



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Criminal Appeal 222 of 2011**

***(From Original Conviction and Sentence in Criminal Childrens Case No. 59 of 2009 of the Senior Resident Magistrate’s Court at Voi – M.S.G. Khadambi (PM)***

**JUMA MWALUMA ALI ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The Appellant was convicted and sentenced to 30 years imprisonment for the offence of defilement of a girl contrary to Section 8(3) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 14<sup>th</sup> day of June 2009 at [particulars withheld] Taita-Taveta County he had unlawful carnal knowledge of L N a girl aged 12 years and who at the time of the offence was mentally disturbed.

After conducting a voire dire examination the trial Magistrate was of the view that it was difficult to have the child testify as she was not responding to basic questions.

The mother P M (PW1) told the trial Court that her daughter was aged 12 years and she had been diagnosed with cerebral palsy at the age of one year. The mother of the complainant is a teacher and did narrate in Court of their efforts to have their daughter treated in various hospitals but all in vain and that she knows only her father and mother and is not able to complete a sentence. On the 14<sup>th</sup> day of June 2009 which was a Sunday the complainant and her two siblings went to Church at Mission Harvest. At around 12.00pm she went missing. The complainant’s mother and father commenced searching for her only to get information from a lady called SAU that her daughter was discovered locked in a house by a man. She ran to Sau’s place and found a group of people surrounding a house. Upon further checking she saw her daughter hoisting up her pants. A man was being beaten by members of public. He was holding his long trouser and covering himself with a bedsheet but he was otherwise naked. She took the daughter to Police Station. Upon checking the panties of her daughter she saw that they were soaked in blood. In the company of a lady police officer they proceeded to Voi Hospital where upon examination they found blood still oozing from her vagina as the walls had been ruptured and they hymen broken.

The following day they went to look for the complainants shoes in the house of the Accused whereupon a bedsheet which was blood stained was recovered together with the shoes.

Maureen Kangwa (the househelp) had been tasked with preparing and taking the complainant and her sisters to Church where their mother was and left her in her custody. One of the sisters later reported that they could not trace the complainant. They got information from a lady that she was locked at a certain

house. She informed the complainant's father who was present in the house at the time. They proceeded there and found members of public surrounding a house and demanding that it be opened. The house was later broken into and the Accused flushed out. The complainant was also found inside. She had a blood stained underpant. She was taken to Police Station and later Hospital. Her evidence was corroborated by that of the father of the child PW3 (P M).

Dr. Charo Wilson (PW5) did testify before the trial Court that upon examination the complainant was found to be mentally handicapped, blood was oozing from her vaginal orifice. The hymen was ruptured and there was a bruise on the lower side of the vagina. The victim's age was later assessed by a Dental Officer and her age was certified as 13 years old. The Accused in his defence had denied the offence stating that he was merely found in his brother's house and beaten by two people who had arrived with the area Assistant Chief.

The learned trial Magistrate in his judgment did observe thus at page 29 line 22-

**“I have looked at the evidence presented before me in regard to this case. For starters I wish to dismiss the attempt by the Accused to insinuate that the victim herein was having menstrual periods. The fact that red blood cells were found in urine and the hymen was ruptured is evidence enough that the victim herein had been penetrated. The issue for determination therefore is whether the Accused herein was indeed the person who penetrated the victim herein. To answer the question, I will rely on PW3. The Accused by his own admission averred that PW3 was the 1<sup>st</sup> person to enter the house. It was PW3's evidence that when he broke open the door, he found the Accused person totally naked. The victim was still dressing. The witness observed that the Accused penis was wet an indication that he had just pulled it from the victims vagina. PW2 also confirmed that when the door was broken, the Accused was still naked. Both witnesses confirmed that the Accused was brought to Voi Police Station covered with a bed sheet. A bed cover was recovered with blood stains. I find that the Accused in this case was found in the act of defilement. “He did not have even time to dress.”**

I do concur with the reasoning of the learned trial Magistrate simply put the Appellant was caught red handed while in the act and in a house where only the two found in.

The conviction was safe and I find no reason to interfere. The complainant's age was assessed as thirteen years. This was a mentally handicapped child. The Appellant capriciously exploited her predicament. The sentence of thirty years is well-deserved and is upheld.

The appeal has no merit both on conviction and sentence and it's dismissed.

**Judgement read and delivered in open Court this 14<sup>th</sup> day of May, 2013.**

**M. MUYA  
JUDGE**

**In the presence of:-**

**Mr. Dzumo for the State**

**The Appellant - present**

**Court clerk – Mr. Musundi**