



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 339 OF 2010

KYALO KIMWELE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Criminal Case No. 576 of 2007 by Hon. A.G. Kibiru, Ag PM on 6/12/2010)

JUDGMENT

1. **Kyalo Kimwele**, 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 being that on the **24th June, 2007** around **3.00pm** at *[Particulars Withheld]* in **Kitui District** of the Eastern Province, defiled **M K** a child of **15 years**.

In the alternative count, the appellant was charged with committing an 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 **24th June, 2007** around **3.00pm** at *[Particulars Withheld]* in **Kitui District** of the **Eastern Province**, committed an act of Indecency with **M K** a child of **15 years** by touching her private parts namely vagina.

2. He was tried and convicted on the main charge and sentenced to serve **20 years** imprisonment. Being dissatisfied by the conviction and sentence he now appeals on the grounds that;-
 - i. The trial was a nullity due to non-compliance with **Section 200** of the **Criminal Procedure Code**.
 - ii. Medical evidence was adduced by a clinical officer instead of a medical officer.
 - iii. The prosecution's case was not proved beyond doubt.
 - iv. Hearsay evidence was admitted which was erroneous.
 - v. The learned trial magistrate erred by shifting the burden of proof to the appellant.
3. The facts as presented by the prosecution were that PW1, **M K** had gone to fetch water when she encountered the appellant. He chased after her, caught up with her, knocked her down on the ground and removed her underwear. He held her throat strangling her and lay on her as he removed his underwear. She felt pain as he penetrated her. On finishing he dressed up and ran away. She stated that it was the first time she was defiled. PW3, **Kathini Kyalo** and PW4, **Kasyoka Musyimi** who were nearby ran to the scene when they heard PW1 crying. They however did not find the appellant. PW2, **W N** was informed of the incident.
4. PW1 was examined by PW5, **Dorcias Wanja** a clinical officer who, found that she was mentally retarded, 15 years old, her hymen was absent. She had vaginal discharge, there was evidence of

- penetration. The appellant was arrested and charged.
5. In his defence, the appellant stated that on the material date he did his routine duties at his mother's kiosk. At midday his mother sent him to purchase shop goods within Kabati Market. He even carried **Mutisya** along the way. He purchased the items. On his way back he was stopped by people who alleged he had defiled a child called **N**. He was taken to the police station where he was held in custody for five (5) weeks. He stated further that he had a grudge with the complainant's mother because he shared a girlfriend with his son and she threatened to kill him.
 6. The appellant relied on written submission. The learned counsel, **Mrs Abuga** opposed the appeal. She stated that PW1 knew the appellant very well hence was able to identify him as the person who defiled her. The clinical officer confirmed that she had been defiled. She stated that **Section 200** of the **Criminal Procedure Code** was compiled with as the case started *de novo*. The defence was a mere denial. She called upon the court to dismiss the appeal and uphold the sentence.
 7. This being the first appeal, I am duty bound to re-evaluate the evidence adduced during trial in order to reach my own independent conclusion, bearing in mind that I neither heard nor saw witnesses who testified. (see **Okeno versus Republic [1972] E.A. 32**)
 8. According to the court record, **E. Juma Osoro, SRM** took over the case from **T.M. Mwangi, R.M** who was on transfer. On the 7/12/2009 he complied with **Section 200** of the **Criminal Procedure Code**. The appellant having understood the explanation given opted to have the case heard afresh. An order was made to that effect and all witnesses were re-called. The appellant cannot be heard to state that the trial was not fair.
 9. Medical evidence was adduced by a clinical officer. Such an officer is a qualified clinical officer and has a right to engage in practice of medicine. It is her area of competence. Therefore she is qualified to fill P3 forms. (see **the Clinical Officers(Training, Registration and Licencing) Act Cap 260 (K); Raphael Kavoi Kiilu versus Republic Court of appeal at Nairobi , Criminal Appeal 198 of 2008; [2010] eKLR**).
 10. The complainant was said to have some condition, some low intelligence quotient. The court took note of it. In his observation the trial magistrate, noted that she had some intellectual deficiency. He stated thus;-

“Although PW1 suffers from some level of mental retardation making her a slow learner she displayed some level of intellectual eloquence which I cannot overlook.”

11. Looking at the proceedings, evidence adduced by her was done in a coherent manner. She was subjected to cross-examination and she answered questions appropriately. This was a witness who knew the appellant and even his home. She was able to identify him since the offence was committed in broad daylight. She told the court how the appellant penetrated her and even pointed out where exactly the act of indecency was done. Evidence of penetration was confirmed by medical evidence. Her hymen was absent as a result of the sexual act.
12. The appellant claimed he was framed-up because of some grudge with the complainant's son – some alleged rivalry over a woman. This allegation that was not proven did not render any explanation as to how the complainant could not be mistaken about her assailant.
13. In convicting the appellant the court upheld the proviso of **Section 124** of the **Evidence Act, Cap 80 Laws of Kenya**. The trial magistrate gave the reason why he believed the complainant. He found that she was truthful and consistent in her evidence such that he had no reason to doubt her. Therefore it is not true to state that he relied on hearsay evidence. There was no misdirection on his part.
14. The appellant also faulted the court in shifting the burden of proof. A re-evaluation of the evidence adduced shows that the prosecution discharged its duty of proving its case beyond reasonable doubt.
15. In his submissions the appellant submitted at length on the issue of unlawful detention. It was his contention that he was in custody for **12 days**. The charge sheet indicates he was arrested on the **24/6/2007** and produced in court on the **9th July, 2007**. The trial magistrate sought an explanation that was given by the prosecution to his satisfaction. Even if the explanation was not satisfactory to the appellant, this would not be a ground for an acquittal. If the appellant believes his constitutional rights were violated the remedy lies in a civil action for damages. (See **Julius**

Kamau Mbugua versus Republic Criminal Appeal No. 50 of 2008).

16. Having re-evaluated the evidence and findings of the trial magistrate, I find the appeal on conviction and sentence meted out lacking merit. I confirm the conviction and sentence of the Lower Court. The appeal is dismissed.

DATED, DELIVERED and SIGNED this **3RD** day of **APRIL** 2014.

L.N. MUTENDE

JUDGE