



No. 412/2014

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL 140 OF 2012

NDIVO NZEU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court

Criminal Case No. 115 of 2012 by Hon. S.K. Mutai, R.M on 26/9/2012)

JUDGMENT

1. **Ndivo Nzeu**, the appellant was charged with the offence of defilement contrary to **Section 8(1) (4)** of the **Sexual Offences Act**. Particulars of the offence being that on the **28th** and **29th** day of **May, 2012** at unknown times at [**Particulars Withheld**] in **Mutomo District** within **Kitui County** intentionally and unlawfully caused his penis to penetrate the vagina of **M K** a child aged 16 years.

2. In the alternative he faced a charge of committing an act of indecency with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **28th** and **29th** day of **May, 2012** at unknown times at [**Particulars Withheld**] in **Mutomo District** within **Kitui County** committed an Act of indecency with **M K** a child aged 16 years by touching her private parts namely breasts and vagina.

3. Having pleaded not guilty to the charge the case was heard. The appellant was found guilty, convicted on both charges and sentenced to **ten (10)** years imprisonment.

4. Being aggrieved by the conviction and sentence thereof in a supplementary petition of appeal the appellant appeals on grounds that:-

- i. The evidence adduced did not support the charges;
- ii. The complainant was not medically examined;
- iii. The age of the complainant was not established;
- iv. Conviction on the principal and alternative charge was erroneous.

5. Both parties opted to dispose of the appeal by way of written submissions.
6. This being the first appellate court, I have to re-consider and re-evaluate evidence adduced in the Lower Court and come up with my own conclusions bearing in mind that I neither saw nor heard witnesses who testified. (See *Okeno versus Republic [1972] E.A. 32*).
7. Briefly, the facts of the case were that on the **28th May, 2012** at about **6.00pm** PW1, **M K** left school going home. She boarded a motor-vehicle and alighted at a stage. She met the accused who promised to get her a motorcycle that would take her home. Thereafter he took her to the lodging. They slept until 1.00a.m. A motor-cycle arrived and took her home. She reached at 2.00am. The following day she went to school. Her teacher sought to know where she had been. They reported the matter to the police. She was examined. The accused was arrested and charged. She denied knowing the appellant.
8. In his defence the appellant stated that he was framed up. He denied having been at the scene of the incident. He stated that he was arrested while on his way to work as a conductor.
9. According to evidence adduced by PW5, **Daniel Mulwa** a clinical officer, on examination the complainant had normal genitalia. There was no vaginal discharge. There was however, spermatozoa seen following a high vagina swab. He concluded that defilement had occurred.
10. This is a case where the complainant stated that she went to a room with the accused and they slept but nothing happened. Her evidence in actual sense was a denial of having engaged in sexual intercourse with the accused. Further, she denied knowing the appellant and claimed that the person she referred to as the accused was not in court.
11. The trial magistrate in convicting the appellant based his finding on the fact that PW2, **M M** stated that he saw the complainant and accused inside the room. He later reported the matter to her teacher PW3, **Onesmus Mutua** who caused the report to be made to the police.
12. The clinical officer concluded that defilement had occurred due to the spermatozoa that were found in the girl's vagina. What was evident was the fact that the vagina was normal on examination would be a suggestion that the girl was sexually active. Having denied that she even knew the appellant, it is possible that she could have engaged in coitus with any other person other than the appellant.
13. In the circumstances it was a misdirection for the trial magistrate to reach a finding that it was the appellant who defiled her.
14. It was also erroneous for the learned trial magistrate to convict both on the principal and alternative charge.
15. From the foregoing, the appeal succeeds. The conviction is quashed and the sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 23RD day of OCTOBER, 2014.

L.N. MUTENDE

JUDGE