



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 177 OF 2013

**(Being an appeal from the Judgment, Conviction and Sentence in Criminal Case No. 2612 of 2012
Chief Magistrate's Court at Mombasa – Hon. Kimanga – Resident Magistrate).**

MICAH AMBANI ANZAYA..... APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The Appellant was Convicted and Sentenced to twenty and a half (20½) years imprisonment for the offence of defilement contrary to section 8 (1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that:-

“On the 31st day of August, 2012 at [particulars withheld] in Bomu location Mombasa County he unlawfully and intentionally caused his penis to penetrate the vagina of S A a girl aged twelve (12) years”.

The prosecution in this case called four Witnesses in support of their case. The Defence called two.

This is first appellate Court and its duty is to re-evaluate and re-consider the evidence on record so as to arrive at its own conclusions bearing in mind that, unlike the trial Court, this one did not have the opportunity to hear the Witnesses testify and observe their demeanour. **Okeno Vs- Republic 1972 EALR page 336.**

Brief facts

At the time of the alleged defilement the Complainant was a standard four pupil at [particulars withheld] Primary School, [particulars withheld] area – Mombasa County. The Accused was a neighbour.

According to the evidence of S A (PW 1) she knew the Accused before as a neighbour. On the date of the incident 31st August, 2012 she had left her mothers stall and was headed home when one of her pair of slippers got damaged. The Accused who was nearby offered to repair it, she followed him. Upon standing at the door the Accused pulled her into the room where there was a mattress on the floor, a seat and a table. He covered her mouth, held her hands from the back and proceeded to undress her. He also undressed and inserted his penis into her vagina, she felt pain and screamed. Afterwards, he told her not

to report the matter to any one, threatening to kill her if she did. She went home but did not tell her mother of what had happened. Several days later she was headed to the shops when she met the Accused he told her that he wanted to send her to her uncle. She stopped and he pulled her into his house. He undressed her. He also removed his clothes and proceeded to insert his penis into her vagina. She felt pain and screamed. Somebody knocked the door inquiring as to what but he Accused said that there was nothing to worry about. She managed to escape and ran away.

The man who had knocked the door of the Accused reported the matter to her mother who later questioned her and she revealed what the Accused had been doing to her. The Accused was arrested by members of public and he was taken to police station and was later charged with this offence.

The particulars of the charge as reproduced herein below reads,

“On the 31st day of August, 2012 at [particulars withheld] Village in Bomu Location Mombasa District unlawfully and intentionally caused his penis to penetrate the vagina of S A a girl aged twelve (12) years”.

At page pages 5 line 6 of the record of proceedings the Complainant told the Court thus,

“Sometimes in August, this year, I left my mums shop and was headed home. My slipper got cut the Accused told me He then removed his clothes and put his penis in my vagina” .

On the same page line 17 she says,

“A few days later when I was headed to the shops, I met the Accused ... he removed my clothes, removed his and put his penis in my vagina, I cried”.

PW 2 R C Complainants mother at page 6 line 14 of the record of proceedings told the Court,

“On 4th September, 2012 I was at the shop when I called S to come and get food for the children. She told me had put his penis in her vagina. She told me he had done it twice. I checked her vagina, I saw blood on her thighs”.

From the above its quite clear that there were two incidents. The first one the Complainant does not appear to be certain of the exact date nor was she certain of the other incident. Its her mother (PW 2) who gives the date as 4th September, 2012. Its not clear where the police got the date of 31st August, 2012. PW 3 PC Anne the Complainant had told her that she was defiled on 30th August, 2012.

In circumstances where the exact date of an offence is not known the charge sheet ought to read on diverse dates between a certain date and another. This does not appear to have been the case.

Article 50 (22) (6) of the Constitution provides,

“Every Accused person has the right to be informed of the charge, with sufficient detail to answer it”.

The charge preferred against the Accused did not contain sufficient details to enable him to answer it. As such he was prejudiced.

It is noted that the Appellant has served an imprisonment term of close to two years.

He had been Sentenced to Twenty and a half (20 1/2) years imprisonment.

In the circumstances of his case I find it proper and prudent to reverse the finding and Sentence of the lower Court which I hereby do and order that the Accused be tried by a Court of competent

jurisdiction.

Mention on 29th October, 2015 before the Chief Magistrate for further instructions and orders.

Judgment delivered dated and signed this **26th** day of **October, 2015**.

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M. MUYA

JUDGE

26TH OCTOBER, 2015

In open Court in the presence of:-

Learned Counsel for the prosecution Miss Ogwen

Learned Counsel for the Appellant Mr Masila

Court Assistant Mr. Musundi

M. MUYA – JUDGE