



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MALINDI**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO. 110 OF 2011**

*(From the original conviction and sentence in criminal case no. 545 of 2009 of the Principal Magistrate's Court at Kilifi before Hon. A. M. Obura – SRM)*

**SAMWEL NZAI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant had been charged with the offence of Defilement of a child contrary to section 8(2) of the Sexual Offences Act. The particulars of the offence were that on the 22nd day of June, 2009 at [Particulars withheld] area in Kilifi District, within the Coast Province, the Appellant committed an act which caused penetration of his genital organs namely, penis, into the genital organs namely, vagina, of S.P a child of 11 (eleven) years.
2. He was further charged with an alternative charge of Indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the 22nd day of June, 2009 at [Particulars withheld] area in Kilifi District, within the Coast Province, the Appellant committed an indecent act with S.P a child aged 11 (eleven) years.
3. The Appellant was found guilty on the main charge convicted and sentenced to life imprisonment.

He has raised from grounds of appeal:

*“That the learned hon. trial Magistrate erred in law as the procedure of voire dire was not conducted to the complainant who was of a tender age.*

- I. *That the learned hon. trial Magistrate erred in law and fact when she convicted me in reliance of the witness which was inconsistent and uncorroborated.*
- II. *That the hon. trial Magistrate erred in law and fact when he did not put into consideration that*

*there existed grudge between me and the father of the complainant.*

III. *That the hon. trial Magistrate erred in law and fact when he convicted me in reliance of insufficient evidence.” (sic)*

4. Mr. Kihanga for the Appellant submitted that the evidence before the court was inconsistent and the *voire dire* examination failed to reveal whether or not PW1, a minor, understood the duty of telling the truth. The inconsistencies related to the duration of the defilement ordeal and payment of certain monies by the appellant. Mr. Kihanga contended that there was no proper age assessment of the alleged victim, no initial treatment notes produced or specimen taken from the minor or the suspect, and finally that the P3 form did not indicate that the minor sustained injuries.
5. He took issue with the court’s analysis of the evidence and argued that the court having noted the inconsistencies, should have resolved in favour of the Appellant. He relied on the finding in **Paul Munyalo vR Mombasa H.C.C.R.A. 222 OF 2001 [U.R.]**. He submitted that the trial court did not pay proper attention to the evidence that was inconsistent and therefore the conviction ought to be quashed and he referred to the finding in **Charles Eloba Rekemo v R Court of Appeal in Nakuru CR. no. 16 of 2003 [U.R.]**.
6. Mr. Nyongesa for the State in opposing the appeal submitted that the minor gave a clear account of the ordeal and that the *voire dire* examination was properly conducted. In addition, that the estimation of time regarding the duration of defilement and monetary inducement was not a material inconsistency.
7. Mr. Nyongesa asserted that the age assessment was properly done and the court which saw the child concluded she was a minor. Besides under Section 124 of the Evidence Act, the evidence of a minor in a sexual assault case need not be corroborated. Finally he argued that the trial court properly evaluate the evidence on record.
8. The Court sitting on a first appeal is obligated not only to evaluate the evidence presented at the trial but also to draw with its own conclusion, bearing in mind of course that it is not privileged with the opportunity of assessing the demeanour of the witnesses who appeared before the trial Court. See **Okeno v Republic [1973] EA 322**. Secondly the appellate court will not interfere with the findings of the trial court that are based on the credibility of witnesses unless the findings are such that no reasonable tribunal could have made them, or that they are plainly wrong (**see Oyier v R**
9. The prosecution case was that the Pw1, who was the alleged victim, was 11 years of age. On the material date at about 7pm she had been sent to make purchases at the shop by Pw2, her mother. On her way there, she met the Appellant on a bicycle and she requested to be given a lift. On their way back home the Appellant asked to touch her breasts which she declined and he promised to tell her something later. That at home her mother made her run another errand, to take a hen to the neighbour’s who would slaughter it for them. As she headed to the neighbour she once again met the Appellant who requested her to follow him to some bushes. She obliged. He then held her dress up, removed her panties and defiled her and told her not to tell anyone otherwise he would stab her with a knife.
10. Pw1 told her mother what had transpired and was taken the following morning to the police station and examined at the hospital the P3 form was completed.
11. Pw2, testified that she had sent Pw1 to the neighbour's to have their hen slaughtered for them as her husband had not yet arrived. Pw1 took too long and on return declined to tell the neighbour and Pw2 where she had been. She had a sweaty odor. Pw1 later informed Pw2 that the Appellant had made her follow him to some bushes near baobab trees and defiled her. Pw2 called her neighbours and they examined Pw1 private parts and noted what seemed to be semen. Early the

