



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. 99 OF 2011**

**JACKSON MWANZIA MUSEMBI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*Being an appeal from the original sentence and conviction in Makindu Principal Magistrate's Court  
Criminal Case No. 237 of 2012 by Hon. P. Wambugu , RM on 10/5/2013)*

**JUDGMENT**

1. The appellant, **Jackson Mwanzia Musembi** was charged with the offence of defilement contrary to **Section 8(1) and (2)** of the **Sexual offences Act No. 3 of 2006**. Particulars thereof being that on the **8<sup>th</sup>** day of **March, 2012** at around **9.00pm**, at **[Particulars Withheld] village**, within the **Makueni County** intentionally and unlawfully caused his male genital organ namely penis to penetrate to the female genital organ namely vagina of **M M** a child aged 11 years.

2. In the alternative the appellant was charged with the offence of committing an indecent act contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that **8<sup>th</sup>** day of **March, 2012** at around **9.00pm**, at **[Particulars Withheld] village**, within the **Makueni County** intentionally and unlawfully manipulated his fingers to touch the genital organ namely vagina of **M M**.

3. He was tried, convicted on the main charge and sentenced to **life imprisonment**.

4. Being dissatisfied with the conviction and sentence thereof, he now appeals on grounds that:-

i. The learned trial magistrate erred in law and fact by violating the provision of the law by not subjecting the complainant to a preliminary examination to establish if indeed she understood the nature and purpose of oath as provided by **Section 19(1)** of the **Oaths and Statutory Declarations Act**.

ii. Identification/recognition evidence adduced was not cogent.

iii. Evidence adduced was contradictory.

iv. There was no evidence of penetration.

v. No DNA test was conducted on him (*appellant*) as required by **Section 36(1) and (2) of Sexual Offences Act.**

vi. Crucial /essential witnesses were not availed.

vii. The defence put up was rejected for no apparent reason.

viii. The case was not proved to the required standard.

5. Brief facts of the case are that on the **8<sup>th</sup> March, 2012** at about 9.00pm, **PW1, M M** went to the toilet and encountered the appellant. They had sex. PW4, **J W** found them engaging in sexual intercourse. He sought assistance of the owner of the hotel nearby. They arrested the appellant. PW1 was subjected to medical examination by **Dr. Shabaani Khalid** who found her hymen broken and there was a presence of discharge leaking from her vagina. Hence the case.

6. When put on his defence the appellant stated that he was at home when some three people went and arrested him for no apparent reason. He was taken to **Kiunduani Police Post**. The next day he was taken to **Makindu Police Station**. He was later charged.

7. At the hearing of the appeal, the appellant opted to rely on his written submissions. He did buttress the thirteen (13) grounds of appeal raised that I have condensed into eight.

8. The state opposed the appeal. **Mr. Gikonyo**, the Assistant Director of Public Prosecution submitted that the appellant was arrested by PW3 and 4 while in the act of defiling the complainant. Evidence adduced by the Doctor confirmed that the complainant was defiled. He called upon the court to confirm the conviction and sentence that was within the law.

9. It is the duty of this court, being a first appellant court to subject evidence on record to a fresh review and scrutiny in order to come up with its conclusions bearing in mind that it did not have an opportunity of either seeing or hearing witnesses who testified. (*See Okeno versus Republic [1972] E.A. 32*).

10. The trial magistrate has been faulted for not conducting a *voire dire* examination on PW1 the victim of the offence as required by **Section 19(1)** of the Oaths and Statutory **Declarations Act (Cap 15)**.

11. In this case at the opening of the trial the learned magistrate remarked thus:-

***“Court conducted intelligence and I do find she understands the nature of the oath. She is sufficient intelligent to understand same and its effects”.***

12. The Court of Appeal had this to state in the case of *Johnson Muiruri versus Republic [1983] KLR 447*.

***“We once again wish to draw the attention of our courts to the proper procedure to be followed when children are tendered as witnesses.***

In *Peter Kanja Kiume, Criminal Appeal No. 77 of 1982(unreported)* we said:-

***“Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of oath in which even his sworn evidence may be received. If the court is so satisfied his unsworn evidence may be received....***

***It is important to set out questions and answers when deciding whether the child is of tender years understands the nature of the oath so that the appellate court is able to***

***decide whether this important matter was rightly decided, and not be forced to make assumptions”***

13. The court did not adopt the proper procedure of establishing if the child was intelligent enough to understand the nature of the oath. It was important for him to frame questions soliciting answers from the child which should have been recorded to enable the Appellate Court looking at it to discern if indeed the child was as intelligent as stated by the trial court.

14. The question I should therefore answer is whether the omission was fatal to the prosecution’s case?

15. In the case of *Muhamed versus Republic*[2008] 1KLR 1175 the court stated thus:-

***“The recording of a voire dire (under Section 19 of the Oaths and Statutory Declarations Act) in the form of questions and answers may be an appropriate procedure where the procedure for recording proceedings is an elaborate one with shorthand personnel and electronic recording as it is in England. The requirement for recording proceedings in Kenya is however, regrettably, still in longhand and it is not mandatory to record both the questions and answers from witnesses, unless in the circumstances of any particular case, there is need for emphasis.***

***Whether a child is of tender years remains a matter of the good sense of the court.”***

16. With this decision in mind it is important to determine if PW1 was a child of tender years. The Doctor who examined PW1 found her to be aged **eleven (11) years** old. This fact was not in dispute. According to **Section 2** of the **Children’s Act [2001]** **“child of tender years”** is a child under the age of ten years. This being the case the omission to conduct a *voire dire* examination on PW1 was not detrimental to the prosecution’s case.

17. The complainant was examined after the act and it was found that her hymen was broken. This was evidence of having engaged in sexual intercourse. In her evidence PW1 said when she encountered the appellant who asked her to remove her clothes. She undressed and lay down. The appellant also undressed and used his genital organ to penetrate into her genital organ (vagina). After the act she went to the house. The appellant had nothing to ask in cross-examination. He did not dispute her evidence.

18. PW3, **F M K** and PW4, **J W** found the appellant and PW1 in the act of sexual intercourse. The evidence of PW1 that the appellant penetrated her was corroborated by that of PW3 and PW4. Therefore, the appellant’s defence that he was at home prior to his arrest is unbelievable. The trial magistrate had good reasons in disregarding the appellant’s defence. He clearly stated that he was caught red handed hence he could not be believed when he alleged he was at his home at the time of the commission of the offence.

19. It is stated that DNA test was not done pursuant to the provisions of **Section 36(1) & (2)** of the **Sexual Offences Act**. The alluded Section provides:-

***“(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.***

***(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the***

*trial.”*

20. It is not a mandatory requirement. The law gives the court the discretion to have a DNA test done in order to establish if indeed an accused person committed the alleged offence. Such evidence would be useful if collected at the scene of crime and not interfered with. This seems to be a case where the victim had consensual sex. Such evidence should have been collected then. The appellant was caught in the act by people without knowledge in forensic who handed him over to the authority. It would have been pointless for the court to make an order envisaged by **Section 36** of the **Act**.

21. Having re-evaluated the evidence adduced I have no reason to interfere with the findings of the Lower Court. The sentence mated out was also legal ( *vide Section 8(2)* of the **Sexual Offences Act**).

22. In the result, the appeal is devoid of merit. It is dismissed in its entirety.

**DATED, SIGNED and DELIVERED at MACHAKOS this 16<sup>TH</sup> day of SEPTEMBER, 2014.**

**L.N. MUTENDE**

**JUDGE**