



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 157 OF 2012

MWANGANGI MUTANGILI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

*(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court
Criminal Case No. 311 of 2008 by Hon. S.K. Mutai, RM on 1/12/2009)*

JUDGMENT

1. The Appellant was charged with the offence of defilement of a girl contrary to **Section 8(1) (3)** of the **Sexual Offences Act No. 3 of 2006**. Particulars being that on the **25th and 28th May, 2008** at unknown time at *[particulars withheld]* Village, **Kawelu** Sub-location, **Kibwea Location** of **Mutomo District** within the **Eastern Province**, defiled **J K** a child aged **12 years**.

In the alternative charge the appellant was charged with indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence being that on the **25th and 28th May, 2008** at unknown time at *[particulars withheld]* Village, **Kawelu sub-location, Kibwea location** of **Mutomo District** within the **Eastern Province**, committed an act of indecency with **J K**, a child aged **12 years** by touching her private parts.

2. The appellant was tried convicted on both the main and alternative charge and sentenced to **20 years** imprisonment. Being aggrieved by the conviction and sentence thereof he filed an appeal on the following grounds:-
 - i. The learned trial magistrate erred in both law and fact by failure to give reasons for his decision.
 - ii. The learned trial magistrate erred in law and fact by failing to observe that the age of the complainant was doubtful, the prosecution having failed to ascertain her actual aged per the requirements of the **Sexual Offences Act**.
 - iii. The learned trial magistrate made an error when she failed to observe that the complainant had been beaten by her mother an act that made her seek refuge at the appellant's home and to avoid further beatings she had to implicate the appellant per her mother's wish.
 - iv. The medical evidence adduced was unsatisfactory as the same was adduced by a clinical officer.
3. The appellant filed written submissions that he relied on. The learned State Counsel, **Mrs Abuga** opposed the application on the ground that the complainant's evidence was corroborated by medical evidence. It was concluded that she had been defiled. The court considered the defence raised and found it was a mere denial. She called upon the court to dismiss the appeal, and uphold the conviction and sentence.

