



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 157 OF 2009**

**MUOKI NTHIWA... APPELLANT**

**VERSUS**

**REPUBLIC**

*(Being an appeal from the conviction and sentence of Hon. S. Gacheru Resident Magistrate delivered on 17/9/2009 in Machakos Chief Magistrate Criminal Case No. 255 of 2009)*

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*(Before Hon. B. Thurania Jaden J)*

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

1. The Appellant, **Muoki Nthiwa** was charged with the offence of defilement contrary to **section 8 (2)** of the **Sexual Offences Act 2006**.

The particulars of the offence were that “on the 28<sup>th</sup> day of February 2008 in **Machakos District** within **Eastern Province**, unlawfully and intentionally penetrated the genital organ of **MW** a girl aged 9 (nine) years.”

2. In the alternative, the accused was charged with the offence of indecent act contrary to **section 11 (1)** of the **Sexual Offences Act 2006**.

The particulars of the offence were that “on the 28<sup>th</sup> day of February 2008 in **Machakos District**, within **Eastern Province** intentionally and unlawfully indecently assaulted **MW** by touching her private parts a girl aged 9 years.”

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. After a full trial, the Appellant was convicted in the main count of defilement and sentenced to life imprisonment.
4. The case presented by the prosecution was that on the material day at about 5.00 p.m., **PW2 MMW**, a standard two (2) pupil was at her aunt’s home. The Appellant then sent the complainant to fetch for him some papers from the complainant’s home. The complainant and the Appellant are relatives and lived on the same family land. The complainant obliged and picked the papers. The complainant after giving the papers to the Appellant then went outside to play. The Appellant then went to where the complainant was, held her and put some pieces of cloth in her mouth then carried her in his house and placed her on the bed. The Appellant then lifted the complainant’s clothes and removed her pants and inserted his penis in the complainant’s vagina. The Appellant thereafter removed the pieces of cloth from the complainant’s mouth and told her to go home.

5. The complainant went home crying. She found her brother PW3 **MW** who was eleven (11) years old and in standard four had arrived home from school. The brother (PW3) who had seen the complainant coming from the home of the Appellant while crying asked her what had happened. The complainant told her brother what had befallen her. The grandmother and the father to the complainant were informed of the matter and a report made to the police and the complainant issued with a P3 form and taken to hospital for treatment. The accused was arrested and subsequently charged with the offence herein.
6. In his defence, the Appellant gave unsworn evidence. No witnesses were called. The Appellant testified that he operates a “*boda boda*” business. He stated that on the material date he was on his way home from work when he met two people. One of those people was known to the Appellant as **Joseph Wambua** and he requested the Appellant to accompany them to the chief’s office to resolve a land dispute. At the chief’s office they were referred to Machakos Police Station where they were put in the cells. The said **Joseph Wambua** was later released from police custody the same day. The Appellant remained in police custody for three days. **Wambua** asked the Appellant to give him Kshs.10,000/= for the Appellant to secure his release. That the Appellant declined to give out the money as he did not know the purpose for the same. The said **Wambua** then threatened to destroy the Appellant’s life. That after seven days in police custody, the Appellant was brought to court and charged with offence that he knew nothing about. The Appellant stated that the said **Wambua** was his neighbour and that they had a land dispute and they had even fought once and **Wambua** had injured the Appellant’s hand.
7. The trial magistrate found the prosecution case was proved beyond any reasonable doubts and convicted the Appellant. The Appellant was aggrieved by both the conviction and sentence and he appealed to this court on the grounds that:-

**A] The prosecution evidence was insufficient and could not support a conviction.**

**B] There was delay in police custody in bringing the Appellant to court, thereby violating the Appellant’s fundamental rights as provided by the Constitution.**

**C] The trial magistrate erred in sentencing the Appellant to life imprisonment.**

**D] The mitigation offered by the Appellant was not considered.**

8. The appeal was canvassed by way of written submissions, which I have duly considered. As a first Appellant court, I have also considered the evidence on record and evaluated the same afresh in order to come up with my own inferences.
9. PW2 the complainant gave sworn evidence after the trial court carried out a *voire dire* and was satisfied that the complainant understood the meaning of oath. The complainant’s evidence is that the Appellant put pieces of cloth in her mouth before carrying her to his house then placed her on the bed then inserted his penis into her vagina. The complainant and the Appellant are relatives and lived on the same family land according to the evidence of their grandmother (PW1). PW3 the complainant’s brother is that he saw the complainant coming out of the Appellant’s house while crying, then the complainant informed him what had transpired. It is observed that the complainant informed her brother (PW3) and her grandmother (PW2) what had transpired soon after the event and the matter was reported to the complainant’s father.
10. The evidence of PW4 **PC Juliana Ngoiri** confirmed that a report of the matter was made at **Machakos Police Station**. The medical evidence adduced by the Clinical Officer confirmed that the complainant had been defiled. According to the P3 form and treatment notes produced by the Clinical Officer, the complainant was nine years old and had a tear on the hymen.
11. The accused in his defence stated that this case was a frame up due to a land dispute with one **Wambua**. However, the complainant’s evidence is that of recognition in broad daylight. There is therefore no possibility of error. The trial magistrate who had the advantage of seeing the complainant’s demeanour believed her evidence. I have found no reason to doubt the same. The proviso to **section 124** of the **Evidence Act** provides as follows:-

**“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.”**

12. The evidence adduced by the prosecution witnesses proved the offence of defilement. The witnesses who the Appellant’s counsel claims to have recorded statements and were not summoned to testify e.g. the aunt to the complainant, the complainant’s parents, teachers and members of public were not in my view crucial witnesses. Failure to call the said witnesses cannot therefore be said to have been an effort made by the prosecution to suppress adverse evidence.
13. Nothing turns on the issue of delay in police custody and the alleged violation of the Appellant’s fundamental rights is provided in the Constitution. That topic is now moot. The Appellant’s remedy lies in a civil action (See for example, **Julius Kamau Mbugua –vs- Republic (Criminal App. No. 50 of 2008)**).
14. After evaluating the evidence on record, I am satisfied that the offence of defilement contrary to **section 8 (1) and 8 (2) of the Sexual Offences Act** was proved. Failure to state **section (1)** occasioned no prejudice to the Appellant (See **section 382** of the **Criminal Procedure Code**). **Section 8 (2) of the Sexual Offences Act** provides a mandatory sentence of life imprisonment where the age of the complainant is eleven or less. The sentence was therefore within the law.
15. The appeal has no merits and I dismiss the same. The conviction and sentence by the trial court is upheld.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 29<sup>th</sup> day of May 2014.**

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**B. THURANIRA JADEN**

**JUDGE**