



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 3 OF 2014**

*(An appeal from the judgment of the Principal Magistrate Siakago in SPMCR. Case No. 728 of 2012 dated 27/01/2014)*

**JULIUS MWANGANGI MUTHENGI..... APPELLANT**

**VERSUS**

**PROSECUTION.....RESPONDENT**

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

1. This is an appeal against the judgment of Siakago Ag. Principal Magistrate in Criminal case No. 728 of 2012. The appellant was charged with the offence of defilement with an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.
2. The grounds of appeal are that the magistrate failed to consider that there was no medical examination done on the appellant; that there was no independent prosecution witness; that the evidence of the doctor exonerated the appellant, and that the case was not proved beyond reasonable doubt.
3. The appeal was argued by way written submissions.
4. The appellant in his submission stated that vital witnesses were not called to adduce evidence. He submitted that identification was not without fault as the incident took place at 6.00 a.m. and it involved identification of a stranger. Further, it was argued that the prosecution evidence was full of contradictions and that the medical evidence did not corroborate PW1's allegation as the doctor who testified is not the one who filled the P3 form. The appellant was aggrieved that there was no DNA conducted on both the appellant and the complainant. The magistrate relied on a defective charge sheet and that the birth certificate of the complainant was not produced. Finally, that the magistrate rejected his defence on weak reasons.
5. The counsel for the State Ms. Nandwa submitted that the evidence of pw1 was corroborated by that of PW2 in regard to identification of the appellant. PW2 did see the appellant taking the complainant to the bush and she rushed home to inform her father about the accident. The incident took place at 6.00 a.m. and there was sufficient light. Evidence under Section 124 of the Evidence Act does not require corroboration. The prosecution does have discretion of who to call as a witness. This was observed in the case of **JULIUS KALEWA MUTUNGA V REPUBLIC** which was cited by the court of appeal in the case of **JWA VS REPUBLIC [2014] eKLR**. Failure to bring the witnesses mentioned by the appellant did not weaken the prosecution case.
6. It was further submitted that under Section 77 of the Evidence Act, any person who qualifies as a medical doctor or clinical officer can produce a P3 form as well as a post rape care form on behalf of another expert unless the court requires that the person who prepared the medical document appears in court personally. The court was satisfied the pw6 could produce the P3 form and post rape care report. The proceedings indicate that the prosecution invoked the provisions of Section 77 of the Evidence Act. The medical evidence of PW6 corroborates the evidence of the

- complainant. The respondent contended that DNA test was not necessary in proving the offence of defilement .
7. The case of ***FKN VS REPUBLIC Criminal Appeal No. 32 of 2012*** was cited in regard to the proof of the age of the complainant. The complainant testified that she was 11 years old while the P3 form indicated that she was 11 years old. The post rape care report indicated that the complainant was born on 3/2/2001 which made 11 years of age at the time of the incident. The respondent also relied on the case of ***JWA V REPUBLIC [2014] eKLR*** where the Court of Appeal held that the age of an individual is a fact. The complainant in that case had testified that she was 10 years old, the medical report by the doctor indicated the complainant was aged 10 years. The P3 form indicated that the complainant was aged 10 years. The court found the evidence sufficient as to proof of age.
  8. Tendering of a birth certificate was not the only way to prove age as was held in the case of ***FRANCIS OMURONI VS UGANDA CRIMINAL APPEAL NO. 2 OF 2000***. Regarding failure to cross-examine PW1, it is important to note that the complainant gave unsworn evidence and was not possessed of the capacity to be cross-examined.
  9. The duty of the first appellate court was explained in the case of ***JOSEPH NJUGUNA MWAURA & 2 OTHERS V REPUBLIC [2013] eKLR*** the court of appeal citing the cases of ***OKENO VS REPUBLIC [1772] EA*** and ***DAVID NJUGUNA WAIRIMU [2010] eKLR*** held that *“the duty of the 1<sup>st</sup> appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”*
  10. PW1 testified that she was aged 11 years old and was in class four. On 1/11/2012 she was going to school at 6.00 a.m. in the company of other pupils. When they met the appellant. He got hold of her and took her to the bush and had sex with her. One of the pupils namely M also known as C K PW2 came and found the appellant having sex with her. M started screaming and attracted the attention of PW1 father who came to the scene. The appellant took off and he was pursued by PW1's father. PW1 was taken to Ishiara Sub District Hospital. She sustained injuries on her private parts. The appellant escaped with her pant.
  11. PW2 testified that on 1/11/2012 at 6.00 a.m. she was heading to school in the company of the complainant and other pupils. On the way, the appellant held the complainant and took her to a nearby river. PW2 rushed home to inform her father who armed himself with a bow and chased the appellant as he fled. She knew where the appellant comes from.
  12. PW4 testified that he is an assistant chief. He said that he was informed of the incident and was looking for the appellant. He was tipped off by an informer on the whereabouts of the appellant. And he arrested him.
  13. PW5 a police officer testified that on. On 1/11/2013 Mwathina Mwangangi brought PW1 and a standard 3 pupil with a report that a man had defiled the girl. PW1 was escorted to the hospital after PW5 booked the report at Ishiara police station. On 9/11/2012 the appellant was arrested and brought to the police station.
  14. PW6 testified that he is a medical doctor at Ishiara. He produced the P3 form on behalf of one Dr. Christine who by then had gone for further studies at Kisumu.
  15. According to the report, the doctor who examined PW1 could not establish if the vagina hymen was intact because the patient was in so much pain. Her vagina was bruised with reddening. It was inflamed and had discharge. No spermatozoa was noted and there was no bleeding. The report was inconclusive on whether there was penetration.
  16. The appellant gave unsworn evidence and stated that he was arrested on 9/11/2012 while working as a casual laborer in Ukambani.
  17. The appellant was convicted of the alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. It provides that Section 2 of the Sexual Offences Act define “indecent act” as any unlawful intentional act which causes-