4. This being the first appeal, I am duty bound to analyse and re-evaluate the evidence that was adduced before the trial court and come up with my own conclusions bearing in mind that I neither saw nor heard witnesses who testified (see *Okeno versus Republic [1972] E.A. 32*).
5. The facts as presented by the prosecution are that on the **25th May 2008** at about **7.00pm** PW1, **J K**, the complainant accompanied the appellant to his home. He took her to his home and offered her porridge. Thereafter he removed her pants, put her on his bed. He removed his pair of short trousers and had carnal knowledge of her. She did not scream. He woke her up and took her to the bush where he hid her. He took to her food at **11.00am**. At **7.00pm** he took her back to his hut and defiled her. At **4.00pm** he took her back to her hiding place in the bush. On the **27th May 2008** he took her to his hut at **7.00pm**. PW3, **T K**, her mother found them. She took her to her uncle's place, (PW4, **J V**).
6. She was taken to hospital and examined by **Nelson Kimanthi**, clinical officer who found her having a laceration on the labia majora with a torn hymen. She also had whitish discharge from the vagina. It was concluded that she had been defiled. The case having been reported to the police PW5, **No. 68782 P.C. Hezron Makokha** caused the appellant to be arrested. He was subjected to examination by a clinical officer. There was no physical injury to his genitalia or anal region. No spermatozoa or pus cells were seen.
7. In his defence the appellant said the complainant is his cousin. It was his evidence that her mother used to assault her. He denied having seen the complainant on the material date. He stated that she was found at his younger sister's house **Mary** who is her friend. He denied having defiled her. **DW2, Mary Mutangili**, the appellant's sister said that PW1 went to their house after being beaten by her mother on **28th May 2008** at **8.00pm**. The mother found her as she slept on her bed. They took her away.
8. **DW3, Kaindi Mutangali**, the appellant's father said PW1 went to his house on **28th May, 2008** after she had been beaten by her mother. When PW3 arrived and inquired about PW1's whereabouts he said he had not seen her. DW2 then confessed that PW1 was inside her room. She took her away. Thereafter PW3 returned with **Vonza (PW4)** alleging that the appellant had defiled PW1. He stated that it was not the first time PW1 was seeking refuge at his house after being assaulted by PW3.
9. With regard to the issue of medical evidence having been adduced by a clinical officer; it has been settled that a clinical officer is a licenced practitioner of medicine who is legally qualified to prepare, sign legal documents like P3 forms and to produce them to court. There is no specific provision in the **Sexual Offences Act** that bars a clinical officer from adducing medical evidence (*see the Clinical Officers (Training, Registration and Licensing) Act Cap 260(k); Raphael Kavoi Kiilu verses Republic [2010], KLR*).
10. It has been stated that the age of the complainant was doubtful. Proof of age of a child in a case of defilement is a necessity. In her testimony, PW1 said she was **12 years** old. The age of the complainant was estimated to be **12 years** at the time of examination by PW2. The age was never challenged by the defence counsel in cross-examination. Age may be proved by medical evidence or any other cogent evidence. In the case of *Francis Omuroni versus Uganda, the Court of Appeal in Criminal Appeal No.2 of 2000* held *inter alia*, that in defilement case, 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 of the victim in the absence of any other evidence. A part from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense. The mother of the complainant, PW3 also said that the complainant, PW1 was **12 years** old. This evidence that was not disputed was sufficient to prove the age of the complainant.
11. Finally, the learned trial magistrate has been faulted for failure to take into consideration the defence raised and not giving reasons for the decision. It was stated that PW1 was beaten by her mother (PW3) and coerced to frame up the appellant. Medical evidence adduced in respect of PW1 showed that she was continuously defiled by the appellant from the **25th to 28th May, 2008**. She was examined and found with lacerations on labia majora and her hymen was torn. She had pus cells and epithelial cells. Spermatozoa was not seen. The appellant was examined but he did not have any pus cells. However, this was **six 6**) days after he was alleged to have committed the offence.
12. It is argued that the complainant (PW1) was found sleeping at the home of the appellant because

she had run away from home having been assaulted by her mother. In his testimony, the appellant argues that she was sleeping in **Mary's** room. It was however the evidence of PW1 that she was found inside the hut of the Appellant. PW2 said she found her inside the appellant's hut after searching for her at the house of the appellant's parents in vain. This was after PW1 responded on being called out. The defence witnesses stated that PW1 went to their home on the **28th May, 2008**. The prosecution however argued that PW1 disappeared from home on the **25th May 2008**. It was her evidence that from that date to the **28th May, 2008** she was having sexual intercourse with the appellant. It is admitted by PW1 that she was beaten once by her mother and she sought relief at her uncle's place, the father to the appellant but on the said date he did not have sexual intercourse with her.

The issue to be considered is whether the complainant could have been made to lie because of fearing to be disciplined by her mother?

13. The complainant's evidence that she was defiled was corroborated by medical evidence. It has not been demonstrated that the PW3 had some spite against the family of the appellant that would make her come up with such a serious allegation. The trial magistrate considered evidence adduced by the appellant and his witness and dismissed it as mere denials. Having re-evaluated the evidence adduced, I find the complainant to have been consistent in her evidence as to who defiled her. Her evidence sought to establish the fact that the sexual intercourse that happened was consensual after the first encounter. Before the law this is still defilement. The complainant had no reason to frame the appellant. In the premises, I am in agreement with the trial magistrate that the case was proved to the required standard. I therefore uphold the conviction.
14. On sentence, the learned trial magistrate imposed the minimum prescribed sentence. I therefore have no reason to interfere with it.
15. From the foregoing the appeal fails. Accordingly it is dismissed.

DATED, SIGNED and DELIVERED at MACHAKOS this 25th day of MARCH 2014.

L.N. MUTENDE

JUDGE