



160/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO 152 OF 2009

SIMON MUTING'A NGUI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence in Yatta Senior Resident Magistrate's Court Criminal Case No. 1086 of 2008 by Hon A.W. Mwangi , SRM, on 1/9/2009

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JUDGMENT

1. 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 **25<sup>th</sup> day of October, 2008** at *[particulars withheld]* Village, Kathukine Sub-Location, Muthesya Location in Yatta District within Eastern Province, had carnal knowledge of **M M M** a girl under the age of 11 years.

In the alternative he faced a charge of committing an indecent act with a child Contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars being that on the **25<sup>th</sup> day of October, 2008** at *[particulars withheld]* Village, Kathukine Sub-Location, Muthesya Location in Yatta District within Eastern Province committed an indecent act to **M M M** by touching her private.

2. He was tried, convicted and sentenced to life imprisonment. Being dissatisfied with the decision of the court he now appeals on grounds that the learned magistrate erred in law and fact by failing to appreciate that the evidence adduced was not sufficient to have him convicted; the evidence adduced was contradictory; vital and crucial witnesses were not called to testify; the defence was not considered, he was not taken for medical examination and he was held in custody for more than the required time.
3. Briefly, the case presented by the prosecution was that the complainant was playing with other children PW3, **M N** and **L**. They went to the toilet. The appellant took her away and locked her inside his house. He had carnal knowledge of her. Her friends run to report to Pw5, **B M M**. He went to **Ngui's** house, peeped through the window as the door was closed. He saw the appellant lying on the bed while the complainant was sitting thereon. He asked the appellant to open the door. PW3 **B N** passed by. He notified her. She took the complainant to her mother, PW1 **S M N**.

- The child's underpart was found at the house of **Ngui**. They took her to hospital. PW8, **Dr Danson Muia** examined the complainant whom she found was a child aged **9 years**. Her hymen was broken and there was obvious discharge. There was presence of spermatozoa, blood and pus cells in the urine. He concluded that she had been sexually assaulted and there was evidence of sexual penetration. The matter was reported to the police. The appellant was arrested and charged.
4. When put on his defence the appellant stated that he did not commit the offence and that is why he pleaded not guilty.
  5. This being the first appeal, it is my duty to subject evidence adduced in the Lower Court to afresh review, scrutiny and come to my own conclusions bearing in my mind, however, that I did not see or hear witnesses who testified. ( see ***Okeno versus Republic [1972] E.A. 32***).
  6. The complainant herein was a child. Medical assessment carried out established that she was aged 9 years. The complainant said the appellant locked her up inside the house and lay on her. He then had sex with her. She pointed at his vaginal area as she expressed what he did saying;- "**he did that to me here**". The appellant was a person she knew. Her evidence that she was defiled was corroborated by medical evidence adduced. Her hymen was broken, there was evidence of penetration.
  7. PW3 who was with the complainant when she was taken away by the appellant informed PW5. This evidence of a minor though credible, the prosecution adduced some other evidence to strengthen it or confirm it as pointed out in the case of **DPP versus Kilbourne [1973] 1 ALL ER 440**. PW5 went to the house and peeped through the window. He indeed saw the appellant with the complainant on the bed. The complainant was sitting while the accused was lying on the bed. When he opened for her she had no pants. It was later recovered from the same house by PW4.
  8. In convicting the appellant the trial magistrate considered the defence put up by the appellant which she dismissed as a mere denial. She had no doubt in her mind that the appellant defiled the complainant.
  9. The evidence adduced was sufficient to prove the prosecution's case. There were not contradictions in the evidence presented by the prosecution as alleged by the appellant. He did not point out the alleged crucial witnesses that were not called by the prosecution.
  10. According to the charge sheet he was arrested on the **1<sup>st</sup> November 2008** and arraigned in court on the **3<sup>rd</sup> November, 2008**. If he believes that his right to personal liberty was violated, this could be a breach of a civil right which would be compensated by damages (see ***Julius Kamau Mbugua versus Republic Criminal Appeal No. 50 of 2008***).
  11. The sentence imposed was legal.
  12. The upshot of the above is that I have absolutely no reason to interfere with the conviction and sentence of the Lower Court which I affirm in its entirety. Accordingly the appeal is dismissed.
  13. It is so ordered.

**DATED, DELIVERED and SIGNED this 22<sup>nd</sup> day of JANUARY, 2014.**

**L.N. MUTENDE**

**JUDGE**