REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

[Coram: F.A. Ochieng J.]

CRIMINAL APPEAL NO. 165 OF 2011

DENNIS MURUNGA MULATI……...…APPELLANT

- VERSUS -

REPUBLIC OF KENYA……..……RESPONDENT

[Being an appeal from the judgment of Hon. Mmasi, Senior Resident Magistrate dated 17/8/2011 at the Chief Magistrate's Court – Eldoret in Criminal case No. 532 of 2011]

JUDGMENT

1. The appellant, **DENNIS MURUNGA MULATI**, was convicted for the offence of Defilement of a child contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. He was then sentenced to Life Imprisonment.
2. In his appeal to this court, the appellant has raised seven issues, which can be summarized as follows;

i. *The age of the complainant was never proved to have been 11 years.*
ii. *The person who recovered the knife which was allegedly used to threaten the complainant did not testify.*
iii. *The father of the complainant did not testify, yet it is he who allegedly reported the incident to the police.*
iv. *The evidence was inconsistent considering that although the complainant's hymen was torn, the doctor who examined her did not see any blood; and also considering that the complainant's mother and her brother did not see the complainant walking with difficulty.*

v. *The Medical Report from Turbo District Hospital, where the complainant was first seen, was not brought to court.*
vi. *The prosecution case was full of contradictions.*
vii. *The language used during the trial was not recorded, thus violating section 197 (1) of the Criminal Procedure Code.*

3. Whilst canvassing his appeal, the complainant noted that the doctor who conducted the age assessment never specified her age. The doctor only said that the complainant was below 18.
4. The appellant also submitted that the complainant cannot be believed when she alleged that the assailant threatened her with a knife. His reason for that submission was that the complainant never informed her mother or her brother about such a threat. Those two were the first persons to come into contact with the complainant after the incident.

5. Furthermore, the failure by the complainant's father to testify is said to have left a gap in the chain of events concerning the recovery of the knife and its handing over to the police. The appellant pointed out that it was the father of the complainant who allegedly handed over the knife to the police, when he went to report the incident.
6. In the appellant's view the issue was made even worse by the failure to have the complainant identify the alleged knife when she gave evidence.
7. The appellant also stressed the delay in taking the complainant for medical examination after the incident. In his view, there was a delay of one month. And that delay was not explained. In the circumstances, the appellant submitted that the case against him was an afterthought.
8. Finally, the appellant faulted the trial court for failing to record the language in which the proceedings were recorded. That failure was said to constitute a violation of Section 197 (1) (a) of the Criminal Procedure Code.
9. In answer to the appeal, Miss Mwaniki, learned state counsel, submitted that it had no merit.
10. The respondent's view was that the age of the complainant was proved, following a medical assessment at the hospital.
11. The Clinical Officer who examined the complainant is said to have confirmed that there has been defilement, as the complainant's hymen was torn and her vagina was reddened.
12. The absence of the medical records from Turbo District Hospital was deemed to be insignificant because the actual medical examination on the complainant was conducted at the Moi Teaching and Referral Hospital.
13. There was proof of defilement, and the perpetrator was described by the respondent, as a well known neighbour to the victim. Therefore, the conviction by the trial court was described as safe.
14. Being a first appellate court I have re-evaluated all the evidence on record.
15. The particulars of the offence with which the appellant was charged were as follows;

> ***"DENNIS MURUNGA MULATI:*** *On the 30th day of January 2011 at [Particulars Withheld] in Uasin Gishu District within Rift Valley Province, unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ (vagina) of A N, a girl aged 11 years".*

16. The complainant said that on the material day, her mother and her siblings went to church. She was left behind, at home, as there was nobody else there. Whilst at home, she was to prepare bananas, for lunch.
17. Whilst the complainant was preparing the said bananas, the appellant called her, so that he could give to her the cooking fat needed to fry the bananas.
18. After using the cooking fat, the complainant returned to the appellant's house, the container in which the fat was. It is when the complainant reached the appellant's house that he pulled her into the house and then defiled her. That is the complainant's story.
19. **D (PW2)** is the complainant's brother. When his mother went to church, PW2 remained at home where he went to herd sheep.
20. PW2 did return home to fetch water for the sheep. But he did not find the complainant at home.
21. A short while later, PW2 saw the complainant emerging from the house of the appellant. When he inquired from her what she was doing at that house, the complainant informed him that the appellant had defiled her.
22. **PW3 (B)** is the mother of the complainant. She testified that the complainant was eleven (11) years old.
23. PW3 was in church when the incident happened, therefore, she only learnt about it from the complainant, later.
24. During cross-examination, PW3 told the appellant that when she had questioned him about the incident, the appellant had confirmed that he did defile the complainant. However, he then asked PW3 to pardon him.
25. **PW4, DR. CYNTHIA JEMUTAI KIBET,** was a medical doctor based at the Moi Teaching and Referral Hospital, Eldoret. Before examining the complainant, the doctor got the complainant to tell her the history of her complaint.
26. According to the doctor, the incident in question was the second time when the appellant defiled the complainant.

