the offence was reported on 12/6/2013. It is obvious that the correct OB number should have been OB No.5 of 12/6/2013 considering the date that offence was reported. The anomaly is a minor one and does not affect the charge provided there is sufficient evidence on the date of offence. Even if it appeared in the body of the charge, it would be curable under Section 382 of the Criminal Procedure Code which provides:-

*Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*

*Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.*

The charge is worded as follows:-

*“On the 10th day of June 2013 at [Particulars Withheld] village, Mutuobare location in Mbeere South District within Embu County intentionally caused his penis to penetrate the vagina of R K, a child aged 9 years”.*

In the Court of Appeal case of **FAPPYTON MUTUKU NGUI VS REPUBLIC [2014] eKLR** it was held that provided the charge sheet outlines the essential ingredients and particulars of the offence, such a charge is not defective.

I am of the considered opinion that the charge contained all the necessary ingredients of the offence and was therefore properly framed. There is no prejudice that was suffered by the appellant as a result of the minor error on the OB number.

The appellant contended that the age of the complainant was not proved. However, the birth certificate produced by PW5 is sufficient proof of age. It is trite law that even the evidence of the mother is sufficient proof of age. It is therefore not correct for the appellant to allege that the prosecution failed to prove the age of the complainant.

It was contended that the evidence of the prosecution was inconsistent and uncorroborated. The evidence of PW2 and PW3 on what transpired was very clear and consistent. The appellant was well known by the two witnesses for he was their neighbour. PW3 told the court that he knew the appellant as Muthui and that he was from his home village. He further stated that he saw the appellant removing the under wear of his sister, apply some liquid and then slept on her. It was not until his sister cried that the appellant left the scene. The evidence of PW2 and PW3 was corroborated by the medical evidence which confirmed that there was forceful penetration.

Section 124 of the Evidence Act provides:-

*Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the*

*prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*

*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.*

It is my considered opinion that the evidence of the prosecution was well corroborated.

The appellant argued that the magistrate relied on verbal evidence to convict him. This is not correct since the P3 form was produced by PW4 and the birth certificate by PW5. He further submitted that he was not taken for medical examination to connect him with the offence. There is no requirement that an accused person facing a defilement charge be subjected to medical examination. In the case of **DENNIS OSORO OBIRI VS REPUBLIC [2014] eKLR** the court in dealing with a similar argument held that the only medical evidence required to prove defilement was that of the complainant as given by the examining doctor.

The evidence of PW4 the clinical officer who produced the P3 form was that there was penetration. In view of the above decision I find no basis in the contention of the appellant that he ought to have been taken for medical examination.

The appellant argued that the magistrate erred in failing to consider that there was a grudge between him and PW1 the complainant's mother. During cross examination by the appellant, PW1 denied that the appellant was his lover and blatantly told him that he was lying to the court. She denied ever having been in any intimate relationship with the appellant. She told the court that she was married and that no grudge existed between her and the appellant. In his defence the appellant made the same allegation that he had a love affair with the complainant's mother 3 years before the incident. Even assuming that the allegation was true, the appellant did not explain why PW1 had not framed any case of that nature for the three years they had fallen apart. It is not PW1 who came up with the defilement incident. It was the complainant herself who informed her mother of what the appellant had done to her. PW3 who was present during the incident confirmed the complainant's allegation. The learned magistrate rightly dismissed the allegation of the existence of any grudge.

On the right to cross-examination, it is apparent that PW2 and PW3 were minors and gave unsworn evidence. The evidence was not subject to cross-examination. It cannot be said that the appellant was denied the right of cross-examination in respect of the minor witnesses.

In his defence the appellant gave an unsworn statement. He told the court that he had traveled on 9/6/2013 to attend a burial and returned home on the 10/6/2013 around 5.00 p.m. He denied committing the offence and said that he was arrested the same evening. The magistrate noted in his judgment that the alibi defence was only raised after the prosecution closed its case. He dismissed the defence as an afterthought. I have perused the evidence on record and I have noted that during cross examination, the appellant did not raise the issue of having been away from home at the material time. Considering the evidence of the prosecution witnesses which was well corroborated, I am of the opinion that the defence of the appellant could not stand. It was therefore considered and found not to be plausible.

All the ingredients of the offence of defilement were proved by the prosecution. I am satisfied that the appellant was properly convicted of the offence under Section 8(1) of the Act. The sentence imposed of life imprisonment was as prescribed by Section 8(2) of the Act.

The conviction and the sentence are hereby upheld.

This appeal lacks merit and is accordingly dismissed.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF SEPTEMBER, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**The appellant**

**Ms. Nandwa for respondent**