REPUBLIC OFKENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 166 OF 2009

KIMEU KISOI MUNGUTI ………………….................…APPELLANT

VERSUS

REPUBLIC …………………………….......…..............RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Criminal Case No. 818 of 2008 by Hon E. Nderitu, SRM on 2/10/2009)

JUDGMENT

1. The appellant was charged with defilement contrary to **section 8(2)** of **Sexual Offences Act**.

Particulars of the offence being that 14th day of April, 2008 at ***[particulars withheld],*** Kangethe Sub-location in Machakos District within the Eastern Province intentionally and unlawfully penetrated the genital organ of J P M M aged 12 years.

2. In the alternative charge the appellant was charged with indecent act with a child contrary to Section 11(1) of the Sexual Offences Act 2006

Particulars of the offence being that on the 17th day of April, 2008 at ***[particulars withheld],*** Kangethe Sub-location in Machakos District within the Eastern Province intentionally and unlawfully indecently assaulted **J P M M** by touching her private parts namely vagina.

3. He was tried, convicted and sentenced to serve twenty (20) years imprisonment on the main charge. Being aggrieved by the conviction and sentence thereof he now appeals on grounds that;-

i. The entire trial was defective as it was based on a defective charge.
ii. He was not accorded a fair trial as envisaged by Article 25(c) of the Constitution, part of the trial having been conducted by an incompetent prosecutor
iii. The burden of proof was not discharged.

4. According to evidence adduced by the prosecutor, on the **17th April, 2008** at about 6.55pm, PW1, **J P M M** was carrying water on a wheelbarrow. On reaching the homestead where the appellant worked he took the container that had water. He requested the complainant to assist him tether the goats and cattle that were some 100 meters away. As they untied the goats he held her, pushed her down and removed her underpants. He removed his penis from his pair of trousers, applied some saliva thereof and told her to close her eyes then in inserted it into her vagina. She felt pain. On completion of the act he told her not to tell anyone. She went home but did not tell her mother.
5. On the **28th April, 2008** she noticed blood coming from her private parts. She then told her

mother what the accused had done. They reported the matter to the police.

The appellant was arrested.

6. PW5, **Dr. Alice Isika** who produced the P3 form on behalf of **Dr. Wambua** who examined the complainant stated that at the time of examination, some four (4)weeks after the alleged offence she had normal external genetalia. Her hymen was ruptured. There was no bleeding or discharge.
7. In his defence the appellant stated that he was doing his casual work when he was arrested. It was alleged he had been defiling a young girl. He denied having committed the offence.
8. This is a case where the State conceded to the appeal. **Mr. Mwangi,** learned State Counsel stated that there was an omission on the part of prosecution when they framed the charge.
9. This being the first appellate court, I do remind myself of the duty to re-consider the evidence adduced bearing in mind that I neither saw nor heard the witnesses who testified. This would call upon me to come to my own conclusions (***see Okeno versus Republic [1972] E.A. 32.)***
10. It is apparent that there was an omission on the part of the prosecution as properly pointed out.
11. The appellant was charged with the offence of defilement. The complainant is said to have been 12 years old. The section creating the offence should have been cited which is **Section 8(1)** of the Act and the Penal Section in the circumstances should have been **Section 8(3)** of the Act. But not **Section 8(2)** of the **Act.**
12. Whether or not failure to cite the correct Section would render the charge defective would be determined if indeed the appellant was prejudiced. Being prejudiced would mean that the content of the charge as framed did not disclose the element of the charge such that the appellant could not tell what case he was intended to meet.(see ***Amedi Omurunga versus Republic- Criminal Appeal No. 1789 of 2012 (Malindi.)***
13. In this case however, without delving into the issue whether or not the charge was indeed defective, the prosecution called evidence to prove that the child was defiled on the 17th day of April, 2008. She went home but did not disclose to any person what had allegedly befallen her. She alleges that the appellant had warned her not to tell anyone. Eleven (11) days later she allegedly saw some blood coming from her private parts. The medical examination report (P3 form) produced is silent on the issue of blood. No evidence was called to explain the cause of bleeding or what exactly it was. At the time of examination by the doctor her hymen was ruptured. It is not stated when it ruptured. Although the complainant explained what allegedly transpired which indeed is defilement there is no proof of when she was defiled.
14. In reaching the verdict the trial magistrate found that there had been penetration. He believed that the complainant was 12 years old. The court did caution itself of the dangers of relying on evidence of a single witness. He believed the complainant on the ground that she was consistent in her evidence as to who her assailant was. However, taking into consideration the duration that had lapsed and the fact that there was no evidence beyond doubt as to when the hymen was ruptured, it could not be proved beyond doubt that it was the appellant who defiled the complainant.
15. In the circumstances, the appeal succeeds.
16. The conviction is quashed, and the sentence meted out set aside. The appellant shall be released forthwith. Unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **19TH** day of **JUNE, 2014.**

L.N. MUTENDE

JUDGE