



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 102 OF 2011

DANIEL MBITHUKA MUIA APPELLANT

VERSUS

REPUBLIC

(BEING AN APPEAL FROM THE CONVICTION AND SENTENCE OF HON. J. KARANJA SENIOR RESIDENT MAGISTRATE DELIVERED ON 27/5/2011 IN MAKUENI SENIOR RESIDENT MAGISTRATE CRIMINAL CASE NO. 477 OF 2010)

(BEFORE HON. B. THURANIRA JADEN J)

J U D G M E N T

1. The Appellant, **Daniel Mbithuka Muia**, was charged with the offence of defilement of a girl between the age of 12 (twelve) and 15 (fifteen) years contrary to **section 8 (3) (3)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 27th day of September 2010 at **[particulars withheld]** in **Makueni District** within **Eastern Province**, the Appellant unlawfully caused penetration with his male genital organ to **E M M** a girl aged 13 years.

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

The particulars of the offence were that on the 27th day of September 2010 at **[particulars withheld]** in **Makueni District** within **Eastern Province** the Appellant unlawfully and indecently assaulted **E M M** by touching her private parts.

3. The case for the prosecution was that at the material time, the complainant, PW1 **E M M** a 13 year old standard 7 girl was asleep in her aunt's house. At about 11.00 p.m., she woke up to find the appellant on top of her having sex with her. The complainant's underpants had been removed. The window to the room was also broken. The complainant called out to her aunt who came to the room. The Appellant left the room and did not sleep in the house that night. The complainant was taken by the aunt to the aunt's room where she spent the rest of the night. The matter was reported to the area chief and at the police station. The complainant was escorted to hospital for examination and treatment. The Appellant was subsequently charged with the present offence.
4. In his defence, the Appellant testified that he was with his wife until 9.00 p.m. when they retired

- to bed. At about 3.00 a.m. police officers arrested him from his house and escorted him to the police station, telling the Appellant that he would know what the matter was when he reached the police station. He was subsequently charged with the offence herein which he knew nothing about. The Appellant further stated that the complainant had developed a habit of going out late and sleeping out then framed him up. He further stated that the complainant appeared to have been coached.
5. After a full trial, the Appellant was convicted in the main count for the offence of defilement and sentenced to twenty five (25) years imprisonment.
 6. The Appellant was dissatisfied by both the conviction and sentence and appealed to this court on the following grounds:-
 - v. **That medical evidence did not link him to the offence.**
 - v. **That there were contradictions and inconsistencies in the prosecution case.**
 - v. **That the prosecution case was not proved to the required standard.**
 - v. **That the trial magistrate erred by filling in the gaps in the prosecution case.**
 - vi. **That the trial magistrate shifted the burden of proof to the Appellant.**
 - v. **That the defence case was overlooked.**
 7. During the hearing of the appeal, the Appellant relied on written submissions. The submissions essentially expounded the grounds of appeal.
 8. **Mr Mwangi**, learned counsel for the State opposed the appeal. It was submitted that identification was positive and that the complainant's evidence was corroborated by the medical evidence.
 9. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – *See Okeno –vs- Republic (1972) EA 32.*
 10. The complainant, **E M M** testified that she was asleep in her aunt's house when she woke up at 11.00 p.m. to find the Appellant who is her aunt's husband on top of her having sexual intercourse with her. The complainant's underwear had been removed. The complainant called her aunt who came to the room and the Appellant went outside. The following day the complainant informed her other aunt, PW2 **A M** of the matter. It was PW2's evidence that the complainant's mother had passed away and that at the material time the complainant was living with one of her aunts who is married to the Appellant. PW2 further testified that she went with the complainant to report the matter to the chief and to the police station. The evidence of PW2 shows that the complainant's evidence in court is consistent with the information that the complainant gave her soon after the offence.
 11. PW3 **Catherine Nzomo** a Clinical Officer gave evidence that corroborated that of the complainant on the issue of defilement. PW3's finding was that the complainant had bruises on her genitals and presence of spermatozoa was noted. The Clinical Officer gave the complainant's age as 13 years and produced the P3 form as an exhibit.
 12. PW4 **Cpl. Agnes Ikiba** the Investigating officer gave evidence that confirms that the report of the defilement was made at the police station and the complainant escorted to the hospital.
 13. Although the Appellant in his defence denied having committed the offence and stated that this case was framed up on him by the complainant, no reasons emerge from the record why the complainant would frame him up or why anybody would coach her on what to say in court.
 14. DW 2 **Ruth Ndunge** the wife to the Appellant testified that although she heard about the defilement, she did not hear any noise or see anything at the material time. DW2's evidence is therefore of no probative value.
 15. The trial magistrate believed the complainant's evidence. The trial magistrate observed the complainant's demeanour and made notes to the effect that the complainant was confident and sure in her answers. I have no reasons to doubt the decision of the trial magistrate. The complainant's evidence on who the culprit was is that of recognition in close proximity. Her evidence is that the Appellant was on top of her and that she saw him when her aunt lit a matchbox. The complainant's evidence in cross examination is clear that no one else entered the house. Although the complainant gave unsworn evidence the same was tested during cross-examination and she maintained her evidence.
 16. The *proviso* to **section 124**, stipulates 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.”

17. With the foregoing, this court’s conclusion is that the appeal has no merits and is dismissed. The sentence of 25 years is however harsh and excessive. The minimum sentence of 20 years imprisonment provided by the **Act** will suffice. The conviction is upheld but the sentence is reduced to 20 years imprisonment.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 31st day of October 2013.

.....

B. THURANIRA JADEN

JUDGE