



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL APPEAL NO.51 OF 2011**

**SAMWEL KANAGI MUCHIRI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal against the Conviction and Sentence by the Resident Magistrate Hon. N. Wairimu at Kericho in S.O Case No.35 of 2010 on 26.09.2011)*

**J U D G M E N T**

1. **SAMWEL KANAGI MUCHIRI** the appellant herein was charged with the offence of Defilement contrary to **Section 8(1)** as read with **Section 8 (4)** of the **Sexual Offences Act No.3 of 2006**. The particulars as stated in the charge sheet were that the appellant on diverse dates between 1st day of May to 3rd day of May 2010 in Kericho District within the Rift valley Province willfully and unlawfully did cause his penis to penetrate the vagina of **AWM** a child aged 16 years in violation of **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act No.3 of 2006**.
2. He faced an alternative charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No.3 of 2006**. The particulars being that the appellant on the diverse dates between 1st day of May to 3rd day of May 2010 in Kericho district within the Rift valley Province did intentionally and unlawfully cause his fingers to come to contact with the vagina of **AWM** a girl aged 16 years contrary to **Section 11 (1)** of **Sexual Offences Act No.3 of 2006**.
3. The appellant denied the charges and the matter proceeded to full hearing and he was convicted on the principal court and sentenced to fifteen years imprisonment. Being dissatisfied with the judgment he appealed against both the conviction and the sentence raising the following grounds vide the Supplementary Petition of Appeal filed by Mr. Motanya when he came on record.
  - a. ***THAT*** the learned Magistrate erred in law and in fact in that she failed to consider the fact that the evidence adduced by PW2 and PW3 did not mention the accused person having been found in the act of defiling. PW2 and PW3 only stated that they were informed by PW1 and therefore their evidence is purely hearsay.
  - b. ***THAT*** the learned Magistrate erred in law and in fact in failing to consider the fact that although PW1 stated that she was defiled in the presence of the accused's wife, the said wife was never called as a prosecution witness.
  - c. ***THAT*** the learned Magistrate erred in law and in fact in failing to consider the fact that the

prosecution evidence lacked corroboration and that the evidence was fabricated to suit the complainant.

d. **THAT** the learned Magistrate erred in law and in fact in that she failed to consider the fact that the prosecution failed to establish the actual age of the complainant by either producing a birth certificate or sending the complainant for age assessment.

e. **THAT** the learned Magistrate erred in law and in fact that she shifted the burden of proof in seeking the defence to challenge the prosecution's case in several instances including the age of the complainant.

f. **THAT** the learned Magistrate erred in law when he considered extraneous circumstances in arriving at the decision that she made.

g. **THAT** the learned Magistrate erred in law in considering the evidence of a single witness (PW1 the complainant) to arrive at her judgment.

h. **THAT** the judgment was bad in law and never considered the mitigating circumstances of the case. It was biased and never analyzed evidence before court.

i. **THAT** the sentence awarded was harsh and excessive in all circumstances of this case and it was in contravention of the Sexual Offences Act for failure to ascertain the age of the complainant.

4. The Prosecution called a total of six (6) witnesses. Brief facts of the prosecution case are that the Complainant a student at [Particulars Withheld] Form two then, was on 1st May 2010 at Sondu to visit her sister MW. She did not find her sister but met Mama Peter at the market at 6.00pm. The said Mama Peter did not know PW1's sister but invited her to her home where she stayed for four days. While there she was twice defiled by Mama Peter's husband who is the appellant. He did this in the presence of his wife.

5. In this house was the Appellant, his wife, two children and the Complainant. She could not scream as the Appellant's wife covered her mouth as the appellant defiled her. The next morning after the first incident she reported the matter to Mama Njeri (PW2) who advised her to go back and see if it would be reported. After the second incident she went back to PW2 and informed her. PW2 organized the market women who took her to the police station and the matter was reported.

6. The appellant was arrested and him and PW1 were taken to hospital for exam. PW6 **Haron K. Rotich** a Clinical Officer at Sigowet Subdistrict Hospital produced two P3 forms in respect of PW1 and the accused. EXB 1&2 are treatment notes and P3 form in respect of PW1 while EXB 3 was the P3 form for the accused. From his evidence all the exam and tests done on PW1 were negative. PW3 and PW4 knew of the matter when they were asked to contribute money, to cater for PW1's transport.

