



**NO. 227/2014**

**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 255 OF 2010**

**MAINGI MUSENYA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court  
Criminal Case No. 116 of 2010 by*

*Hon. S.K. Mutai R.M. on 14/9/2010)*

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

1. The appellant was charged with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence thereof being that on the 26<sup>th</sup> day of June 2010 at around 6.00 p.m. at **[particulars withheld]** village, Athi location in Mutomo district within the Eastern Province defiled a girl aged 12 years namely **M M**.

In the alternative charge, he is charged with Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence thereof being that on the 26<sup>th</sup> day of June 2010 at around 6.00 p.m., at **[particulars withheld]** village, Athi location in Mutomo District within the Eastern Province, committed an act of indecency with **M M** a child aged 12 years by touching her private parts namely vagina and buttocks.

2. He was tried, convicted and sentenced to serve 20 years imprisonment. Being dissatisfied by the conviction and sentence he now appeals on grounds that:
  - i. The learned trial magistrate erred in law and fact by sentencing him on both the main and alternative charge.
  - ii. The medical evidence adduced was not satisfactory, the P3 form having been filled by a person who was not a medical officer.
  - iii. The age of the complainant was not proved.
3. Facts of the case were that on the 26/6/2010 as PW1, **M M** was grazing animals in the field, the appellant herein chased after her, caught her and removed her pants. He also removed his clothes. He defiled her. She felt pain. She screamed. Her sister **S** and mother went to her aid and the

- appellant ran away. They reported the matter to the village elder then police station whereafter she was taken to hospital.
4. PW2, **K M** the mother to the complainant had just come from home when she heard screams. She recognized the voice as her daughter. Her eldest daughter ran ahead of her. They met the complainant who told them that she had been defiled by the appellant. She was bleeding from her private parts. She said the complainant was 12 years old.
  5. PW5, **No. 88254 P.C. Joseph Waweru** received the report from the complainant, her mother and members of the public. She took possession of the exhibits they had, the complainant's pant that was blood stained and a T-shirt said to belong to the appellant that he was wearing on the material date.
  6. PW4, **S M** an elder sister to the complainant was at home when she heard screams. Recognizing her sister's voice she ran towards the place whence it emanated from. She met her sister **M** who told her that she had been defiled by **Maingi** (Appellant). She noticed blood rolling down her legs.
  7. PW5, **Monica Munyolo** the Assistant Chief received the report from the village elder. PW6, **S T** the village elder received the report from PW2. PW7, **Nelson Kimanthi** the clinical officer examined PW1. Her hymen was perforated with a small tear on the anal region. Her pants were soaked with blood. A vaginal swab carried out indicated many red blood cells. Urinalysis done showed epithelial cells. He concluded that she had been defiled.
  8. In his defence the appellant denied having committed the offence. He stated that on the 26<sup>th</sup> June 2010 he was at Ndauwi market where he stayed until 6.00 p.m. He went back home to learn that the village elder and the complainant were looking for him following allegations that he had defiled her. He stated that they compromised the medical officer who filled the P3 form. On cross examination he said that he disagreed with the complainant's mother as she wanted him to be her lover but he declined.
  9. The appellant filed written submissions and added that he was not examined. In response, the learned state counsel, **Mrs. Abuga** submitted that when the complainant screamed following the ordeal the appellant ran away leaving behind his red T-shirt which was identified as belonging to him. Medical evidence adduced corroborated that of PW1. She called upon the court to uphold the conviction and sentence and dismiss the appeal.
  10. This being the first appellate court, I am duty bound to analyze and re-evaluate the evidence which was adduced before the trial court and come up with my own conclusions bearing in mind the fact that I did not have an opportunity of hearing and seeing witnesses (*See Okeno versus Republic (1972) E.A. 32*).
  11. Evidence in respect of the age of the complainant was adduced by PW1, the complainant herself, PW2, her biological mother and PW7 the clinical officer who produced the medical examination report (P3) which indicates the estimated age of the complainant as 12 years. The age of the complainant can be proved by medical evidence, a birth certificate by a parent/guardian, observation or commonsense. (*See Omuroni Francis versus Uganda, Court of Appeal No. 2 of 2000*). Proof in this case was beyond doubt.
  12. The P3 form in respect of the complainant was filled by a clinical officer. A clinical officer is qualified to fill a P3 form. This is an area of his competence. (*See Raphael Kavoi Kiilu versus Republic Criminal Appeal No. 198/2008; Section 2 of the Clinical Officers Act (Training, Registration and Licencing) Act, Cap 260 (LOK)*).
  13. An evaluation of evidence adduced shows that the complainant was a child aged 12 years. Her evidence that it was the appellant who inserted into her female a organ male organ unlawfully, amid screams is uncontroverted. There was penetration. He offered no explanation of how he ran away leaving his T-shirt at the scene. His allegation of having declined to accept the complainant's mother's seduction is therefore unfounded. The trial magistrate correctly reached a decision to convict him on the main count. I do confirm it,
  14. With regard to the alternative count, it was erroneous on the part of the trial magistrate convict on that count as well. He ought to have made no finding on the same. In the circumstances, I do quash the conviction on the alternative count. The sentence imposed was the minimum prescribed sentence for the offence. I confirm it.
  15. For reasons given I dismiss the appeal.

**DATED, SIGNED and DELIVERED at MACHAKOS this 25<sup>TH</sup> day of MARCH, 2014.**

**L.N. MUTENDE**

**JUDGE**