



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 70 OF 2014

JACOB MUMO MUTIA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in **Kitui Senior Principal Magistrate's Court Criminal Case (S.O.) No. 30 of 2011** by **Hon. B. M. Kimemia, P M** on 15/04/14)*

J U D G M E N T

1. **Jacob Mumo Mutia**, hereinafter “the appellant” was charged with the offence of **Defilement** contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **2nd** day of **August, 2011** at around **11.00 a.m.** at **[particulars withheld] Village, Kanyangi Location** within **Kitui County** unlawfully caused his penis to penetrate the vagina of **S J** a girl aged **9 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 **2nd** day of **August, 2011** at around **11.00 a.m.** at **[particulars withheld] Village, Kanyangi Location** in **Kitui County**, did an indecent act with a child namely **S J** a girl aged **9 years** by touching her private parts namely vagina.

3. He was tried, found guilty, convicted on the main count and sentenced to **life imprisonment**.

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

- The evidence adduced was contradictory and not corroborative.
- The Complainant's evidence was obtained through coercion therefore should have had no evidential value.
- The specialist's (PW4) evidence which was at variance with the Complainant's testimony was disregarded.
- The charge was defective as evidence adduced was at variance with particulars of the offence.

5. Facts of the case were that the Appellant was an employee at the Complainant's home. On the **2nd August, 2011** at about **11.00 a.m.** PW1 **S J**, the Complainant was grazing goats with her siblings **M J** (PW2) and **J J** when the Appellant went and told her that her father was calling her. She went home but her parents were not there. The Appellant seized the opportunity to take her to his house where he penetrated her through the vagina. He threatened to kill her if she notified anyone. He bought her some sweets.

6. The following day her sister **M** noticed blood stains on her dress. She divulged the information. PW3 **J M M** her father arrested the Appellant and took him to the police station. The Complainant was subjected to medical examination. Subsequently the Appellant was charged.

7. When put on his defence the Appellant stated that the charge was trumped up because he had not been paid wages for five (5) months. On cross examination, he admitted seeing the Complainant and her siblings on the material date but argued that he went to collect goats. He denied having defiled the Complainant.

8. The Learned Trial Magistrate analyzed evidence adduced and reached a finding that the identification of the Appellant was proper and there was penetration of the Complainant's genitalia.

9. At the hearing the Appellant canvassed the appeal by way of written submissions.

10. The Respondent/State through Learned State Counsel, **Ms. Amojong** opposed the appeal. She submitted that the Complainant positively identified the Appellant. Her age was proved and so was the act of penetration. She prayed for dismissal of the appeal.

11. This being the first Appellate Court, its duty is to reconsider the evidence, re-evaluate it and draw its own conclusion bearing in mind that it neither saw nor heard witnesses who testified (**see Okeno vs. Republic (1972) EA 32**)

12. The Trial Court was obligated to consider:

- Whether the Complainant was a child aged nine (9) years.
- Whether there was an act of penetration.
- Whether identification was cogent.

13. In her evidence the Complainant stated that she was born in the year 2002. PW3 **J M**, her father was silent on her age. PW4 **Dr. Patrick Mutuku** who filled the P3 form stated that the Complainant's age was assessed and she was found to be nine (9) years old.

14. It has been held that medical evidence is paramount in determining the age of the victim and the Doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence(**see Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000**).

Evidence adduced therefore proved the fact that the Complainant was a child aged 9 years.

15. The child was taken through *voire dire* examination by the Trial Court which formed the opinion that she understood the nature, purpose and consequences of taking an oath. Consequently she was duly sworn. This was in compliance of the law (**see also Kiune vs. Republic, Criminal Appeal No. 77 of 1982**)

16. The Complainant was a child of tender years (**see Section 2 of the Children Act**). She adduced evidence that the Appellant inserted his penis into her buttocks. This was an insinuation that there was anal penetration.

17. According to medical evidence adduced she had blood spots on the labia and her hymen was absent. The examination was done the following day. This was evidence that the penetration was through her genital organ.

18. The Learned Trial Magistrate analyzed the evidence as adduced and formed the opinion that due to the Complainant's age she may not have known whether the penetration was through the vagina or anus, but having sustained injuries in her vagina the cause must have been the penetration.

19. According to **Section 124** of the **Evidence Act**, where the court relies solely on the evidence of a

child of tender years, the accused person cannot be liable to conviction on such evidence unless the Trial Court records reasons in the proceedings that it is satisfied that the alleged victim is telling the truth. **(See Geoffrey Kioji vs. Republic, Criminal Appeal No. 270 of 2010 (Nyeri).**

20. No reasons prompting such a belief are recorded in the proceedings. In her Judgment the Learned Magistrate states thus:

***“..... there is no doubt in the mind of the court that the accused defiled PW1. I therefore find that the prosecution has established the main charge*”**

Similarly, in her Judgment she failed to expressly state if indeed she believed the victim (Complainant) and further she failed to record reasons that made her have such a belief. This was fatal to the prosecution's case.

21. In the premises, the appeal succeeds. I allow it in its entirety. The conviction is quashed and sentence set aside. The Appellant shall be at liberty forthwith unless otherwise lawfully held.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 11th day of November, 2015

L. N. MUTENDE

JUDGE