



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO 353 OF 2015**

**JEREMIAH MUTIE MUTHUSI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court, Criminal Case No.216 of 2010 by Hon. S. K. Mutai, Principal Magistrate on 15<sup>th</sup> December, 2010)*

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

1. **Jeremiah Mutie Muthusi**, the appellant, was charged with the offence of defilement contrary to **Section 8(1) (3) of the Sexual Offences Act No.3 of 2006**. Particulars of the offence were that on the **15<sup>th</sup> day of October, 2010** at **Athi Location** in **Mutomo District** within **Eastern Province** defiled **A N K** a girl below the age of fifteen years.

2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act, No 3 of 2006**. Particulars of the offence being that on the **15<sup>th</sup> day of October, 2010** at **Athi Location** in **Mutomo District** within the **Eastern Province**, he committed an act of indecency with **A K**, a child aged **12 years** by touching her private parts namely vagina and breasts.

3. He was tried, found guilty on the alternative count, convicted and sentenced to **ten (10) years imprisonment**.

4. Being aggrieved by the conviction and sentence thereof the appellant appealed on grounds that:

**-The delay caused in reporting of the matter to the police was not considered.**

**-The conviction was based on a purported medical report that did not disclose the offence of indecent act.**

**-alleged exhibits relied on by the court were not produced in court.**

**-The alibi defence was not considered.**

**-Existence of a land dispute between the complainant's family and that of the appellant was not considered.**

**-The sentence imposed was excessive.**

5. It was the prosecution's case that the complainant was coming from the river having fetched water when she encountered the accused who held her and pulled her into the bush. He tore her biker and had sex with her, she was in pain but could not scream because he covered her mouth and threatened to kill her. She noted some blood on her clothes. She went home and slept. The following day she notified her mother who took her to the dispensary. They were referred to **Mutomo Hospital** and thereafter to **Kitui District Hospital** where she was admitted for four (4) days.

6. Thereafter, she was examined by **Dr. Barasa** who filled a P3 form in that regard. He did not detect any spermatozoa following a high vaginal swab carried out but there was blood in the urine. He noted the hymen was lacerated.

7. When put on his defence the appellant stated that on the fateful date he was on the farm. He went to the hotel afterwards and took tea. Then he returned home. He denied having committed the offence.

8. He called a witness, **DW2 Musango Ngemu** who stated that the appellant was at his hotel at around 6.30pm on the material date and he left at 7.30pm.

9. This being the first appellate court, it is duty bound to review evidence of the case and reconsider all material presented before the trial court, analyze it, evaluate it and come to its conclusion bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses called by the prosecution and the appellant and seeing them. (**see Okeno – vs- Republic (1972) EA 32**).

10. The learned magistrate considered evidence adduced and reached a finding that the main charge was not proved to the required standard. The main charge having been defilement. The prosecution had a duty of proving:

**(i) The age of the complainant**

**(ii) Whether the appellant did an act that caused penetration into the genital organ of the complainant.**

11. Particulars of the offence indicate that the complainant was a girl aged below **fifteen (15) years**. When taken through voire dire examination the child stated that she was **twelve (12)** years old. **PW2 R K** her mother was silent on her age but the P3 form filled indicates her estimated age is **12 years**. It has been held that the age of a victim in Sexual Offences can be proved by medical evidence and other cogent evidence (**see Francis Omuroni –v- Uganda Criminal Appeal No 2 of 2000**).

This is a case where the age of the child is not in dispute thereof I find that it was proved as required by the law.

12. With regard for the 2<sup>nd</sup> issue of penetration. Evidence adduced by the complainant was that the appellant had sex with her. Her clothes were soiled with blood. He threatened to kill her if she did not keep quiet. She went home at about 8.00 pm but did not tell her mother.

13. **PW2, R K**, her mother stated that the complainant went to fetch water with three (3) donkeys. On her return she was crying and she told her that the donkeys had disturbed her. The following day she woke up while crying and she took her to the dispensary. She realized that she was bleeding.

14. If indeed the complainant bled and her clothes were soiled, Something must have caused it. There is nothing on record to suggest that the complainant was taken to hospital soon thereafter. **PW4**, the doctor who examined her saw her **eleven (11) days later**. He was not able to conclude if indeed the complainant had been defiled because she had taken a bath, used the toilet and changed clothes which in his opinion concealed important clues. However, he formed the opinion that there was attempted penetration. A high vaginal swab carried out showed presence of some blood but no spermatozoa were noted. There was also a presence of blood in the urine. It was also noted that the hymen had laceration. Blood in urine could be a sign of a medical condition. The underlying cause should have been established. A hymen having

laceration may suggest that the organ that was used to penetrate the genitalia could have been placed either within the vulva or between the thighs.

15. The victim herein was a child aged **12 years old**. In her testimony she did not describe what actually happened. All she said was that they had sex. This would be a suggestion that there was genital contact and body penetration which was not the case, according to the medical report (P3). Whether or not she understood what having sex entailed should have been established by the trial court. The learned trial magistrate reached a finding that the charge of defilement could not be sustained since the complainant was presented late for medical examination hence vital evidence was lost. On that basis he returned a finding of guilty on the alternative count. The learned magistrate made no observation on the complainant's demeanor.

Consequently, there is nothing recorded to suggest if indeed the complainant appeared a truthful witness.

16. The matter was indeed reported to the police on the **20<sup>th</sup> October, 2010** according to **PW3 No 66007 Corporal James Oluoch**. The only thing the officer seems to have done after receiving the report was to issue a P3 form to the victim and re-arrest the appellant after he was arrested by the victim's father on **26<sup>th</sup> October, 2010**. Medical documents issued to the complainant at the first instance would have been very important. This could have confirmed the state the complainant was in at the time of going to hospital if indeed she sought treatment earlier than the **26<sup>th</sup> October, 2010**. This would also have confirmed if indeed the complainant's clothes were soaked in blood as alleged, considering the fact that the alleged clothes were not adduced in evidence.

17. The learned magistrate did convict on the alternative count of committing an indecent act with a child. According to the law any person who commits an indecent act with a child is guilty of an offence (**see Section 11 of the Sexual Offences Act, 2006**). (Act).

18. An indecent act is defined by Section 2 of the Act as

**“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 that causes penetration”.**

19. In reaching the finding to convict the appellant the learned magistrate stated thus:

**“In fact the accused committed an act of indecency with the complainant, a child aged 12 years as evidenced by the P3 form produced as an exhibit. The evidence adduced does not clearly show whether penetration of the complainant's genital organ took place..”.**

20. Evidence adduced by the complainant was silent on what indeed transpired that could be concluded to be an indecent act. Going by the evidence, it would suggest the occurrence of an act of sexual intercourse which was disapproved by medical evidence adduced. In the premises there was no evidence to support the alternative count.

21. The alternative count having not been proved the appeal is meritorious. Accordingly, I do quash the conviction and set aside the sentence imposed. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

21. It is so ordered.

**DATED, SIGNED and DELIVERED at KITUI this 21<sup>st</sup> day of OCTOBER, 2015**

**L.N. MUTENDE**

**JUDGE**