



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**CRA NO.10 OF 2015**

***(Appeal originating from Hon. A. M. Obura in Kilifi Cr. No.76 of 2010)***

**GEORGE IBRAHIM CHAI MUNGA.....APPELLANT**

**VRS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged with the offence of defilement contrary to section 8 (2) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that the appellant on the 20/1/2010 at (particulars withheld) in Kilifi District of the Coast Province intentionally caused his penis to penetrate the vagina of G D, a child aged seven (7) years.

The trial court sentenced the appellant to life imprisonment. The grounds of appeal are that the charge was not proved beyond reasonable doubt, that the prosecution case was full of contradictions, that some witnesses were not called to testify, that section 109 of the Evidence Act was not complied with and his sworn defence created doubt on the prosecution case. The appellant argued all the above grounds together.

The appellant contends that the complainant's age was not established. Apart from the P3 form and the statement of the complainant's mother, there is no any other evidence on the age of the complainant. The appellant relies on **Malindi Criminal Appeal no.504 of 2010 Kaingu alias Kasomo v Republic (C.A)**: It is further submitted that the evidence of PW1 and PW3 was full of contradictions. The mother alleged that PW1 was in pain but PW1 never mentioned such a thing. Some witnesses like PW3's maid and one Grace who allegedly observed PW1 were not called to testify. Finally, the appellant maintains that his defence raised doubt on the prosecution case. There was inspection going on at the school and no such a thing could have happened.

The State opposed the appeal. Miss Mathangani, prosecution counsel maintains that PW1 narrated how the appellant defiled her. PW1 was later medically examined and it was noted that her hymen had been torn. The complainant's age was given as seven (7) years. Counsel concedes that there was no document produced in relation to the age of the child but the trial court observed that she was a minor.

The records of the trial court shows that four witnesses testified for the prosecution. The appellant called three other witnesses apart from his testimony. PW1 was the complainant. She testified that she was seven (7) years old and a class three pupil at (particular withheld). On 20/1/2010 at about 4.00 p.m, it was time for games at school. The appellant who was her class teacher called her and took her to the

classroom. He removed her clothes and defiled her. When he was through, he warned her not to tell anyone and released her. She went to the field for games and later went home. She did not tell anyone. Her mother later cajoled and revealed to her what had happened. When she was defiled, she felt pain but did not bleed. No one else saw what had happened. She was later taken to hospital for treatment.

The record of the trial court does not show the name of PW3. He was a male adult who produced the P3 form filled by Doctor Kembo. He testified that he was familiar with Dr. Kembo's handwriting. PW1's hymen was torn. PW3, Rachel Chinyavu is PW1's mother. She is a veterinary officer at Kilifi. On 20/1/2010 her only child PW1 went to school. She came home late and was walking with difficulties. She felt pain while urinating. On 21/1/2010, PW3 took her child to school on a "tuk tuk". The school is about 100 metres away from her home. PW3 later asked her maid to check on PW1. PW1 told them that her teacher had put a finger in her private parts. She then said that it was a ruler and later revealed that she had been defiled by the appellant who had threatened her not to tell anyone. PW3 reported the matter to the chief. PW1 was taken to hospital. At that time PW3 was sick.

PW4, P. C Noah Mativo was based at the Kilifi Police Station. The case was reported on 22/1/2010. He referred PW1 to Kilifi Hospital. He arrested the appellant and charged him with the offence. He did not visit the scene. Initially, PW1 did not open up as she appeared traumatised but after talking to a female police officer, she gave a further statement. By then, the appellant had been charged with the offence. It is his evidence that PW3's statement was also different and he took a further statement from her.

In his sworn defence, the appellant denied committing the offence. He knew the child since class one. The class had seven female pupils and nine boys. On 20/1/2010 there were inspectors at the school from Public Health. The school wanted to register for class eight (8) National exams for the first time and had to be inspected. He was assigned the task of labeling the classes and other areas such as headmaster's office. The inspectors went to the school at 2.00 p.m. and stayed until the games were over at 4.00 p.m. Thereafter, the students had one hour preps and left at 5.00 p.m. On 21/1/2010, PW1 attended school as usual and nothing was observed on her. PW1 did not attend school on 22/1/2010, a Friday. He was arrested on 22/1/2010 while teaching the first morning lesson and put in the cells. He knew PW1's mother and had developed good relationship with her.

