



No. 345/2014

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS  
CRIMINAL APPEAL NO. 178 OF 2013

MBAI KATUVU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in Mutomo Senior Resident*

*Magistrate's Court Sexual Offence Case No. 11 of 2013 by Hon. S.A Ogot, RM on 2/8/2013)*

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**JUDGMENT**

1. The appellant 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**. Particulars of the offence being that on **3<sup>rd</sup>** day of **May, 2013** at about **9.00pm** at **Kalambani Market, Mutha Location** of **Mutomo District** within **Kitui County**, intentionally caused his penis to penetrate the vagina of **K S** a child aged **5 years**.
2. 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**. Particulars of the offence being that on **3<sup>rd</sup>** day of **May, 2013** at about 9.00pm at **Kalambani Market, Mutha Location** of **Mutomo District** within **Kitui County**, intentionally touched the vagina of **K S** a child aged **5 years**.
3. He was tried, convicted and sentenced to serve **life imprisonment**. Being aggrieved by the conviction and sentence thereof, he now appeals on grounds that;-
  - i. The trial magistrate erred in law and fact when she failed to find that the charge sheet was defective.
  - ii. Evidence adduced was contradictory.
  - iii. A grudge existed between the mother to the complainant and the appellant.
4. The case presented by the prosecution was that on the **3<sup>rd</sup> May 2013** at **9.00pm S K, PW1**, a mother to the child **K S** aged **5 years** was cooking in the kitchen while her children were in the main house. She

had left the door open. She went to check on them only to find the door locked. She knocked the door. The appellant opened the door; he had only the shirt on. Child **K** lay on the bed without clothes. She demanded to know what he had done to the child and he did not respond. His pair of trousers was under the bed while the child's pant was outside the door. He left with only the shirt.

5. PW1 checked the child and found discharge around her private parts and the abdomen. She called **Ngayao** and **Mativo, Nzau Nzoo** and **Kaweni**. They arrested the appellant and took him to the Police Station. The child was subjected to examination. A P3 form was filled by **PW7, Benjamin Mwanzia**, a Clinical Officer. He found whitish discharge on her. Her hymen was broken. Further investigations in the laboratory showed pus cells and red blood cells. He formed an opinion that the child had been defiled. **PW6, No. 641515 Corporal Benedict Kiptoo** re-arrested the appellant, investigated the case and caused him to be charged.

6. In his defence, the appellant stated that he was in his house at **9.00pm** when three people went and knocked at his door. They tied him up and took him to the Police Station. The following day he was taken to hospital with the child for examination. Nothing was detected. The following day he was released. He went home. **Six (6)** days later he was re-arrested. He stated that PW1 had his debt and when he asked for it she accused him falsely.

7. This is the first appeal. I am duty bound to re-evaluate evidence adduced in the trial court, make inferences and come up with my own conclusions bearing in mind the fact that I neither saw nor heard witnesses who testified. (See **Pandya versus Republic [1957] E.A. 336; Okeno versus Republic [1973] E.A. 32**).

8. It is the appellant's contention that the charge was defective. A charge would be fatally defective if it does not allege essential ingredients of an offence. In the case of **Sigilai versus Republic [2004] 2 KLR 480**; it was stated thus:-

***"The principal of the 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 that he can understand. It will also enable an accused person to prepare his defence."***

9. This is a case where the appellant was charged with an offence that is stipulated by statute. The ingredients of the offence of defilement are captured. It was clear the appellant understood the charges as a result he was able to participate in proceedings and defend himself appropriately. No defect in the charge has been disclosed.

10. Per the evidence adduced, on being examined the child's hymen was broken. There was evidence of whitish discharge, pus cells and red cells. This was evidence that some foreign body penetrated the sexual organ of the child. The fact that there were pus cells and a whitish discharge was evidence of a male organ having been inserted into the child. Nobody witnessed the act but we have the evidence of PW1 who states that the person who opened the door which had been locked was the appellant who was half naked. In the case of **Ongweya versus Republic [1964] E.A. 12**. It was held that the commission of a sexual offence can be corroborated with circumstances.

11. Circumstantial evidence is the proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to establish the guilty or innocence of defendant (**see people versus Jones (1985) 105, III, 2d 342**). Although the appellant stated that he was in his house when arrested, there is evidence that he opened the door to the room where the child lay on the bed having been defiled. The appellant was half naked. He only wore a shirt. **PW2, N M** was the first to reach the scene of the incident when she heard screams. She found the appellant outside PW1's house and he had a shirt and a lesa wrapped around his waist. This evidence confirms that the appellant did not have a pair of trousers. The question will be, what was he doing at the house of PW1? In his defence he alleged that PW1 was indebted to him. This issue was not raised in cross-examination in order for the witness to respond thereto. She was not tested at all on that allegation. The circumstantial evidence adduced points to the

appellant as the person who defiled the child. The trial magistrate did not err in reaching the finding she did.

12. The appellant argues that there was a contradiction as to the date of his arrest. Witnesses claimed he was arrested on the **3<sup>rd</sup> May, 2013** while the charge sheet indicates the **12<sup>th</sup> May, 2013**. It is in evidence that the accused was arrested, released and re-arrested. In that regard there was no contradiction.

13. On sentence, the child was examined by a Clinical Officer. Her age was given as **5 years** old. PW1, the mother of the complainant stated that she was **6 years old**. This was a child of less than **eleven years**. The sentence provided for is **life imprisonment**. In the premises, the sentence meted out was within the law.

14. From the foregoing, the appeal must fail. Accordingly, it is dismissed.

**DATED, SIGNED and DELIVERED at MACHAKOS this 24<sup>TH</sup> day of JULY, 2014**

**L.N.MUTENDE**

**JUDGE**