27. The complainant also told the doctor that the appellant had threatened to stab the complainant using a knife.
28. A physical examination by the doctor revealed that the complainant's hymen was torn and that there was redness of the vagina. There was, however, no spermatozoa.
29. The doctor also produced the Age Assessment Report on the complainant, which showed that the said complainant was a person who was under 18.
30. **PW5, AP NELSON NJOROGE,** is an Administration Police officer. He was attached to the Kipkaren AP post, at the material time.
31. PW5 was at the AP post when the father of the girl reported that they had arrested the person who had defiled their daughter. At the time the girl's father was making the report, he was accompanied by **JULIE ROP.**
32. The girl's father delivered to PW5, the knife which the assailant had used when threatening the complainant.
33. **PW6, CPL ADAN HUSSEIN,** is a police officer attached to the Turbo police post at the time in issue. One day after the complainant's father reported at the Kipkaren AP post, concerning the arrest of the appellant, the said father escorted the appellant to the Turbo police post. On that day (the 3rd of February 2011), the complainant accompanied her father to the police post.
34. The girl's father also delivered the knife to the police post at Turbo.
35. After the prosecution closed its case, the appellant gave a sworn defence. He denied committing the offence.
36. He then explained that he was arrested by a village elder on the Tuesday after the alleged incident had taken place on the Sunday.
37. As regards the said Sunday, the appellant said that he was at home, washing clothes. He then had lunch before going to watch football until evening.
38. Considering that the incident happened between the hours of 8.00 a.m and 2.00 p.m, that would imply that if the appellant was at home on that morning, he could have had the opportunity to commit the offence.
39. Secondly, the appellant confirmed that he was a neighbour to the complainant's family. That implied that he was not a stranger. In effect, this was a case of recognition.
40. Thirdly, the incident took place in broad daylight; therefore, there was no room for any mistaken identification.
41. It is noted that the person who recovered the knife is the girl's father, **J.** That person did not testify. Therefore, it is not known exactly in what circumstances the knife was recovered.
42. The complainant did not mention a knife, when she testified. Furthermore, the knife which had been allegedly used to threaten her, was never shown to the complainant, to enable her confirm whether or not the knife exhibited in court was the one which the assailant had.
43. I note that the complainant made reference to the threats by the assailant, to cut her if she cried. But she did not specify the weapon, implement or item with which the assailant threatened her.
44. In the circumstances, I find that the knife, as an exhibit, did not advance the case for the prosecution at all.
45. On the other hand, I note that the said knife was not used to inflict any injury on the complainant. And because the presence or otherwise of a dangerous weapon or instrument is not an ingredient of the offence of Defilement, I hold the view that the failure to have the knife identified by the complainant, or to be produced by her father, did not diminish the prosecution's case.
46. That is even more so when it is borne in mind that the particulars of the offence do not cite any knife.
47. In relation to the report about the incident, it was the girl's father who reported it at the Kipkaren AP post. Thereafter, he was with the complainant when he reported the said incident at the Turbo police post, on the day after he had been at the Kipkaren AP post.
48. The presence of the complainant at the Turbo police post, when the father reported the incident, served to close any gap which could otherwise have remained if it was only father who reported the incident and then failed to testify.
49. The girl's brother and mother did not testify that the complainant walked with difficulty at the time immediately after being defiled. The appellant submitted that that meant that the girl had not been defiled.
50. On my part, I do think that the submission by the appellant is not the only conclusion that can be

drawn from the absence of evidence that the complainant walked with difficulty. There is no requirement, either in law or in fact, that all victims of defilement must walk with difficulty.