DW2 J L was the headmaster of the school. His evidence was that on 20/1/2010 they had inspectors at the school. He assigned the appellant the task of labelling the school areas as he is good at labelling. There were about 200 pupils. The students went for games. The owners of the school were also present. Since it is a private school, it had to be inspected before it could register for National Examinations. According to him, the defilement could not have happened. There are subordinate staff who clean the classrooms.

DW3, O M was a teacher at the school. He testified that they had guests at the school on 20/1/2010. The appellant did not go for games as he was assigned the task of labelling the classrooms. DW3 left with all the students for games. According to him, PW1 was in school the following day. DW4 James K K is a cleaner at the school. His evidence was that he knows PW1. On 20/1/2010 they had Public Health Officers inspecting the school. He swept class three and class five plus toilets. The appellant was tasked to label the classrooms. This was meant to make the classrooms easy to identify.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. The evidence shows that no one witnessed the incident. According to PW1, it was games time at around 4.00 p.m. The appellant took her to their classroom and defiled her. She did not bleed. The P3 form was filled on 22/1/2010. The Doctor noted that the hymen was broken. There were no bruises, lacerations or swelling on the other parts of the body. According to PW3, the child initially told them that the appellant had inserted his finger on her private part. She later changed to a ruler and ultimately to defilement. The investigating officer took two statements from PW1 and two from PW3. It is his evidence that by the time the further statements were taken, the appellant had been charged.

The main issue being raised by the defence evidence is that there was an activity going on at the school and no such defilement could have taken place without being noticed. PW3 talked to the headmaster of

the school, DW2, who told her that no such thing happened. There were inspectors checking the school. Their number was not given.

Whereas PW3 testified that PW1 was in pain and had difficulties in walking and passing urine, PW1 herself never raised those issues. According to her, she went for games after she was defiled. She later went to class. The following day she went back to school. She never complained of any difficulties. PW3 stated she was sick and did not check on PW1.

The prosecution did not adduce any evidence on the age of the child. The mother, PW3, did not indicate when PW1 was born. PW3 is educated and she is a veterinary officer. The age is quite crucial as it determines the sentence. PW1 was in class three yet she was alleged to have been 7 years. This means she started class one at the age of five years. The trial court observed the child during *voire dire* and noted that she was a minor. My view on the issue of the age of the child is that even if the age is not properly established, that cannot be a ground for acquittal. Once sexual contact is proved and penetration is established, the accused cannot be allowed to walk free just because the age of the victim has not been proved. The court can convict the accused for the offence of rape as it would be clear that the accused had had sex with someone without her consent.

The defence evidence is quite elaborate. Under section 123 of the Evidence Act, the trial court can convict an accused on the evidence of the complainant if it is satisfied that the victim is telling the truth. The complainant initially stated that it was a finder and changed the story to a ruler. It could be true that she had been threatened. However, a criminal case has to be proved beyond reasonable doubt. Once there is an element of doubt, the accused must benefit from that doubt and be acquitted. It is doubtful that PW1 could have been defiled and go for games without other children noticing her. It is equally doubtful that PW1 could have walked in pain in school on 21/1/2010 without anyone at school noticing her. According to PW3, PW1 used to cry wherever she passed urine. I think that PW3 exaggerated the evidence. PW1 herself never bled after the defilement. She simply went for games. The evidence shows that the appellant was charged in court even before PW1 had revealed that she had been defiled. The record does not indicate the date when the two statements from PW1 were taken. It is not clear whether they were taken in different dates or on the same date. It is not clear when PW1 revealed that indeed she had been defiled.

Given the evidence on record, it is quite doubtful if the appellant defiled PW1. It is the word of PW1 against the defence of PW1. When she stated that it was a finder or ruler that had been used, the appellant was not there. This was the 3<sup>rd</sup> day after the alleged incident. It raises doubt as to whether PW1 was defiled or was injured. The medical evidence does not indicate that the hymen was completely broken or missing... It indicates that it was torn. One can interpret this to mean that the hymen was present but was torn. It could heal and be present. This raises doubt in the court's mind as to what actually happened. I do find that the case was not proved beyond reasonable doubt. The conviction is not safe. The Doctor who attended to PW1 ought to have testified to shed more light on the medical evidence. PW2 simply narrated what was on the P3 form.

In the end, I do find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 16<sup>th</sup> day of September, 2015.

**SAID J. CHITEMBWE**

**JUDGE**