REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 132 OF 2012

ONESMUS MUSYOKI MUEMA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence in Tawa Senior Resident Magistrate's Court S.O. Case No.5 of 2010 by

Hon. J.W. Gichimu SRM on 26/06/2012)

J U D G M E N T

1. **Onesmus Musyoki Muema** the appellant, was charged with the offence of defilement of a child contrary to **Section 8 (1) as read with Sub Section (2)** of the **Sexual Offences Act, No.3 of 2006**. Particulars of the offence being that on the **10th** day of **December 2010** at **[particulars withheld]** in **Mbooni West District** within **Makueni County**, intentionally and unlawfully caused his penis to penetrate the vagina of **N.J** a child aged **10 years.**

2. In the alternative charge the appellant was charged with the offence of committing an **Indecent Act** with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2003.** Particulars of the offence being that on the **10th** day of **December 2010** at **[particulars withheld]** in **Mbooni West District** within **Makueni County**, intentionally and unlawfully did an indecent act to **N.J** a child aged **10 years** by touching her private parts.

3. He was tried, convicted and sentenced to life imprisonment.

4. Being aggrieved by the conviction and sentence thereof, he appealed on the grounds that the learned trial magistrate erred in law and fact by: convicting on evidence adduced yet there was no independent witness; failing to observe that the appellant was not medically examined as required by the law; admitting identification/recognition evidence adduced that lacked value; relying on evidence of a clinical officer who was not qualified to perform the duty; and reaching a conclusion that the case was proved beyond doubt when some crucial witnesses did not testify.

5. The facts of the case were that on the **10th** of **December 2010,** PW1 **N.J,** a child aged **10 years** went to a structure made of sacks that served as a toilet. As she pulled up her pants an individual interrupted her, offered her **Ksh.20/=,** held her hand and led her to a place with nappier grass. He removed her pants, unzipped his pair of jeans trousers, felled her onto the ground and inserted his penis into her vagina. He blocked/covered her mouth with his hands. She however screamed calling out her mother. PW2 **S.J.M**, her mother answered her call of distress. Prior to reaching the scene she saw the appellant running away.

PW1 was on the ground crying.

6. PW2 lifted her up and picked her underpant that was on the ground. She called her husband. The complainant narrated to them what had befallen her. They took her to Mbooni Dispensary for treatment. **PW3 George Gichohi Kamande,** a clinical officer on examination found the complainant having a freshly torn hymen following a slight penetration. The appellant was arrested and charged.

7. In his defence the appellant stated that on the material date he was sent to Machakos to take chicken to his employer's place of residence. He did so and returned at 4.00 p.m. At about 11.00 p.m. he heard a knock on the door. It turned out to be the village elder **M.L** and **Mary Wambua.** They arrested him and asked him to lead them to the home of the child that he did not know. They took him to where the child was. **Mary Wambua** examined her. He asked them to take him and the child to hospital. The village elder asked them to avail the child's clothes as evidence of defilement. It rained that night, therefore, he stayed at the village elder's home. The following day he was taken to the police station. Further, he stated that his employer's home is some two (2) kilometres away from the complainant's home and he does not own a red shirt or a jeans pair of trousers. He called witnesses.

8. DW1 **P.M.L,** the village elder of [particulars withheld] village stated that he saw the complainant with her mother on the fateful date at 3.00 p.m. The complainant's mother told him that she would be seeing him. At 5.00 p.m. the complainant's father went to his place of work and sought to know if the complainant's mother had told him anything. Thereafter, he was assigned the duty of arresting the appellant. They took the appellant to where the child was. He sought to see the underpants the child had but were not availed.

9. DW2 **Joshua Mule Mbondo** the employer of the appellant stated that he sent him to Machakos on the **9th December 2010** but he was away in Eldoret.

10. At the hearing the appellant relied upon his grounds of appeal and added that the trial magistrate failed to taken into consideration his defence.