7. The appellant had initially stated that he could give unsworn evidence and call three witnesses. However, on the hearing date he decided he would not give any evidence.

8. When the appeal came before me for hearing Mr. Motanya submitted on ground **4&5** saying the Complainant's age was never ascertained. He further submitted in respect to ground **3&7** that the evidence of PW1 was never collaborated. That even the medical evidence by PW6 did not support the charge. Finally, he submitted that there was no connection in law between the appellant and the Complainant.

9. Mr. Mutai the learned Senior Counsel opposed the appeal saying age was established by PW1. And that her evidence was clear and was supported. She was not a child of tender years he said. For corroboration he asked the court to look at the consistency of PW1's evidence which was corroborated by that of PW3 and PW4. On the P3 form he further submitted that the findings on the P3 form were well explained by the Clinical officer.

10. This court as a 1st appeal has a duty to re-evaluate and reconsider the evidence adduced together with the grounds of appeal and arrive at its own conclusion. I am alive to the fact that I did not see nor hear the witnesses. See

**Ngui v. Republic (1984) KLR 729**

**Soki v. Republic (2004) 2 KLR 21**

**Ajode v. Republic (2004) 2 KLR 81**

**Simiyu & Anor. v. Republic (2005) 1 KLR 192**

11. I have considered the evidence on record alongside the supplementary grounds of appeal. I have equally considered the submissions by both counsels appearing herein.

12. Upon analysis of the grounds of appeal I have decided to consolidate them into one and deal with the issue of whether there was sufficient evidence to found a conviction of the appellant. In this I will broadly look at the elements of:

**a. Age**

**b. Medical evidence.**

**c. Evidence of a single witness**

13. The Sexual Offences Act places age at the center of most of the offences under the said Act. The reason being that the sentencing under this Act and in particular **Section 8** of the **Sexual Offences Act** are pegged on age. It is therefore not sufficient for one to argue that the complainant stated her/his age and that is sufficient. The trial court if not certain of a complainant's age has the power to order for an age assessment at a Government facility.

14. In this case it is clear that besides PW1's word of mouth there was no proof of her age. The age indicated in the P3 form EXB2 was not after an age assessment but what PW1 told the examining officer.

15. The learned trial Magistrate was very well aware of the need to establish age. She states this in her judgment at page 19 of the typed proceedings.

***“I have considered the fact that the complainant's age was not proved by way of medical or other evidence except for the reference by the clinical officer to the effect that the complainant was about sixteen years old, this in my considered view is sufficient especially considering the fact that the complainant was on transit and was therefore unable to provide any proof of age.”***

16. With all due respect PW1 was not on transit to any place. From her evidence she had come to visit her sister and nobody knows for how long she wanted to stay. In other words she had arrived. The moment the learned trial Magistrate realised that the issue of age was not established she ought to have *suo moto* ordered for an age assessment. She did not.

### **Medical Evidence**

17. The medical evidence in this case was provided by PW6 a clinical officer. He stated the following:-

*i. Approximate age of injuries – three days*

*ii. There was no tear or bruises on the labia majora and minora.*

*iii. No bruising or tear*

iv. *No discharge or blood from genitals after examination*

*Lab report*

v. *No spermatozoa*

vi. *pregnancy negative*

vii. *STD negative*

viii. *HIV negative*

ix. *Urine analysis- nothing detected.*

x. *Degree of injury assessed as harm*

18. After finding all these tests and exam negative, he assessed the injury as harm. This is serious! It is quite true as submitted by Mr. Mutai the learned Senior Counsel that the absence of tears or bruises is not evidence of lack of sexual assault. Medical evidence in a case of sexual assault is there to support or give credence to the claim of sexual assault.

19. The alleged sexual assault is said to have occurred on the nights of 1st and 3rd May 2010. It was the evidence of PW1 that she reported to PW2 after the first incident of defilement. PW2 in her wisdom or lack of it told her to stay and see if it happened again. PW2 does not however refer to this in her evidence. The complainant reported at PW2's house on 4th May 2010 at 6.00am.

20. The treatment notes (EXB1) again shows that PW1 reported at the Health facility on 5th May 2010 for treatment. The women around this girl (namely PW2 and PW4) did not see any need for urgent action. According to PW6 spermatozoa cannot be detected after 72 hours or if the victim has bathed. For PW1's case no spermatozoa were detected, but she had been presented to the hospital in less than 72 hours!

