



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

CRIMINAL APPEAL CASE NO. 171 OF 2011

GEOFREY MUGENDI NYAGAH.....APPELLANT

VERSUS

REPUBLICRESPONDENT

*(Being an appeal from the original conviction and sentence in Criminal Case No. 926 of 2010
Republic vs. Geoffrey Mugendi Nyagah in the Senior Principal Magistrate's Court at Limuru by M.
A. Murage, Senior Principal Magistrate on 28th June 2011)*

JUDGMENT

The Appellant was charged with the offence of defilement of a child contrary to **section 8(1)(2) of the Sexual Offences Act** and the particulars were that on 7th April 2010 at (particulars withheld) Village in Kiambu West District within Central Province, the Appellant intentionally and unlawfully defiled C W W , a girl under the age of 5 years, by penetrating his male organ namely penis into her vagina. In the alternative, 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** and the particulars were that on 7th April 2010 at(particulars withheld) Village in Kiambu West District within Central Province, the Appellant intentionally and unlawfully committed an act of indecency with a child namely C W W by touching her genital organ namely vagina.

The Appellant denied both charges and upon full trial, the trial magistrate convicted him with the offence of defilement and sentenced him to serve life imprisonment. Being aggrieved by both the conviction and the sentence, the Appellant filed his Petition of Appeal dated 5th July 2011 and filed in court on the same date in which he listed the following grounds of appeal:

1. That he pleaded not guilty and trial was conducted in breach of **Article 40(1) and section 4 of the Constitution.**
2. That the trial magistrate erred by imposing upon him a sentence which was harsh and excessive in view of the presented evidence which was contradictory to **section 37(d) of the Evidence Act.**
3. That the trial magistrate erred by failing to consider that he was not examined by any doctor neither did the doctor implicate him with the offence.
4. That the proof adduced fell short of the standard.

Later, the Appellant filed Amended Grounds of Appeal as follows:

1. That the trial magistrate erred by failing to draw an adverse inference from the prosecution's

- failure to make the report of the incident known to the authorities immediately.
2. That the case of the prosecution was not proved beyond reasonable doubt.
 3. That the medical evidence was not satisfactory as the Clinical Officer was in legal terms not a Medical Officer.
 4. That the age of the victim was not ascertained.

In his written submissions, the Appellant stated that while the offence was said to have been committed on 7th April 2010, the report of the same was stated by PW1 to have been made on 10th July 2010. He then stated that he was being framed due to that lapse of time. On the matter of the age of the complainant, the Appellant submitted that the same was not proved as no birth certificate was provided nor was there any other documentary evidence produced to prove the same. He further submitted that PW5 who was said to be a Clinical Officer was not qualified to produce the medical evidence as he was not a Medical officer. Further, he argued that though it was stated that the complainant's hymen had been torn, it was not proved that he is the one who tore it.

The State opposed the appeal. The State Counsel reiterated the evidence adduced during the trial of this case and concluded that the Appellant was convicted and sentenced to life imprisonment.

The issue of the matter having been reported by PW1 on 10th July 2010 raised by the Appellant is incorrect going by the record of the proceedings in the trial court. On the matter of the age of the complainant not having been proved by documentary evidence, my response is that this should have been raised during the trial and not at this level of appeal. It is therefore just an after-thought on the part of the Appellant. The same applied to the production of medical evidence by Dr. Kavete. Again, this issue was not raised during trial and cannot therefore be raised now. That leaves me with only one issue to address, whether the prosecution proved its case beyond reasonable doubt as required by law. This requires me to review the evidence adduced at the trial court and form my own impression on the same. The complainant, PW2 was a child of 5 years of age. After a *voire dire* was conducted by the trial magistrate, she was found fit to give a sworn statement which she did. She testified that on the material date, she left home with her mother and went to her teacher Jenniffer's house and found the house closed with a padlock. She then stated that Mukurino called her. She identified the Appellant to be Mukurino and said that he told her to enter his house which she did. She reported that he told her to remove her pant which she did, he put her on his seat and did "bad manners " to her in her private parts (and she pointed her private parts). She testified that he gave her bread. She also stated that she told her sister M W about the incident. She identified the Appellant to be Mukurino. PW3 was the complainant's sister M W who after a *voire dire* was conducted, and the trial magistrate certified her as fit to give a sworn statement, testified that her sister the complainant told her that Mukurino did bad manners to her when she was going to call teacher Jenniffer. She then stated that she went and told her mother PW1. PW1, the mother of the complainant, testified that on the material day, she washed the complainant and dropped her at her teacher's place and left for work. She then testified that she came back home in the evening to find the complainant asleep. She then testified that the following morning, she noticed that the complainant had problem urinating and she promised to take her to hospital after work. She further testified that on 10th April 2010, PW3 told her that the complainant had been defiled by Mukurino. She stated that she told the Landlord and remembered the day when the complainant had a problem urinating. She testified that she knew Mukurino because he used to make and sell mandazi. She then stated that she together with her relatives arrested Mukurino's child and when Mukurino came to inquire why they had taken the child, she told him that he was aware what he had done to her child. She then reported that Mukurino ran away. She then reported that she reported the incident to the police and they started looking for Mukurino and said that her brother arrested him in Kitengela. PW4, a cousin to the complainant's father, testified that he received a report from the complainant's father that Mukurino had defiled his daughter. He testified that he knew Mukurino because they used to work together in a construction site and also played darts together. He testified that while walking in Kitengela, he saw Mukurino and he followed him with his friend Titus. He then stated that they followed and arrested him. PW5, Doctor Kavete, testified that he examined the complainant 1 week after the offence. He testified that the child complained of pain on passing urine. He stated that his findings were that the complainant's hymen was completely broken and concluded that she suffered harm. PW6, a police officer, confirmed the matter having been reported to Tigon Police Station and also confirmed the arrest and charging of the Appellant for the offence of

defiling the complainant.

Upon my own independent review of this evidence, I find the same to be vivid, consistent and convincing that indeed the Appellant did defile the complainant. I noted that I am relying on the evidence of minors but confirmed that the same was credible and strongly corroborated by all the other evidence adduced before the trial court. Of particular note is the Appellant's behavior when he was confronted by the child's manner. He opted not to deny but instead fled away and went into hiding. The defense he mounted in the trial court was also a mere denial. I therefore agree with the finding of the trial magistrate that the prosecution had proved their case beyond any reasonable doubt.

That being my finding, I also find that the sentence meted out on the Appellant being life imprisonment is clearly supported by **section 8(2) of the Sexual Offences Act**. I therefore uphold the conviction and sentence meted out by the trial court and hereby dismiss this appeal.

SIGNED AND DELIVERED AT NAIROBI THIS 15th DAY OF November 2013

MARY M. GITUMBI

JUDGE