



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 172 OF 2012

MUSYOKI MWAKAVIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Makindu Principal Magistrate's Court Criminal Case No. 444 of 2012 by Hon. P. Wambugu, RM on 9/1/2012)

JUDGMENT

1. The appellant was charged with defilement contrary to **Section 8(1) (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence being that on the **19th** day of **May, 2012** at **[Particulars Withheld] Makueni County** within **Eastern Province** intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of **K M** a child aged **14 years**.

In the alternative, 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 the **19th** day of **May, 2012** at **[Particulars Withheld], Makueni County** within **Eastern Province** intentionally and unlawfully touched the vagina of **K M** a child aged **14 years** with his penis.

2. He was tried, convicted on the main count and sentenced to serve **20 years** imprisonment. Being aggrieved by the decision of the court he now appeals on the grounds that:-
 - i. The learned magistrate erred both in law and fact by convicting him as charged yet the age of the complainant was not ascertained.
 - ii. The charge was defective by virtue of the provisions quoted having read "**contrary to section 8(1) and (3) of the Sexual Offences Act instead of "Section 8(1) as read with Section (3) of the Sexual Offences Act"**."
 - iii. The trial magistrate erred in law and fact by failing to make a specific finding, whether or not the burden of proof had been discharged.
3. Briefly, the case as presented by the prosecution was that **PW2 K M** a child aged **14 years** was sent by her mother to the appellants shop at **[Particulars Withheld]** to purchase sugar and cooking oil. On making payment the appellant went to look for change, returned and gave her

- Ksh.400/= then asked her to enter the shop and pick some biscuits. She complied only to be forced into the back side of the shop. He defiled her and gave her some Kshs.50/= and biscuits. She went home but did not tell her mother believing that she would beat her up. Apparently this was not the first time. The appellant had defiled her previously.
4. In the meantime she had dropped in her class work. Her English teacher got concerned and sought an explanation from her. She revealed that she had been defiled. PW1, **E M M**, the complainant's mother was notified by the school teacher of the incident on the **25th May, 2012**. She went to school as summoned. The child was interrogated in her presence. It turned out that the appellant was also a parent at the same school. The matter was reported to the **Assistant Chief**. PW3, **Esther Amina Mbai**, the **Assistant Chief** on receiving the complaint reported the matter to the police. The child was examined by PW4, **Patrick Musyoki Kibwana**, a medical officer on **30th May, 2012**. She had a perforated hymen. There was whitish vaginal discharge. A vaginal swab carried out revealed the presence of pus cells. This indicated that she had been defiled. PW6 No. **85884 P.C. Emily Ngulet** investigated the case and charged the appellant.
 5. The appellant filed written submissions. The learned state counsel **Mrs Abuga** reiterated facts as presented, evidence adduced in the Lower Court and stated that the case was proved beyond reasonable doubt; the court rightly convicted the appellant and the sentence meted out was within the law.
 6. It is the duty of this court being the first appellate court to subject evidence on record of the Lower Court to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see the witnesses testify (see **Pandya versus Republic [1957 E.A. 336, Okeno versus Republic [1972] E.A. 32)**.
 7. It was the evidence of the complainant that she was aged **14 years** old, having been born in **1998**. PW1 her mother said she was **14 years** old. The Doctor who examined her also assessed her age as **14 years** old. In the case of **Francis Omuroni versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** - it was held thus:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

8. It was not mandatory for a birth certificate to be produced by the prosecution in the instant case. The evidence adduced by the witnesses in respect of the age of the complainant could not be dismissed as mere assertions per the authority cited by the appellant (see **Muiruri Njoroge versus Republic Criminal appeal No. 115 of 1982)**.
9. It is submitted that the charge as drawn was technically defective which prejudiced the appellant in terms of **Article 25 (c)** of the **Constitution** as he was not accorded a fair trial. The appellant has cited the case of **Sigilai versus Republic [2004] 2 eKLR 480** which states thus:-

““The principle of law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge the he can understand. It will also enable an accused person to prepare his defence to the charge”.

He is faulting the statement of the charge not the ingredient of the offence as stated out in the particulars of the offence. This means that he was able to understand and appreciate the particulars of the offence as stated in the charge which made him participate fully in the trial.

10. The statement of the offence as stated in the charge sheet is contrary to **Section 8(1)** of the **Act**, which creates the offence of defilement and the **Section 8(3)** which stipulates the penalty to be meted out. Failure to specify what the **Section 8(1)** of the **Act** was to be read with **Section 8(3)** of the **Act** could not have occasioned any substantial injustice. He was accorded a fair trial as envisaged by **Article 25(c)** of the **Constitution**. This cannot be fatal to the prosecution's case. A

case cannot be dismissed on that ground.

This now brings us to the issue whether the burden of proof was beyond reasonable doubt.

11. The age of the child was proved to the required standard of proof beyond reasonable doubt. It was PW2's evidence that that it was not the first time she engaged in the act of sexual intercourse. At the time of examination her hymen was perforated. The examination was done some **eleven (11)** days after the alleged act. She also had pus cells. This was evidence of the child having been penetrated. The probable weapon used was definitely a male genital organ following the infection she got. Being a minor even if this was the second time she was engaging in sexual intercourse with no intention of telling her mother she was by law incapable of consenting to the act. The act occasioned on her was therefore unlawful.
12. The final issue to be answered will be whether the appellant was the one who committed the act of penetration on her genital organ? The appellant herein was well known to the complainant and her family. His identity was not in question. As the appellant cross-examined PW2 he did not come up with any allegation as to why PW2 could not make the allegation against any other person as opposed to him. In his defence he stated the event of the date he was arrested and denied having defiled the complainant. No spite or malice having been imputed on the person of the complainant this court reverts to **Section 124 of the Evidence Act Cap 80 Laws of Kenya**. The proviso thereto provides.-

“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.” *Emphasis mine.*

13. In reaching its finding the trial court stated thus:-

“On analysis of evidence on record, I do find PW1's evidence credible and admissible in as much as she was informed by PW2 her daughter before the teachers of the defilement. I have no doubt she was truthful to the court. PW2 evidence is also admissible as she is the complainant. She has explained why she could not tell anybody of the act done to her as she feared that the children would laugh at her and mother would beat her.”

14. The trial court having heard the evidence of the complainant was satisfied that she was truthful. It went on to give reasons upon which it formed the opinion prior to convicting the appellant. Arguments raised on appeal did not raise anything whatsoever to make this court fault the trial court. In the premises, the offence as charged was proved to the required standard of proof namely proof beyond reasonable doubt.
15. The sentence meted out was the minimum prescribed sentence. I have no reason to interfere with the conviction and sentence imposed.
16. For reasons given, the appeal fails. Accordingly it is dismissed.

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

L.N. MUTENDE

JUDGE