21. In this case the support required from medical evidence is completely lacking. The court had to evaluate the other available evidence to see if it supports the charge.

### **Evidence of a Single Witness**

22. Subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness. **Section 124** of the **Evidence Act** provides this:

***“ Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

23. Under the above proviso the court may in a case involving a sexual offence convict on the uncorroborated evidence of the victim of such assault. The court must however give reasons in writing to show its satisfaction with the victim's evidence.

24. PW1 stated that she was a student in Form 2 in a school in Nairobi who had come to see her sister. She arrived in Sondu Market on 1st May 2010 and was not able to trace her sister. Besides her sister's name there is nothing she said about her. It's not clear what her sister was doing in Sondu, and nobody seemed to know the sister; It's also noted that the time she came was the 1st week of MAY when most schools are opening for the 2nd term. But she chose to stay on with strangers.

25. She did not explain to the court how she was spending the day and with whom. Did she even look for her sister on 2nd and 3rd of May 2010 since she claimed this was the reason for her coming to Sondu? Nothing in this direction is on record.

26. **Section 127 (3) (b)** of the **Evidence Act** provides;

***“In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged -***

***(b) with offences under the Sexual Offences Act; or”***

PW1's evidence is that the appellant defiled her with the support of his wife. She was therefore an accomplice if indeed that's what happened. Why was she not charged? And if indeed she witnessed the defilement why was she not called as a witness by the Prosecution? She was a competent and compellable witness, in offences under the Sexual Offences Act. This was a crucial witness and if the prosecution did not want to call her, she should have been charged alongside the Appellant.

27. PW1 stated that the appellant's wife was sleeping in a chair and she too could sleep or sit in that chair. The report by the Probation Officer filed herein and the evidence of PW5 confirms that the appellant stayed in a single room with his wife of three children. The defilement allegedly occurred at night with the participation of the appellant's wife. PW1 stated that she screamed twice. Apparently no one heard. Not even the children of the appellant yet they were all in this one single room!

28. Mama Njeri (PW2) was allegedly informed of this issue by PW1 after the 1st incident. She is said to be a trader in clothes at the market where the appellant works. Instead of assisting the girl she advised her to go back and see if she could be defiled again! It's not clear why this woman could not report the matter or confront the appellant's wife or the appellant, himself over the same.

29. A responsible woman would have taken the girl to her house for safety. But she told her to go back to the house of the alleged defiler. Did she not believe her story? PW1 did not report this issue to PW3 and PW4. PW3 got it from PW1 while PW4 got it from another person. And this was all because of trying to raise money for PW1's fare.

30. At the end of the day, the issue that remains lingering in my mind is whether PW1 was indeed defiled. And more importantly if indeed the appellant's wife was the one removing her skirt for her husband to defile her. And that when he was laying on her, the wife was covering her mouth to stop her from screaming. And this was all happening in a single room with two children present!

31. From my re-evaluation of the evidence before the trial court. I have found that:

- i. A crucial witness (appellant's wife) was without any reason not called by the prosecution.
- ii. If the prosecution did not deem it fit to call him as a witness she should then have been charged alongside the appellant assuming that the prosecution believed her evidence.
- iii. The age of PW1 was not established. This could have been cured vide **Section 186** of the **Criminal Procedure Code** had there been sufficient evidence to proving another offence.
- iv. The medical evidence did not support the charge of defilement. **Section 186** of the **Criminal**

**Procedure Code** could have been applied had there been other evidence supporting another offence.

v. PW1's narrative of the happenings is not convincing. The truth of what really happened was not fully explained to the court. Look at what PW1 alleges was done by PW2!

vi. There are many unanswered questions in this matter. It is always the duty of the Prosecution to prove its case beyond reasonable doubt, and not the other way round. From what I have narrated above I have a doubt in my mind as to the guilt of the appellant. He should have benefited from this doubt. The Appeal has merit and it is allowed. The conviction is quashed and the sentence set aside. The Appellant to be released unless otherwise lawfully held under a separate warrant.

**Dated, signed and delivered in open court this 21st day of November, 2014**

**H.I.ONG'UDI**

**JUDGE**

**In the presence of**

M/s Kivali for State

Mr. Motanya for Appellant

Appellant-present

Benson Karanja- Court Assistant