(a) any contact between the genital organs of a person, his or her breasts and buttocks

with that of another person;

(b) exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration.

18. Section 11 (1) Of the Sexual Offences Act provides that;

*Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.*

19. In the case of **CHARLES BUSUTU KAVULAVU VS REPUBLIC [2015] eKLR** the court held:-

*There were three ingredients that the prosecution was required to establish for the Appellant to be convicted of the charge. The first one is the indecent act. The second is the age of the victim and the third is the identity of the perpetrator.*

20. In the case of **DOMINIC SIBI PETER V REPUBLIC [2014] eKLR**, the court held that all the court was required to do was to prove that the child was aged below 18 years.

21. It was not necessary to produce medical evidence as was explained in the case of **DENNIS OSORO OBIRI VS REPUBLIC [2014] eKLR** where the court held:-

*The appellant secondly contends that there was no medical evidence adduced to link him with the defilement of PW1. In our view, such evidence was not necessary the moment the trial court found that there was sufficient medical evidence to prove that the appellant had been defiled and that the appellant's evidence was trustworthy as to the identity of the person who had defiled her.*

22. In **KASSIM ALI VS REPUBLIC, Cr. App. No. 84 of 2005 (Mombasa)**, this Court upheld the same view in the following terms:

*"... The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."*

23. There is no legal requirement that the evidence of the complainant in a sexual offence be corroborated provided that prosecution witness. The evidence of PW1 was sufficient to prove the offence for the court was satisfied that she was telling the truth.

24. Section 124 of the evidence Act provides that no Corroboration is required in criminal cases where it is a sexual offence involved. It provides:-

*Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*

*Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*

25. The prosecution in this case was required to prove the ingredients of the offence that the appellant committed an indecent act with a child. This burden of proof was satisfied.

26. The appellant was identified positively by the PW1 the complainant and by PW2. The two witnesses knew the appellant and even where he lived in the neighborhood.

27. It was not necessary to conduct a DNA test in a case of this nature as was explained in the case of

**FAPPYTON MUTUKU NGUI V REPUBLIC [2014] eKLR** where the court held that;

*In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her. In AML VS REPUBLIC [2012] eKLR (Mombasa), this Court upheld the view that:*

*The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.*

28.As regards the age of the complainant it was held in the case of **JWA vs REPUBLIC** the court of appeal held:-

It is our considered view that the age of an individual is a fact and the two courts below established the fact that the complainant was 10 years of age. The complainant testified that she was 10 years old; the medical report produced as Exhibit 1 signed by Dr. K Mulumbe who examined the complainant indicates she was born in 1999 and was thus 10 years old in the year 2009, when the offence was committed; the P3 Form tendered in evidence as exhibit 2 shows that the complainant was 10 years old at the time of the offence. On our part, we see no reason to disturb the finding of fact made by the two courts below and we are satisfied that the evidence on record shows that the age of the complainant was proved to be 10 years.

29. The age of an individual is a fact. The complainant testified that she was aged 10 years. A medical report produced by a doctor indicated that the complainant was 10 years. The P3 form also indicated that the complainant was aged 10 years. The court was satisfied that the age of the complainant was proved to be 10 years.

30. In the instant case, PW1 testified that she was aged 11 years, which was supported by the P3 form and the post rape care report. The failure to produce the birth certificate did not affect the proof of age by other evidence. I am satisfied that the age of the complainant was satisfactorily proved.

31. The magistrate in his judgment noted that the only appellant merely explained how the appellant was arrested and merely denied that he committed the offence. For the trial court to reach this conclusion the defence was considered and it cannot therefore be said that the magistrate rejected the defence on weak reasons.

32. Having re-evaluated the evidence and the defence put forward by the appellant, in view of the grounds of appeal, I find that the cogent and consistent evidence of the prosecution placed the appellant at the scene. He was properly identified and the offence proved to the standards required.

33. The appellant was sentenced to fifteen (15) years imprisonment which is within the law.

34. I find no merit in this appeal and it is hereby dismissed.

35. The conviction and sentence are hereby upheld.

36. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF DECEMBER, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**1. Appellant**

**2. Ms Nandwa for respondent**