



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Criminal Appeal 220 of 2011**

**MW..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the conviction and sentence of A.G. Kibiru PM delivered on 17/11/2011 in Kitui Principal Magistrate Criminal Case No. 12 of 2011)***

***(Before Hon. B. Thurania Jaden J)***

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

The Appellant, **MW** was charged with the offence of defilement contrary to **section 8 (1) (2)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 21<sup>st</sup> day of March 2011 at about 1.00 p.m. at (Particulars withheld)village, (Particulars withheld)sub-location, (Particulars withheld) Location in **Kitui** County, intentionally and unlawfully caused his penis to penetrate the vagina of **ML** a child aged 7 years.

In the alternative, the Appellant was charged with indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 21<sup>st</sup> day of March 2011 at about 1.00 p.m. at (Particulars withheld) village, (Particulars withheld)Sub-Location, (Particulars withheld) **East** Location, in **Kitui** County, intentionally and unlawfully touched the vagina of **ML** a child aged 7 years with his penis.

The Appellant pleaded not guilty before the lower court. After a full trial, the Appellant was convicted with the main count of defilement and sentenced to life imprisonment.

The Appellant was aggrieved by the conviction and sentence and appealed to this court.

The grounds of appeal are that the charge sheet was defective; the evidence in respect of the date the offence was committed was contradictory; the doctor who filled in the P3 form did not testify and the defence case and the mitigation by the Appellant were not considered.

During the hearing of the appeal, the Appellant relied on his written submissions which essentially buttressed the grounds of appeal.

**Ms Maingi** the State Counsel who appeared for the State opposed the appeal. In a nutshell, the State Counsel submitted on the sufficiency of the evidence and stated that the prosecution had proved its case beyond reasonable doubts.

This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.

The prosecution case as narrated in the lower court is that PW2 **MM**, a girl aged 13 years was on 23/4/2011 giving a bath to her niece, **ML** (PW3), the complainant herein. PW3 noticed the complainant's private parts were swollen. PW3 questioned the complainant who told her what had happened two days earlier on 21/4/2011. The complainant's story as captured in her own evidence is that one day after she had come home from school the accused called her and held her by the hand and took her to his house, removed her underpants, threatened her with death if she told anybody, then placed her on the bed and put his male organ on her private parts. She later felt pain when she was being given a bath and explained what had happened to her aunt.

The matter was reported to the complainant's grandmother, PW1 **JM**. The grandmother checked the complainant's private parts and noted that they were swollen. The matter was reported at (Particulars withheld) **Police Station**. The complainant was issued with a P3 form and treated at (Particulars withheld) **District Hospital** where it was confirmed she had been defiled.

The Appellant who was identified by the complainant as the culprit was arrested and subsequently charged with the present offence.

In his defence the Appellant gave unsworn evidence. No witnesses were called. The Appellant described himself as a casual labourer. He stated that he was going on with his work when he was arrested on allegations of defilement and charged. That the complainant did not report to anyone until after two weeks. The Appellant termed this case as a frame up and stated that he has no parents and lived with his grandmother.

The complainant (PW3) gave a detailed account of evidence which left no doubt that she was defiled. She testified about being led to a house where there was no one else, her underpants removed and being placed on the bed and the Appellant put his male organ on her private parts. The complainant also talked of the pain she felt during bath time, leading to the disclosure of what had transpired.

The complainant identified the Appellant as the person who defiled her. The complainant knew the Appellant and identified him in court by his name, **MW**. The complainant also knew the house of the Appellant which she described as roofed with iron sheets. The complainant's evidence was not shaken during cross-examination. The complainant's account of evidence given in court is consistent with what she told her aunt (PW2) who was bathing her. The aunt's evidence and that of the grandmother (PW1) established that they observed that the complainant's private parts were swollen and the matter was reported to the police.

PW4 **Dr. Patrick Mutuku** of **Kitui District Hospital** produced the P3 form which was filled by **Dr. Okoko** who had since been transferred and could not be traced. **Dr. Patrick Mutuku** testified that he knew the handwriting of **Dr. Okoko**. The doctor gave the complainant's age as 7 years at the time of examination. The doctor's evidence is that the complainant had been sexually assaulted. The doctor stated that the complainant's hymen was missing and the vagina was **Hyperaemic** (reddish) with a discharge. The doctor's evidence was that the incident occurred on 21/3/2011 and the complainant was seen at the hospital on 24/3/2011. The evidence of the grandmother (PW1) was that she was informed of the offence on 23/3/2011 while the aunt (PW.2) gave the date 21.3.11 as when the defilement took place but was discovered on 23.3.11. The date 21.3.11 is stated in the charge sheet as the date of the offence and is supported by the evidence aunt (PW.2) and the doctor (PW.4).

The evidence of PW5 **PC Margaret Kwamboka** confirms that a report of the defilement of the complainant was made and the Appellant taken to the police station on 4/3/11.

Although the Appellant has raised issues concerning the date of the offence, it is quite clear from the evidence of the, aunt and the doctor that the complainant was defiled on 21/3/2011. The date of the offence stated in the judgment of the lower court as 4/3/2004 must be an error as the same does not accord with the evidence on record.

The evidence by the Appellant in his defence that this case is a frame up cannot be believed in view of the strong prosecution evidence. The issue of any land dispute was only raised by the Appellant in his submissions is an afterthought and did not feature anywhere during the trial.

The court believed the complainant's evidence. This finds support in the proviso to **section 124** of the **Evidence Act** which provides as follows:-

**“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.”**

The circumstances of the offence were conducive to positive identification. Indeed the complainant's evidence is that of recognition in broad daylight.

The complainant's evidence was corroborated in all other material aspects by the evidence of the grandmother (PW.1), the aunt (PW.2) and the doctor (PW.4).

PW1 the grandmother described the Appellant as her nephew. PW2 the aunt described the Appellant as her cousin. According to the accused in his submissions, if that was the case, he ought to have been charged with incest. However, an offence of defilement as defined under **section 8 (2)** of the **Sexual Offences Act** had been committed. The citation of **section 8 (1) (2)** of the **Sexual Offences Act** as opposed to **section 8 (1)** as read with **section 8 (2)** of the **Sexual Offences Act** did not occasion any prejudice to the Appellant and the mistake is curable under **section 382** of the **Criminal Procedure Code**.

**Section 8 (2)** of the **Sexual Offences Act** provides for life imprisonment. The trial magistrate's hands were therefore tied. The medical evidence and the clinic card proved the age of the child as 7 years at the material time.

Having re-evaluated the evidence, I am satisfied that the Appellant's conviction was based on sound evidence. The sentence was within the law. The appeal has no merits and is dismissed. The conviction and sentence are upheld.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 23<sup>rd</sup> day of May 2013.**

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**JUDGE**