51. In this case, the victim had had one previous incident with the appellant. The fact that the incident in issue was the second one may explain why the complainant did not walk with difficulty. Secondly, that fact may also explain why there was no bleeding observed by the doctor when he examined the girl. I say so because if the hymen was torn on the first occasion, there would not be bleeding during the second instance when the complainant's genitalia was subjected to penile penetration.
52. As regards the absence of any medical report from Turbo District Hospital, I note that although that is the hospital where the complainant was first taken, there is no evidence that she was either examined or treated there. The complainant said that she was taken to the Turbo Hospital, then to the Moi Teaching and Referral Hospital.
53. It is therefore entirely possible that no medical report was ever prepared at the Turbo District Hospital. In the event, it may be misleading to criticize the prosecution for failing to make available a medical report which the appellant has not demonstrated to have been prepared.
54. The other point raised by the appellant was that the complainant was only taken for medical attention after one month. The delay was said to have been un-explained by the prosecution.
55. In the charge sheet, the incident is said to have taken place on 30th January 2011. The complainant confirmed that date in her evidence.
56. Her brother and her mother both corroborated the evidence of the complainant on the issue as to the date when the complainant was defiled.
57. PW5 testified that the incident was reported at the Kipkaren AP post on 2nd February 2011. And on the next day (3rd February 2011) the incident was reported at the Turbo police post.
58. The arrest of the appellant was effected on 4th February 2011.
59. It is on the same date (4th February 2011) that Dr. Kibet examined the complainant at the Moi Teaching and Referral Hospital. That date is specified at "Section B" of the P3 Form, which the doctor ultimately filled and signed on 7th February 2011.
60. From that chronology of events, it is obvious that the appellant got it wrong when he asserted that there was a delay in taking the complainant for medical examination.
61. As regards the language in which the trial court recorded the evidence, the appellant submitted that there was a violation of Section 197 (1) of the Criminal Procedure Code. That section reads as follows;*"197 (1) In trials by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner –*

a. *the evidence of each witness shall be taken down in writing or on a typewriter in the language of the court by the magistrate, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the magistrate, and shall form part of the record.*
b. *Such evidence shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative;Provided that the magistrate may take down or cause to be taken down any particular question and answer".*

62. The language of the Magistrates Court is either Kiswahili or English. Therefore, pursuant to the provisions of Section 197 (1) above – quoted, the trial court was obliged to record the answers of the witnesses in either English or Kiswahili.
63. A perusal of the original record reveals that the proceedings were all recorded in English. By doing so, the learned trial magistrate complied with the law.
64. In my understanding, the only shortcoming in the record is that the court did not cite the language spoken by each of the witnesses.
65. As the appellant had made it clear that he understood Kiswahili, there would have been a need for translation if any of the witnesses testified in either English or in any other language, apart from Kiswahili.
66. In this case, the appellant did not complain that the proceedings or any part thereof was conducted in a language which he did not understand.
67. In any event, given the nature and relevance of the questions asked during cross-examination, it does appear to me that the appellant ably followed the proceedings. Therefore, the failure to indicate the language in which each witness testified cannot have prejudiced the appellant.

68. In conclusion, there was sufficient evidence to prove that the appellant defiled the complainant. However, there was no evidence to prove that the complainant was eleven years old.
69. Whilst a mother is presumed to know the age of her children, her word alone is not sufficient proof. As the appellant submitted, a Birth certificate; a Clinic card or a Baptismal card are all documents which can be admissible as evidence to prove age.
70. In this case no such document was produced. Instead, a medical doctor produced an Age Assessment Report. Such a report is perhaps the most scientific proof of age.
71. However, the report did not show that the complainant was 11 years old, as at the time the offence was committed.
72. Why is proof of the complainant's age so important in cases of defilement?
73. It is because that offence can only be committed in respect to a child. It cannot be committed against an adult.
74. Secondly, it is because the sentences to be handed down against the offender is determinable on the basis of the age of the victim.
75. Pursuant to Section 8 (2) of the Sexual Offences Act, a person convicted for defiling a child who was aged eleven years or less, shall be sentenced to life imprisonment.
76. If the victim is aged between 12 and 15, the offender is liable to imprisonment for a term not less than 20 years.
77. And if the victim was a child between 16 and 18, the offender may be sentenced to imprisonment for a term not less than 15 years.
78. First, it is to be noted that no specific sentence is prescribed if the offence is committed against children aged;

i. *between 11 and 12; and*
ii. *between 15 and 16.*

79. Secondly, I hold the considered view that if the prosecution proves that the child had been defiled, then a conviction must result. The only difficulty would be in relation to the appropriate sentence, if the prosecution did not prove that the victim was of the age specified in the charge sheet.
80. Surely, it cannot have been the intention of the legislature to set free offenders when the age of their child victims was not specifically proved. I believe that the offender would, in such circumstances, be entitled to most lenient sentence, in line with the age that is proved.
81. In this case, defilement was proved. But the only proof of age was that the victim was under 18. Therefore, the appellant ought to have been imprisoned for a term of not less than 15 years.
82. In the result, I uphold the conviction, but set aside the sentence of Life Imprisonment. I direct that the appellant be imprisoned for to SEVENTEEN (17) YEARS. The said sentence will run from 17th August 2011, when the trial court first handed down the sentence.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 25th day of July 2014.

FRED A. OCHIENG

JUDGE

Judgment read in open court in the presence of

Appellant in person.

N/a for the Respondent.