



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO.99 OF 2010**

**BETWEEN**

**EUPHINALIS MANINI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from original conviction and sentence of the CM's court at Kisii in Criminal Case No.1877 of 2008 – Hon. Njeri Thuku, RM, dated and delivered on 7<sup>th</sup> May 2010)*

**JUDGMENT**

1. The appellant herein Euphinalis Manini was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences act No.3 of 2006**, the particulars thereof being that, on the 27<sup>th</sup> day of August 2009 at [Particulars Withheld] in Kisii South District within Nyanza Province, intentionally and unlawfully penetrated the vagina of R K, a girl aged 3 years using his genital [organ] namely penis.
2. In the alternative, the appellant was charged with the offence of indecent act contrary to **Section 11 (1)** of the **Sexual Offences Act No.3 of 2006**. In this particular count it was alleged that on the 27<sup>th</sup> day of August 2009 at [Particulars Withheld], Kisii South District within Nyanza Province, the appellant did commit indecent act with R K a girl aged 3 years by rubbing his penis against her vagina.
3. At the trial, the State called a total of four (4) witnesses while the appellant gave a sworn statement but did not call any witness.
4. As a first appellate court, it is necessary for this court to interrogate the evidence afresh and come to its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses first hand. Fresh analysis of evidence is a right that the appellant is entitled to at this stage of the criminal justice process as was stated in **Okeno -vs- Republic [1972] E.A. 32 at page 36** where the Court of Appeal in its decision said:-

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya -vs- R. [1957] E.A. 336*) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala -vs- R. [1957] E.A. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it**

**should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters -vs- Sunday Post, [1958] E.A. 424.***”

5. The evidence that was led at the appellant's trial was that the victim's mother (PW1) left her daughter with the appellant. Apparently her daughter was only three (3) years old. The appellant who used to work for the victim's mother (PW1) was to look after the three (3) year old child until PW1 came back from visiting her cousin. She (PW1) came back after visiting and as she was preparing the evening meal the victim narrated to her what transpired while she was away. That the appellant told her (the victim) to lie down on a sack and when she refused the appellant forced her onto the floor, removed her panty and inserted his penis into her vagina. When asked by the victim's mother, the appellant denied the allegations. She then sought help at the nearest facility but was not assisted prompting her to take the victim to Kisii Level 5 Hospital for treatment. She then reported the matter to the police station, and a P3 form was filled for the victim.

6. PW1 the mother of the victim knew the appellant as he was the one who was taking care of her cattle and tilling her shamba. He was also looking after the victim on the 27<sup>th</sup> August 2009.

7. PW2 the clinical officer was the one who examined the victim and filled the P3 form. He relied on the physical examination and treatment notes from Kisii Level 5 Hospital. The P3 form indicated that there were no bruises or inflammation and the victim's hymen was intact. However laboratory tests revealed a sexually transmitted infection which is not normal for a three (3) year old child.

8. He (PW2) also filled in a P3 form for the appellant who he examined on 1<sup>st</sup> September 2009. The laboratory results showed that the appellant had a sexually transmitted infection.

9. The third to testify was Edward Moenda (PW3) Assistant Chief in [Particulars Withheld]. He told the court that he arrested the appellant on 28<sup>th</sup> August 2009 after being informed by a community police person that the appellant had defiled the victim. He told the court that he took the appellant to Gesonso police post and handed him over to the police there. He also identified the appellant in court.

10. Lastly PC Julia Lowoi testified as PW4. She was the investigating officer. She told the court that she received the appellant from PW3 on the 28<sup>th</sup> August 2009 which was the same day the victim and PW1 went to Gesonso police post and she recorded their statements. She testified that she had the appellant examined and a P3 form filled in for him. She produced the victim's panty and petticoat which she was wearing on the day she was defiled as **P. Exhibits 3 and 4** respectively.

11. She testified that after completing her investigations she preferred the charges against the appellant herein.

12. The appellant who gave sworn testimony denied having committed the offence and testified that he was beaten by the vigilante group who arrested him. He told the court that PW1 was out to frame him because he had asked for his wages for the month amounting to Kshs.1000/= which PW1 owed him. He also told the court that the vigilante group was paid Kshs.700/= to arrest him. He failed to substantiate these allegations on cross examination and he did not call any witness. In his testimony he confirmed having worked for PW1 for two (2) months.

13. In her judgment, the learned trial magistrate dwelt at length on the conduct of voir dire examination on the victim. She made a finding that the victim was unable to testify after she failed to answer questions put to her. The learned trial magistrate found the appellant guilty of committing the alternative charge, namely an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No.3 of 2006** and she went ahead and sentenced him to 10 years imprisonment.

14. It is against both conviction and sentence that the appellant has appealed to this court setting out the following homemade grounds:-

1. *That the learned trial magistrate erred in law and fact in entering a plea against him and further in placing him on trial without considering that the failure of the police to arraign him in court within twenty four (24) hours was a violation of his fundamental rights as guaranteed contrary to **Section 72 (3) (b)** of the **Constitution of Kenya**.*

2. *That the learned trial magistrate erred in law and facts in convicting him on the basis of contradictory doubtful and flimsy evidence of the prosecution witness especially the evidence of the clinical officer.*

3. *That the learned trial magistrate erred in law and facts in admitting the evidence of the prosecution witness which was from one family without evaluating that there was no eye witness to support the charges.*

4. *That the learned trial magistrate reached to an opinion without reflecting into the appellant's sworn illustration which she reflected without any cogent reason thus she relied on the prosecution side.*

5. *That the appellant be furnished with true copies of lower court proceedings to enable him lodge more grounds to his appeal.*

1. When the appeal came up for hearing the appellant abandoned grounds 1-4 of the appeal and appealed only on the sentence of ten (10) years as he was satisfied with the conviction. He told this court that he had since learnt a skill in prison and promised to be a useful citizen of this country. He further told the court that he had become God fearing and if released he would continue to serve his family as he was the sole bread winner.

2. In opposing the appeal, Mr. Ochieng for the State told the court that **Section 11 (1)** of the **Sexual Offences Act**, provides for a term of not less than 10 years. It was therefore his position that the ten (10) years sentence imposed upon the appellant was just, legal and a deterrent to others. He urged this court to dismiss the appeal.

3. The court has considered the grounds upon which the appellant's appeal is based and the submissions by both the appellant and counsel for the State.

4. The only issue for determination in this case is whether this court should interfere with the sentence of ten (10) years imprisonment imposed upon the appellant by the learned trial magistrate. Since the appellant abandoned his appeal on conviction, it is not necessary to delve into the evidence to find out whether the conviction of the appellant was well founded.

5. The principles for an appellate court to interfere with the sentence passed by a trial court are now well established. An appellate court will interfere with such sentence if the sentence is excessive in the circumstances of if it is irregular, or where the subordinate court did not impose sentence in accordance with the law. See **Republic -vs- Kiritta [2008] KLR 614** and **JMA -vs- Republic [2—9] KLR 671**.

6. In the instant case, the sentence of 10 years is as provided for under **Section 11 (1)** of the **Sexual Offences Act**. I will therefore not interfere with the lower court's sentence as it is the least that the statute provided for. The appeal therefore stands dismissed and the lower court's sentence upheld. R/A within 14 days from today.

**Dated and delivered at Kisii this 31<sup>st</sup> day of July, 2014**

**R.N. SITATI**

**JUDGE.**

In the presence of:-

Present in person for Appellant

Mr. Majale for Respondent

Mr. Bibu - Court Assistant