



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 110 OF 2010**

**MUTUA MULI KILONZI ..... APPELLANT**

**VERSUS**

**REPUBLIC**

*(Being an appeal from the conviction and sentence of Hon. A.W Mwangi Senior Resident Magistrate delivered on 13/05/2010 in Kithimani Senior Resident Magistrate Sexual Offence Case No. 16 of 2009)*

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*(Before Hon. B. Thurania Jaden J)*

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

1. The Appellant, **Mutua Muli Kilonzi** was charged with the offence of **defilement** contrary to **section 8 (1) (2)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 18<sup>th</sup> day of June 2009 at **Kithendu Sub-location** in **Yatta District** within **Eastern Province** intentionally and unlawfully did an act which caused penetration with his genitals namely penis into the genitals namely vagina of **M M** a girl aged 4 years.

2. When the Appellant was arraigned in court, he pleaded not guilty. After a full trial, the Appellant was convicted for the offence of defilement and sentenced to life imprisonment.
3. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-

- v. **That the prosecution case was not proved beyond reasonable doubts.**
- v. **That the doctor was an essential witness who was not called to testify.**

4. The appeal was opposed by the State. The learned counsel for the State submitted that the prosecution case was proved beyond reasonable doubt.
5. This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences – **See Okeno –vs- Republic (1972) EA 32.**
6. The prosecution case was that the complainant PW3 **M M** a four (4) year old baby class pupil and her sister lived with their grandfather. The mother, PW1 **R M** worked in **Nairobi**. The children's grandmother was not alive but PW2 **E M** stayed in the same home and took care of the children.
7. On the material day at about 4.00 p.m., PW2 noticed that the complainant was limping. Upon being asked the complainant revealed that the Appellant who was her uncle had defiled her. PW2

- examined the complainant and confirmed that she had been defiled. The complainant's grandfather was informed about the matter. A report was made to the village headman and a report made at **Yatta Police Station**. The Appellant was arrested and escorted to the police Station. The complainant was issued with a P3 form and taken to **Matuu District Hospital** for examination and treatment. The Appellant was subsequently charged with the offence herein.
8. In his defence, the Appellant stated that on 26/6/2009, he was arrested from his house and forced to sit outside his father's house. He was then tied up with ropes then interrogated on allegations of having defiled a child. He was beaten and taken to the police station. The Appellant stated that the complainant's mother got married and left the complainant at home under the care of their father and a caretaker who was mad. That their mother passed away and the father and the caretaker started having an affair. That all his siblings live in **Nairobi** and he is the only one who lives at home. The Appellant termed this case a frame up because of the bad blood between him and his father.
  9. The trial magistrate carried out a *voire dire* before the complainant testified. The trial magistrate was satisfied that the complainant understood the duty to tell the truth but found her too young to understand the meaning of oath. The child gave unsworn evidence and was duly cross-examined. The complainant pointed out the Appellant as the one who defiled her. According to the complainant's evidence, she was at home when the Appellant touched her at the part of her body which she pointed out in court as her female genitalia. The complainant further testified that she felt bad. That there was blood in her female genitalia and she cried but there was nobody else at home.
  10. PW2 who used to take care of the children gave evidence that corroborated the complainant's evidence. PW2's evidence is that she had left the home on the material day and on returning at 4.00 p.m. she found the complainant limping. The complainant then narrated to her what had happened which is consistent with the complainant's evidence in court. PW2's evidence is that the complainant was unwell and had not gone to school that day. PW2's evidence is that the child had been defiled on the same day.
  11. The evidence of the complainant (PW3) and that of the care giver (PW2) was corroborated by the medical evidence adduced by PW4 **Benjamin Maingi**, the Clinical Officer. The clinical officer confirmed the child's age as four years old. His evidence was that the child's hymen was torn with raw edges and the child was walking with difficulty when he examined her on 20/6/2009. The clinical officer concluded that the child had been defiled.
  12. The child's mother (PW1) gave evidence that established that the child (PW3) and her sibling lived at their home with their grandfather and PW2 who was in charge of the home. The mother testified that the Appellant is her younger brother.
  13. The evidence of the Investigating Officer, PW5 **Cpl. Amina Thomas** confirmed that a report of the defilement was made at **Yatta Police Station** and after investigation the Appellant was arrested and charged.
  14. Although the Appellant in his defence stated that this case is a frame up, the defence did not cast any reasonable doubts on the prosecution case. The child was defiled and pointed out the Appellant as the culprit. The child knew the Appellant who was her uncle and even knew his name. The scenario described by the child's minder (PW2) as analyzed above shows that the child (PW3) was at home on the material day and did not go to school because she was unwell. The Appellant lived in the same home. The defilement was discovered the same day and the child pointed an accusing finger at the Appellant even when her memory was still fresh. On the issue of the bad blood between the Appellant and his father, nothing emerges from the record that indicates such bad blood existed.
  15. The Clinical Officer is a competent expert witness as provided for under **section 48** of the **Evidence Act**. In the case of **Kavoi Kiilu –vs- Republic (2010) e KLR** the **Court of Appeal** state as follows:-

**“Under section 2 of the Clinical Offences Act (Training, Registration and Licensing Act Cap 260 (LOK) a clinical officer means:-**

***“a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is***

*registered under the Act.....”*

**Section 7(4) of the Act States:-**

*“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”*

**The Act goes further to provide that such officers may engage in private practice “in the practice of medicine, dentistry or health work for a fee.” It follows that the clinical officer did testify in this case on his area of competence.”**

16.The child’s age was four years according to the mother (PW1) and the Clinical Officer’s (PW4) evidence. Having evaluated the evidence on record, I have no reasons to defer with the findings of the trial magistrate who observed the demeanour of the witnesses. Under the proviso to **section 124 of the Evidence Act Cap 80 Laws of Kenya:-**

**Provided that where in a Criminal case involving a sexual offence he 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.”**

17.The appeal has no merits and is dismissed. The sentence is within the law. I confirm the conviction and the sentence meted out by the lower court.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 19<sup>th</sup> day of February 2014.**

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**B. THURANIRA JADEN**

**JUDGE**