REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 69 OF 2012

ALFRED MUEMA SYENGO.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court Criminal Case No. 46 of 2012 by Hon. S.K. Mutai, SRM on 8/5/2012)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to **Section 9(1) (2)** of the **Sexual Offences Act No. 3** of **2006.** Particulars of the offence being that on diverse dates between **7th** and **10th March, 2012,** at unknown time, at ***[particulars withheld]*** **Village, Uai sub-location** in **Mutomo** within **Kitui County,** defiled **H K,** a child **a**ged **7** years by his penis penetrating into her vagina.

In the alternative he was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** No. **3 of 2006.** The particulars being that on diverse dates between **7th** and **10th March, 2012,** at unknown time, at ***[particulars withheld]*** **Village, Uai sub-location** in **Mutomo** within **Kitui County,** committed an act of indecency with **H K** a child aged 7 years by touching her private parts namely vagina and breasts.

2. He was tried, convicted on both the main and alternative charges and sentenced to serve **life imprisonment.** Being aggrieved by the conviction and sentence in his amended supplementary grounds of appeal he states ;-

i) **That** the prosecution did not prove the charges to the required standard of proof beyond reasonable doubt against the appellant.

ii) **That,** essential witnesses were not called to give evidence. The two (2) people who were in his company and PW1's grandmother who was the first person to receive the report.

iii) **That** the delay of six (6) days taken by the school teacher to report the matter to PW1's father, the police and when the complainant was taken to hospital was not explained away.

iv) **That** the trial magistrate erred in law and fact in relying on evidence of the P3 form which was produced by an unqualified clinical officer who examined the complainant **six (6)** days after the

occurrence of the defilement.

v) That the unsworn defence was unrebutted

3. The appellant filed written submissions. **Mr Mwangi** learned counsel for the State opposed the appeal. He submitted that after the appellant defiled PW1, the complainant, she informed her teacher, PW2 the following day. The complainant a 7 years old girl had pains in her genital area. The examination carried out by the clinical officer confirmed that PW1 had reddish vagina walls and was in pain. The hymen was missing. She also had pus cells. Referring to the appellant's defence he said it was a mere denial. He argued that identification was proper, penetration was proved and the sentence was in order.

4. To prove its case the prosecution called 5 witnesses. PW1 **H K** a minor having been examined by the court preliminarily gave an unsworn statement. She stated that between **7th** and **10th March, 2012** she had visited her aunt when she saw **Nyenze** and the appellant at night. The appellant called her, took her to his bed, removed her clothes and had sex with her, having inserted his penis into her. She felt pain and cried. The appellant released her and told her not to tell anyone. She went home and told her grandmother. The following day she went to school and told her teacher, **Mrs R**.

5. **PW2, L K,** PW1's teacher stated that she encountered her on the **8th March, 2012** at **5.00pm.** having tied a lessor. She told her that she had gone to see a child at her aunt's place. The following day she called out the register and she was shocked. She took her to the staffroom. She told her that she was feeling pain in her private parts. She said that **Muema** had defiled her and told her not to tell anyone what had happened.

6. PW4, **C K S** got a report from PW3 on the **14th March, 2012** that PW1 had been defiled. He took her to **Mutomo Health Centre.** She was examined by PW3, **Daniel Mulwa,** a clinical Officer found her to be shy and in pain. On examination, her vagina was reddish and the hymen was missing. A high vaginal swab carried out showed pus cells. He concluded that there had been penetration. She had genital infection.

7. PW5, **No. 56626 Corporal Rose Wekesa,** investigated the case and caused the appellant to be charged.

8. In his defence, the appellant said he was working at **Mutomo** as a mason when he was arrested. He denied having defiled the child. He stated further that the teacher had promised to lock him up.

9. As a first appellate court, I am duty bound to re-evaluate the evidence adduced before the trial court and come up with my own conclusions and findings bearing in mind that I neither saw nor heard witnesses who testified. **(*see Okeno versus Republic 1972 E.A 32*.)**

10. The prosecution had a duty of proving beyond doubt essential elements of the charge of defilement in order for conviction to be secured. The appellant is said to have defiled a child aged 7 years old. PW1 did not know her age at the time of testifying. Her father PW4 was also silent on the issue regarding her age. However, PW3 stated that he filled a P3 form of **H K** aged **7 years** old. The P3 form filled indicates her age was estimated as **7 years** old. In the case of ***Francis Omuroni versus Uganda – Court of Appeal Criminal Appeal No. 2 of 2000*** it was held i*nter alia* that in defilement cases medical evidence is paramount in determining the age of the victim and that the doctor is the only person who could professionally determine the age, in the absence of any other evidence.

