



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 90 OF 2013**

**STEPHEN MWAMBUA MRATA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From original Conviction and Sentence in Criminal Case No. 124 of 2012 of the Principal Magistrate's Court at Voi – Hon. Nyakundi - PM)**

**JUDGMENT**

**STEPHEN MWAMBUA MRATA** hereinafter referred to as the appellant was Convicted and Sentenced to twenty (20) years imprisonment on the first Count of defilement contrary to section 8(1) (3) of the Sexual offences Act and ten (10) years imprisonment in respect of Counts 2, 3 and 4 for the offences of indecent Acts with children contrary to section 11(1) of the Sexual offences Act.

The particulars in respect to the first count are that:-

***“On the 19th day of February, 2012 at [particulars withheld] Primary School Taita Taveta county, he intentionally and unlawfully caused his penis to penetrate the anus of J M a child aged twelve (12) years”.***

In respect of Counts 2, 3 and 4 the particulars are that:\_

***“On 19th February, 2012, 18th February, 2012 and 20th February, 2012 respectively he intentionally and unlawfully touched the penises of the three complainants”.***

Being dissatisfied on both the Conviction and Sentence he has now lodged this appeal whose grounds are:-

1. That the trial magistrate relied and admitted hearsay and circumstantial evidence in arriving in the Conviction of the appellant.
2. That there was no proper Voie dire examination carried in admitting the evidence of the minors.
3. That the Conviction was against the weight of the evidence adduced.
4. The learned trial magistrate did not consider the evidence adduced by the defence.

This is the first appellate Court and its duty bound to examine and re-evaluate the evidence on record so as to arrive on its own conclusions bearing also in mind that it did not have the opportunity of hearing and observing the demeanour of the Witnesses. ***Republic – Vs Okeno 1972 EALR.***

The prosecution in the lower Court called seven (7) Witnesses in support of their case. The Appellant gave a sworn statement and did not call any other witnesses in his defence.

### **Brief Facts.**

At the time of the alleged offences the appellant was the Head Teacher of **[particulars withheld]** Primary School in Taita Taveta.

The four (4) complainants in respect of Counts 1-4 were pupils in the Said School. All of them were in standard five.

Between the 17th day of February, 2012 and 19th of the same month and year, a scouts camp was being conducted at **[particulars withheld]** Primary School for that school and another called **[particulars withheld]** Primary.

The appellant was staying in a house in the school. It is in the house that the alleged acts took place. It is unfortunate that the lower Courts record of proceedings were not paginated but this is what PW 1 told the court,

***“As I was heading to the classroom, the Headmaster called me to his office. He was alone. He told me to accompany him to his house. We entered his house. There was nobody in the house except the two of us. He told me to remove my clothes. I obliged and removed my pair of shorts. He took petroleum jelly and applied on my “mdudu”. I call it mdudu. I use it to urinate. After applying petroleum jelly he started to massage my private parts and then told me to leave ..... On 19th February, 2012 the visitors from [particulars withheld] Primary School went back. The teachers of our school left and the Head teacher called us to his office. He called S first. When he came back he told me that I had been called. I went to the Accused persons office. I went alone. It was around midday. He greeted me and told me to remove my pair of shorts ..... He told me to bend. He did “tambia mbaya” to me on my anus. He inserted his penis. He removed and then told me to do it to him. I also did it to him what he had done to me. I f\*\*\* him in his anus”.***

The other three (3) complainants also testified in Court of how the appellant called them to his house, ordered them to remove their clothes and proceeded to apply petroleum jelly on their penises and thereafter fondled and massaged their private parts. PW 2, PW 3 and PW 4 did not testify to have been sodomized hence they were not taken to Hospital for examination by Doctor.

It is PW 1 who was taken for examination. Dr. Charo Wilson (PW 6) did testify that upon examination of the anal region of the complainant he did not observe any bruises or tears. He had normal anal muscles. There was no discharge from the anus. A rectal swap did not show the presence of spermatozoa. He attributed this to the time lapse between the time of the incident to the time the Complainant was examined.

### **Age assessment**

PW 6 Dr. Wilson Charo did produce P. Exhibits No. 2, 3, 4 and 5 which are age assessment notes signed by medical superintendent Moi Hospital. The age of M M was assessed as ten (10) years.

That of C M was assessed at nine (9) years. That of S M as twelve (12) years and J M as twelve (12) years. PW 6 did testify to the effect that the assessment was done by a Dentist. The Court is satisfied that a proper age assessment of the Complainants was done.

### **Corroboration.**

Section 124 of the evidence Act provides,

***“Notwithstanding the provisions of section 19 of the Oaths and statutory declarations Act, where the evidence of alleged victim 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 lenience in support thereof implicating him.***

***Provided that where in 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 the present case the victims were four in number. Their ages was ascertained as ranging from 9 – 12 years. Who is a child of tender years?

The childrens Act Cap 141 under section 2 defines a child of tender years to mean ***“a child under the age of ten (10) years”.***

The first second and third complainants were aged over ten (10) years at the time of the incident. They are not children of tender years.

The learned trial magistrate did observe that they were truthful Witnesses and gave reasons for so finding.

In the Court of Appeal Case of ***Johnson Muiruri -Vs- Republic Criminal Appeal No. 44 of 1982*** it was held,

***“Where in any proceedings before any Court, a child off tender years is called as a Witness the Court is required to form an opinion, on a Voire dire examination, whether the child understands the nature of an oath”.***

In the present case I am satisfied that a proper Voire dire examination was carried out by the Court before admitting in evidence the Complainants statements.

Further, I am satisfied that three (3) of the Complainants were not children of tender years and the admission of their evidence was proper.

***Penetration in respect to the charge of defilement.*** First Complainant (PW 1) did testify that the appellant inserted his penis into his anus and also invited him to do the same to him. However, when he was taken for examination three days later there was no evidence of penetration observed. The explanation being that he had parsed stool since the incident and much time had lapsed.

There is no evidence to corroborate that of the Complainant on the issue of penetration.

#### ***Indecent assault/act.***

Section 12 of the Sexual offences Act defines it to mean,

***“An unlawful intentional act which causes-***

***(a) any Contact between any part of the body of a person with the genital organs breasts or buttocks of another, but does not include an act causes penetration .....”.***

PW 1, PW 2 PW 3 and PW 4 did testify of how the appellant was calling each of them to his house in turns and of hows he ordered each to undress and then proceeded to lubricate their penises with petroleum jelly and fondled and massaged their private parts. This act on the part of the appellant was intentional and unlawful.

Whereas, I find the charge of defilement not to have been proved beyond reasonable doubt, I find the alternative one of indecent act to have been proved in respect to the first count. The Convictions on the 2nd, 3rd and 4th Counts were safe.

The upshot is that the imprisonment term of twenty (20) years in respect of the 1st Count of defilement is substituted with a term of ten (10) years in respect of the alternative count of indecent Act. The imprisonment terms in respect to the 2nd, 3rd and 4th Counts to remain the same.

A perusal of the sentencing notes does not show whether the sentences were to run concurrently or consecutively. It is ordered that the Sentences are to run concurrently from the date of sentence by the trial Court.

This appeal succeeds to that extent only.

Judgment delivered dated and signed this **17th** day of **September, 2015**.

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**M. MUYA**

**JUDGE**

**17TH SEPTEMBER, 2015**

**In the presence of:-**

The appellant

Learned Prosecutor Mr. Masila

Court Assistant

**M. MUYA – JUDGE**