



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO.178 OF 2014

JOSEPH MUTERI LETIMO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of the Chief Magistrate's Court at Makadara Criminal Case No.3084 of 2013 delivered on 20/11/2014 by Hon. Linda C. Kosgei)

JUDGMENT

The Appellant was charged with defilement contrary to Section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 25th day of June 2013 at *[particulars withheld]* Estate in Makadara District within Nairobi County intentionally and unlawfully caused his penis to penetrate the anus of B S, a child aged 9 years. He was charged in the alternative with the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars were that on the 25th day of June, 2013 at *[particulars withheld]* Estate in Makadara District within Nairobi County intentionally touched the anus of B S a child aged 9 years with his penis. He was convicted in the main charge and sentenced accordingly. Being dissatisfied with the conviction and sentence, he appealed on grounds narrowed down to the following two;

1. **That the learned trial magistrate relied on insufficient and incredible evidence.**
2. **That his defence was not regarded.**

He relied on written submissions in which he stated that the offence of defilement was not proved since there was no evidence of penetration. He referred to Section 2 of the Sexual offences Act no. 3 of 2006 which defines the word “**penetration**” to include the partial or complete insertion of the genital organs of a person into the genital organs of another person. He argued that the medical evidence produced in court indicated that there was no such penetration. He submitted that his alibi defence was not taken into consideration but instead the burden of proving the case was shifted to him.

The appeal was opposed by Miss Aluda, learned counsel for the Respondent. Her submissions were that PW1 was 8 years old and this was proved by production of her birth certificate in court. Her evidence was consistent as she was able to give an account of what transpired between her and the Appellant who happened to be their neighbour. She knew him as Masai. PW4 was within the vicinity when the Appellant called PW1 to his house from where he defiled her. PW3 saw the Appellant taking PW1 to his house while PW4 found PW1 sitting on the Appellant's bed. Miss Aluda cited Section 124 of the Evidence Act which provides that the evidence of a minor need not be corroborated. She urged the court to dismiss the

appeal.

It is now the duty of this court to re-evaluate the evidence and come up with its own independent conclusions. The issues to be determined are whether the offence of defilement was proved and; whether it is the Appellant who defiled the complainant.

Six witnesses were called by the prosecution. The complainant B S testified as **PW1**. His account was that on 25/6/2013 he was called from his house by the Appellant to go to the Appellant's house. His mother J N who testified as PW4 gave him permission to be with the Appellant. On reaching inside his house, the appellant did "bad manners" to him. PW1 narrated that the Appellant took his thing for urinating from his clothes, made him sleep on his bed and while lying on his stomach put the thing in his buttocks. He felt pain. They were found by one Mama Njoro who went and called PW4. The Appellant warned him that he would cut him if he told anyone. When PW4 arrived, she took him to their house and interrogated him. They reported to Makongeni Police Station and afterwards he was taken to hospital where he was treated. His evidence was corroborated by **PW3**, R W who testified that she was a neighbour to the Appellant. She heard PW1 crying from the Appellant's house. She went and saw through the Appellant's window that the Appellant was lying on top of PW1 with both their trousers removed. She then went and called PW4 to go to the Appellant's house to find out why he was crying. **PW4's** account did not differ from PW3's story. After being asked by PW3 where PW1 was, she went and called PW1 out of the Appellant's house. The Appellant was inside washing his clothes. She interrogated PW1 and asked him what had happened. She threatened to beat him if he dared not to tell the truth. It was then that PW1 told her that the Appellant had defiled him. She went and reported at the police and on the following morning took PW1 to hospital where the doctors confirmed that he had been defiled. The medical examination was done by **PW2**, Doctor Zephania Kamau, a police doctor at the Nairobi Area. He examined PW1 on 2/7/2013. This was a week after the alleged offence had taken place. His finding was that PW1's anus did not have any injuries and that his private parts were normal. He found that there was no history of bleeding on the anus. **PW5**, Irene Nyagwachi a Clinical Officer at MSF, Mathare examined PW1 on 27/6/2013 at 3:00 p.m. Her finding was that he had normal outer genitalia and that there were no bruises or tears. There was normal muscle formed and normal anal sphincter. **PW6**, PC Philip Mutinda Kanta attached to Makongeni Police Station was the arresting officer. He testified that he received a report that PW1 had been defiled. He started investigations and was told by PW1 what the Appellant had done to him. He issued PW1 a P3 form. He went to the Appellant's house to arrest him but he did not find him there. He arrested him five days later at Makongeni Estate and charged him accordingly.

The Appellant's defence was that on a certain date, at around 2:00 p.m. he was arrested from Industrial Area for a different matter. It is then that he was informed that he also had this matter to answer to. He made his statement and was released three days after. He said PW3 was his landlord and that he had not paid her rent and that is why she framed him up. He said that PW1 would go to his house to play with another boy who the Appellant stayed with.

It was incumbent upon the prosecution to prove three elements, namely; whether there was penetration, whether the complainant was a child and, whether the Appellant was responsible. I will start with proof of the second element. The complainant's age was proved by PW4, his mother who told the court that he was born on 25/12/04. She produced his original Birth Certificate in court. This placed him at 9 years old as at the time the offence was alleged to have been committed. On the first element, PW1 told the court that he had been defiled severally on different occasions by the Appellant. This included the 25th June, 2013 which was the date on the charge sheet. According to the evidence of PW2 and PW5, he was taken to hospital for examination first on the 27/6/2013 when he was examined by PW5 and later on 2/7/2013 when he was examined by PW2. According to PW2, the complainant did not have any injuries and his private parts were normal. This examination was done a week after the date of commission of the alleged offence. The medical examination conducted two days after the alleged defilement also indicated that PW1 had normal outer genitalia and that at his anus there were no bruises or tear. The report also indicated that there was normal muscle and anal sphincter. This finding completely negated the possibility that there was penetration into PW1's anus. Besides, the evidence of PW3 was inconsistent with somebody who had witnessed such a heinous act being committed. She alleged to have seen the Appellant on top the PW1. Surprisingly, she remained quiet, raised no alarm and only asked PW1's

mother to go and find out what PW1 was doing in the house of the Appellant. Even when she went to call PW1's mother she did not mention it to her that she caught the Appellant red handed on top of PW1. She instead went her way after calling the child's mother and did not witness what happened afterwards. That account of events ought to have cast doubts in the mind of the trial court that there was a possibility that PW1 was not defiled.

On the third element, although the identification of the Appellant was by recognition, in view of my foregoing observations, there was no concrete evidence that he committed the offence.

In the upshot, I find that the prosecution did not discharge its burden to the required standards; beyond all reasonable doubts. The appeal has merit. I quash the conviction and set aside the sentence. I order that the Appellant be forthwith set free unless he is otherwise lawfully held.

DATED and DELIVERED at NAIROBI this 11th Day of November, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

.....**for the appellant.**

.....**for the respondent**