11. In response thereto learned State Counsel **Mr. Mwangi** opposed the appeal. He stated that the complainant's mother saw the appellant, a person who was not a stranger to her running away on seeing her. It was, therefore, a case of recognition. He recounted the evidence adduced by the complainant. He stated that the age of the complainant was proved by evidence of a birth notification and child health card; the offence having been committed in broad daylight identification was not in question; there was evidence of penetration hence proof of defilement. Urging the court to uphold the conviction he noted that the appellant gave an alibi defence but the evidence adduced by the prosecution was overwhelming.

12. I have considered evidence adduced at trial, rival submissions by the appellant and the state counsel.

13. The appellant has faulted the trial magistrate for basing a conviction on uncorroborated evidence. He argued that the prosecution should have called an independent witness to confirm the allegations of the complainant. In the case of ***Mukungu versus republic (2002) E.A*** the assailant of the complainant was not medically examined and hence there was no medical evidence to connect him to the alleged crime. Neither was there other independent evidence connecting the accused with the crime save that there was ample evidence that indeed the complainant had been raped. The court of appeal held that there was no basis for requiring corroboration of the victim's story.

14. In Sexual Offences corroboration is not a requirement as long as the court believes the victim of crime and reduces reasons thereof into writing in the proceedings. ***(See Section 124 of the Evidence Act.)***

15. In this case, however, evidence adduced was that after the appellant grabbed the complainant and led her to a place where nappier grass was growing, he removed her underpants, forced her onto the ground, unzipped his pair of trousers and inserted his penis into her vagina. She felt pain and screamed. Although the appellant covered her mouth her cry for help was heard by her mother who in the meantime was looking for her. On seeing the complainant's mother approaching the appellant ran away. PW2 saw

him running away.

16. PW2 found the complainant lying on the ground without the underpant that was beside her.

17. PW1 was later examined by PW3 a clinical officer. He found that there had been slight penetration. The hymen of the complainant was freshly broken. His evidence is challenged on the ground that he was not a medical officer, therefore, unqualified to fill a P3 form. It has been held severally that a clinical officer is qualified to fill a P3 form as it is an area of his competence (***See Raphael Kavoi Kiilu versus Republic Criminal Appeal No. 198 of 2008; Fappyton Mutuku Ngui Criminal Appeal No.32 of 2013; Section 2 of the Clinical Officers (Training, Registration and Licencing Act).***

18. **Section 2** of the **Sexual Offences Act 2006** defines penetration as:

> ***"The partial or complete insertion of the genital organ of a person into the genital organ of another person."***

Slight penetration meant that the penetration was not complete, it was partial but it resulted into the hymen of the complainant being torn. This was penetration as required by the law.

19. The appellant submitted that there was no corroboration in the instant case. In the case of ***Mutonyi versus Republic (1982) KLR 203*** the Court of Appeal defined corroboration as:

> ***"an important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming some material particular not only the evidence that the crime has been committed but also that accused committed it."***

20. Medical evidence adduced confirms that the complainant was defiled. Evidence adduced by PW2 tends to connect the appellant with the offence. She did not see him in the act of defiling the complainant but she saw him running away from the scene of the incident.

21. The appellant gave an alibi defence. He alleged that his employer sent him to Machakos, therefore, it was not possible that he was at the scene of crime. Indeed his employer DW2 admits having sent him to Machakos but the date alluded to was **9th December 2010.**

22. The complainant recognized the appellant as an employee of DW2 their neighbour. She even stated that he had a co-worker, another young man. In his defence the appellant stated that he had a colleague called **Nathan Kyalo Kiilu.** Similarly PW2 knew the appellant very well as he used to buy fruits from her kiosk.

23. This was a case of recognition. It was not mistaken identity. Evidence adduced by PW2 corroborates evidence of PW1 that it was the appellant who defiled her.

24. The age of the complainant was proved beyond any reasonable doubt. The fact that she was born on the **29th November 2000** was proved by the birth notification issued at the time of her birth and the child health card. PW2 her mother also confirmed that fact.

25. The sentence imposed is the one provided for by the law.

26. This was a case that the learned trial magistrate analysed evidence properly and reached a correct decision. There is no merit in the appeal. The same is dismissed in its entirely.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **16TH** day of **DECEMBER, 2014.**

L.N. MUTENDE

JUDGE