11. In this case the medical evidence adduced by the clinical officer which was not discredited by the appellant estimated the aged of the victim as **7 years.** Without evidence to the contrary, I find that indeed the complainant was **7 years** old.

The next issue would therefore be whether there was penetration of the child.

12. PW3, the clinical officer acted pursuant to a licence awarded to him as a practitioner of medicine hence qualified to do so (see ***the Clinical Officers (Training Registrations and Licencing Act Cap 260(K); Raphael Kavoi Kiilu versus Republic [2010] eKLR.*** He examined the child on the **14th March 2013.** He found her having a reddish vagina, the hymen was missing. A high vaginal swab carried out established that she had genital infection. This was evidence that there was penetration into the genital organ of the child.

The issue to be considered is therefore whether it was the appellant who penetrated her:

13. The only evidence on record as to who the child's assailant was is that of the child herself. A preliminary inquiry was carried out by the trial court at the hearing. The court formed an opinion that the child was incompetent to give sworn evidence. Consequently, she made an unsworn statement whereby she was not subjected to cross-examination. In her testimony the child stated that she could recall between **7th** and **10th March, 2012,** while going to her aunt's home she met **Nzenze** and the appellant. The appellant took her to bed had sex with her. He inserted his penis into her. She felt pain and cried. He then released her. Although the appellant had asked her not to tell anybody what transpired she went home and told her grandmother. PW2, encountered PW1 on the **8/3/2012** who told her that she had gone to see a child at his aunt's home. It was the following day presumably on the **9th March, 2012** that she confided in her that she had been defiled. PW4 got a report from the school teacher on the **14/3/2012** that is when he took her to hospital. Looking at the chain of events the prosecution failed to explain why the teacher did not notify PW1's parents soon after she learnt of the allegation.

14. In sexual offence cases the court shall receive the evidence of the alleged victim and proceed to convict the accused if, for reasons to be recorded in proceedings the court is satisfied that the alleged victim is telling the truth. (***see section 124 of the Evidence Act, Laws*** *of* ***Kenya).***

15. The trial magistrate reached a finding that the evidence of PW1 which was unsworn was confirmed by that of PW2 and PW4 and was supported by that of PW3. He also found that the appellant was positively identified by the complainant. There was indeed corroboration of the fact that the child had been defiled. However, there was no evidence to confirm that of the complaint as to who defiled her. The court other than making a finding that the evidence was confirmed did not make any finding pursuant to **Section 124 of** the **Evidence Act.** This meant that some other evidence was required to confirm that of the complainant.

16. It was the complainant's evidence that she lived with her grandmother and soon after the ordeal she told her grandmother what had befallen her. This was a crucial witness who could have told the court if indeed the complainant reported to her and when it actually happened. The complainant also stated that on the fateful night she met one **Nyenze** and the appellant. It was then that the appellant allegedly took her to bed. Evidence of **Nyenze** would also have been crucial. The grandmother would have confirmed if indeed she received any report from the complainant. **Nyenze** on his part would have confirmed if indeed he was in company of the appellant when the complainant allegedly met them.

17. In the case of ***Bukenya & Others versus Uganda [1972] E.A. 549) it was held that;-***

"Where the evidence called is barely adequate, the court may infer that he evidence of uncalled witnesses would have tended to be adverse to the prosecution".

18. The question that remains unanswered is whether the prosecution failed to call **Nyenze** and the complainant's grandmother because their evidence may have been detrimental to their case? Failure to call those two witnesses weakened the prosecution's case.

19. The court was satisfied that the complainant positively identified the appellant. Per evidence adduced she pointed at him in the dock. No evidence was led to establish if indeed she knew the appellant prior to the fateful date. It has been held that dock identification is worthless and a court should not rely on it unless well established. (see ***Njoroge versus Republic [1987] KLR 19).***

20. It must not be regarded in isolation from other evidence adduced. As I have aforestated evidence was not led to suggest how well the child knew the appellant, how she came to know his name, whether she had seen him before and whether she had any reasons to remember him.

21. In his defence the appellant alluded to events of **15th March, 2012** when he was arrested. He denied having defiled the complainant. In his finding the trial magistrate stated thus ;

"***I find the defence by the accused is wanting and unconvincing hence the same fails to challenge the prosecution's case which I find strong and credible".***

22. The appellant was not duty bound to disapprove the case presented by the prosecution. That would mean shifting the burden of proof to him. The prosecution had the duty of proving the case beyond reasonable doubt. It is apparent that the prosecution failed to discharge the duty. There was no proof that the appellant is the one who penetrated the complainant.

23. For reasons aforestated the appeal is meritorious. I therefore allow the appeal, quash the conviction and set aside the sentence imposed. The appellant is hereby set at liberty unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** this **25TH** day of **MARCH, 2014.**

L.N. MUTENDE

JUDGE