



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 5 OF 2012

MULI IVUSU APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. J. Karanja Principal Magistrate delivered on 9/1/2012 in Makueni Principal Magistrate Criminal Case No. 124 of 2011)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Muli Ivusu**, was charged with the offence of defilement of a child contrary to **section 8 (1)** as read with sub section (2) of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 13th day of March 2011 at *[particulars withheld]*, **Kalawa Location** in **Mbooni East District** within **Makueni County** did cause his penis to penetrate to the vagina of **M M**, a child aged 11 years.

2. In the alternative, the Appellant was charged with the offence of indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 13th day of March 2011 at *[particulars withheld]*, **Kalawa Location** in **Mbooni East District** within **Makueni County** did intentionally and unlawfully cause his penis to come into contact with the vagina of **M M**, a child aged 11 years.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. After a full trial, the Appellant was convicted and sentenced to life imprisonment. The Appellant was dissatisfied with both the conviction and sentence and appealed to this court.
4. During the hearing of the appeal, the Appellant relied on his amended grounds of appeal which can be summarized as follows:-
 - v. **That his fundamental rights to a fair and impartial trial guaranteed under Article 25 of the Constitution were infringed in that the trial proceeded when the Appellant was unwell.**
 - v. **That the medical evidence was unsatisfactory as it was adduced by the Clinical Officer who is not a medical officer.**

- v. **That the evidence by the prosecution witnesses was inconsistent and contradictory.**
 - v. **That the plausible defence case was rejected.**
 - vi. **That the complainant's age was not ascertained.**
 - v. **That PW3 and PW4 who claimed to have caught the Appellant red handed did not identify the complainant in court.**
5. During the hearing of the appeal, the Appellant relied on written submissions which essentially expounded on the grounds of appeal.
 6. The appeal was opposed by the State. The learned counsel for the State submitted that the minor's evidence was corroborated and that the Appellant was caught red handed in broad daylight. That the defence was unconvincing and the sentence is within the law.
 7. 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.**
 8. The case for the prosecution was that on 13/3/11 the complainant, PW1 **M M**, a girl aged eleven years was at home alone cooking. Her mother had gone to church and her father had gone to **Wote**. The other children had gone to the river. PW1 decided to go to a nearby bush to check on their goats that had been tethered there to graze. On the way she was called by the Appellant who was a neighbour. The Appellant felled the complainant down, removed her panty and started having sexual intercourse with her.
 9. PW4 **A K N** and PW3 **J N M**, who are their neighbours were passing by when they heard the complainant crying and on checking found the Appellant with his pants lowered to the knees. The Appellant was having sexual intercourse with the complainant. They arrested the Appellant and escorted him to the assistant chief's office. The matter was referred to the police. The complainant was issued with a P3 form and referred to the hospital for examination and treatment. It was confirmed that the complainant had been defiled. The Appellant was arrested and subsequently charged with the offences herein.
 10. In his defence, the Appellant stated that he was on his way home at about 11.00 a.m. when he met PW3 and PW4 who were carrying the complainant who was crying. The Appellant was stopped and arrested, tied with ropes and taken to the assistant chief's office. The Appellant was escorted to the police station and the complainant taken to hospital by the mother. At the police station allegations of defilement were made. The Appellant was severely beaten but he was not taken for any medical examination. The Appellant stayed in custody for two days then he was brought to court. The Appellant blamed this case on a land dispute with **J N (PW3)**.
 11. The complainant gave unsworn evidence after the trial court held that she did not comprehend the importance of an oath. However, holding a *voire dire* was superfluous. The complainant gave her age as eleven (11) years and was therefore not a child of tender age. Under **section 2 of the Children Act Cap 141 Laws of Kenya**, a child of tender years means a child under ten years. (**See Samson Oginga Ayieyo –vs- Republic – Criminal Appeal 165 of 2006**). In cases where a child of tender years is the proposed witness, the correct procedure of recording the child's evidence should be followed (**See for example Kibangeny Arap Korir –vs- Republic (1959) EACA 92**). In the case at hand, the trial magistrate failed to make a record of the purported *voire dire*.
 12. The complainant in her evidence narrated how the complainant defiled her. The complainant described to the court how the Appellant removed her pants and proceeded to have sex with her. The complainant maintained her evidence during cross-examination. The complainant's evidence was fully corroborated by the evidence of her two neighbours, PW3 and PW4 who testified that they caught the Appellant red handed having sex with the child and they proceeded to arrest him. It is noted that the evidence of the complainant and her two neighbours (PW3 & PW4) is that the offence took place in broad daylight and that they were neighbours and knew each other. There was therefore no possibility of mistaken identity.
 13. The evidence of the Clinical Officer, PW2 **Tabitha Njeri Ireri** further corroborated the evidence of the complainant. The Clinical Officer testified that the complainant's female genitalia had bruises and the hymen was broken. The complainant was examined by the Clinical Officer just a few hours after the defilement. The Clinical Officer assessed the complainant's age as 11 years. The Clinical Officer was a competent witness to testify on the complainant's medical condition. In the case of **Kavoi Kiilu –vs- Republic (2010) e KLR** the **Court of Appeal** state as follows:-

“Under section 2 of the Clinical Officers 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.”

14.The evidence of the Assistant Chief, PW5 **M N N**, PW6 **PC Nyiria Alboro** and PW7 **PC Stephen Onchori** confirms the arrest of the Appellant was made by passersby (PW3 & PW4) and the matter was investigated and the Appellant charged. The evidence of the investigations carried out clearly shows that the complainant was defiled. The complainant identified the Appellant as the culprit. Nothing turns on the claim by the Appellant that the complainant was not identified by the eye witnesses or that the complainant’s mother was not called as a witness. 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 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.”

15.Although the 1st Appellant in his defence blamed this case on a land dispute between his family and **J N** (PW3). There is on record also the evidence of the complainant and PW4 who is also from the same neighbourhood that links the Appellant to the offence herein.

16.Although the Appellant in his submissions complained about the charge sheet, I have seen no defects in the same. On the issue whether the Appellant was afforded a fair trial, the trial court on 13/4/2011 made orders for the Appellant to be provided with statements. The court record also reflects a history of the Appellant stating that he was unwell every time the prosecution witnesses were present and ready to proceed. On 16/5/2011, three prosecution witnesses were present. The Appellant applied for adjournment and stated that he was unwell. On 12/9/11 the prosecution had four witnesses in court. The Appellant again stated that he was unwell. It is noted that no medical documents were at any stage produced by the Appellant to back his claims. Given that circumstances, the trial court made the decision to proceed and I have no reasons to fault the same.

17.After evaluating the entire evidence on record, I am satisfied that the Appellant was convicted on sound evidence. The appeal has no merits and I dismiss the same. The conviction and sentence by the lower court upheld.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 26th day of March 2014.

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B. THURANIRA JADEN

JUDGE