REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO 248 OF 2010

JOHN MUSYOKA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No.424 of 2009 by Hon T.M. Mwangi, SRM 2/9/2010)

JUDGMENT

1. 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 being that on the **31st** day of **March, 2009** at around **9.00am** in **Kitui District** of the **Eastern Province,** defiled **V M** a child aged **12 years.**
2. In the alternative he was charged with the offence of **Indecent Act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act.** Particulars thereof being that the **31st** day of **March, 2009** at around **9.00am** in **Kitui District** of the **Eastern Province** committed an act of **Indecency** with **V M** by touching her private parts namely vagina.
3. He was tried, convicted and sentenced to serve **20 years** imprisonment on the **main count.** Being dissatisfied with the decision of the court he now appeals against the conviction and sentence on grounds that;-

i. The charge as drawn was defective
ii. The learned trial magistrates relied on contradictory evidence in convicting him.
iii. Vital witnesses and exhibits were not availed
iv. The case was not proved beyond doubt and the defence was rejected without any apparent reason.

4. At the hearing the appellant relied on written submissions filed. The learned State Counsel **Mr. Mukofu** opposed the appeal on the grounds that at the time of commission of the offence conditions that prevailed favoured positive identification of the appellant by the complainant; penetration of the complainant was proved; and the court on reaching its findings warned itself pursuant to **Section 124** of the **Evidence Act.**
5. This being a first appeal, my primary duty is to revisit evidence tendered before the trial court, analyse it independently and draw my own conclusions bearing in mind the fact that I neither saw nor heard witnesses who testified at the first instance in the Lower Court. (*see* ***Okeno versus Republic [1972] E.A. 32, Muthoka and Another versus Republic [2008] KLR 297.***
6. I have re-evaluated the evidence adduced at the trial stage raised on appeal and rival submissions presented by both the appellant and State Counsel.

7. PW6, **V M,** the complainant, a child aged 12 years old was in company of PW2, **M P** when they encountered the appellant, a person who worked for her teacher (*Mrs Kaloki).* He took her to the house, removed her clothes, then her pant, having removed his clothes. They lay on one of the beds in the room and he had carnal knowledge of her. He gave her 10/= shillings coin to go and buy sweets then told her not to tell anyone. She later joined PW2 and they went to school. In the meantime PW2 whispered to other pupils about the incident.
8. Other pupils mocked the complainant, an act that prompted her to report the matter to PW5, **A M K** who in turn interrogated her and caused her to confess what had transpired. PW5 informed PW1, **F M M,** the complainant's mother. They reported the matter to the police. The complainant was taken to hospital. PW3, **D N,** a Clinical Officer examined the complainant and also relied on treatment notes from **Muthale Mission Hospital** where she was first seen. He found the complainant's vagina was reddened due to penetration by a blunt object. She had contracted a urinary infection. PW4, No, **715661 P.C. David Thuranira** investigated the case and charged the appellant.
9. In his defence, the appellant said he was framed up. He stated that there was no eye-witness to what happened and her employer had threatened to take him where others are taken when he demanded for his salary arrears.
10. It has been stated that the charge was defective. In the case of ***Sigilai versus Republic [2004] 2KLR 480*** it was held thus;-

> "***The principle of law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge the he can understand. It will also enable an accused person to prepare his defence to the charge".***

11. The appellant was charged with **defilement** under **Section 8(1) (3)** of the **Sexual Offences Act, 2006.** This is an offence known in law. The ingredients of the charge were disclosed. When the charges were read to the accused he was able to respond and thereafter he participated in the trial per the proceedings and even defended himself. The omission defect was not prejudicial to him.
12. The appellant faulted the trial court to have convicted him without taking the evidence of those who initially arrested him. On record is evidence of the officer who investigated the case after the appellant had been arrested and placed in custody. He does not challenge the fact of arrest. This allegation was not fatal to the prosecution's case.
13. The appellant claimed the charges were trumped up. PW5, his employer allegedly owed him salary arrears. On cross-examination of the witness, the appellant suggested that he had not been paid salary but he did not link the allegation to the offence he was charged with. There was no demonstration of how the complainant herein and PW5 could have been lured into coming up with such a serious allegation if indeed it did not happen.
14. An analysis of the evidence proves that the medical evidence adduced proves that there had been penetration of the complainant, a child aged 12 years. Prior to convicting the appellant, the trial court cautioned itself that there was no independent eye-witness to the act of defilement. The conviction was therefore following some belief that the complainant had told the truth as to what transpired. There was no error established on the part of the trial magistrate.
15. Consequently, the evidence on record was sufficient to secure a conviction.
16. I therefore have no reason to interfere with the conviction which I uphold. In respect of sentence, the minimum prescribed sentence for the offence is **20 years.** There was no error whatsoever. Similarly the sentence imposed is confirmed.
17. The appeal is dismissed in its entirety.

DATED, DELIVERED and **SIGNED** this **27TH** day of **JANUARY, 2014.**

L.N. MUTENDE

JUDGE