- following day, the Appellant came to their house and gave Pw1 70/- to buy her silence. Pw2 together with her husband and biological father made a report at the police. She also took Pw1 to Kilifi District Hospital where she was examined. PW1 and PW2 were subjected to rigorous cross-examination by the defence.
12. Pw3, a medic from Kilifi District Hospital produced the P3 form, testified that the Doctor who filled the P3 form had since left government employment and that he was familiar with her handwriting and signature. The form revealed that there had been a history of defilement, hymen was broken, the person examined was assessed 11 years.
  13. The Appellant's defence was that he knew the Pw1 and their family as they had once rented rooms from his family but failed to pay rent. That this resulted in a grudge and Pw1's parents never talked to him although they lived a distance of about 500m from each other. He denied giving Pw1 a ride on his bicycle. He also denied waiting for Pw1 at a 'Mbuyu' tree. He stated that he did not know whether or not Pw1 went to school as he had never seen her in school uniform. Pw1 testified that the Appellant was her husband that on the material date her husband was at home with her. She said she knew Pw1 as a neighbour.
  14. The prosecution bore the onus of proving the ingredients of defilement, which are basically, penetration and the age of the child.
  15. On the first question, Pw1 stated that it was the appellant who defiled her. The P3 form indicates that there was a broken hymen. Pw2 alleged that she and others had examined Pw1's private parts and noted a broken hymen and 'semen'. However Pw1 testified that no one, save at the hospital, had examined her. Pw3 testified that the P3 form showed no sign of injury though in his opinion there should have been injuries resulting from lack of vaginal fluid due to the tender age of the victim. He however opined that it was likely that the injuries had healed as the P3 examination was done 9 days after the alleged incident. He also accepted that hymen can rupture without a sexual encounter. The trial court found that PW1, PW2 and the medical evidence adequate.
  16. The trial court invoked Section 124 of the Evidence Act, cautioned itself about acting on the evidence of a minor and believed that the minor was telling the truth. The reason given was that there was corroboration of PW1 by PW2 and the medical evidence.
  17. There were notable inconsistencies in the prosecution case. The testimonies of PW1 and PW2 were fraught with many inconsistencies. For example, on the scene of the alleged crime. PW1 at one point stated it was in a bush but during cross-examination stated that it was at the house of the neighbor where the chicken was to be slaughtered. There was no agreement as to whether or not PW2 physically examined the child, whether PW1 thereafter walked normally and whether any injuries were sustained. These were material to proving the prosecution's case. It does not help that the medical evidence showed no injuries while Pw3 appeared surprised by this in light of the child's age.
  18. PW2 also stated that she and others examined PW1 while PW1 testified that she was only examined at the hospital. PW2 further stated that PW1 was walking with difficulty but PW1 had testified to the contrary. PW1 testified that her mother, PW2, forced her to give an explanation of her whereabouts on the material evening. She later withdrew this statement but her mother, PW2, admitted that she used threats to obtain the information from her. PW2 also stated that they took PW1 to hospital the same night in one statement and also stated that she was taken the following morning in another. PW1 herself testified that she was taken to hospital the following morning.
  19. On the issue of payments, on one hand PW2 stated that the appellant brought it to their home and gave it to PW1 and on the other hand she stated that PW1 left home early the following morning and came back with the money.
  20. I hope I have said enough to show the unsatisfactory state of the evidence adduced by the

prosecution in the trial. These inconsistencies went to the credibility of the key witnesses PW1 and PW2. The trial court's finding that PW1 was a witness of truth could not have taken full account of the nature of the witnesses' evidence. Her evidence and that of her mother PW2 varied on significant issues, not to mention the contradictions in the evidence of PW2 herself.

21. The evidence of pW3 could not salvage the prosecution case in light of the opinion made concerning the absence of injuries. Finally, the trial court's finding that the appellant attempted to buy PW1's silence by giving her money was based on highly contradicted evidence and could not provide any probative value to the case.

The conviction cannot be allowed to stand for the foregoing reasons. The appeal is allowed. The sentence is set aside and the appellant set at liberty unless otherwise lawfully held.

**Delivered and signed at Malindi this 31<sup>st</sup> day of March, 2014 in the presence of the appellant, Mr. Nyongesa for the State.**

**Court clerk – Samwel**

**C. W. Meoli**

**JUDGE**