



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL APPEAL CASE NO. 5 OF 2010**

PETER MUNYUA KIARIE .....APPELLANT

VERSUS

REPUBLIC ..... APPELLANT

*(From the original conviction and sentence in Criminal Case no. 77 2007 of the Chief Magistrate's court at Kibera before Hon. Mrs. Kasera on 30<sup>th</sup> December, 2009)*

**JUDGMENT**

The appellant was charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. In the alternative he was charged with the offence of indecent act with a child contrary to Section 11(1) of the same Act. The complainant was a child aged 6 years old. The appellant denied the offence but was convicted of the main count after a full trial and sentenced to life imprisonment. This appeal arises from the conviction and sentence.

From the amended grounds of appeal he complained that the evidence of the complainant P.W. 1 was not supported by any independent witness and that her age was not proved. He has also complained that his defence was rejected yet it was not challenged by the prosecution.

It is my duty as the first appellate court to consider all the evidence adduced before the lower court with a view to arriving at independent conclusions. Before the learned trial magistrate took the evidence of the complainant she conducted a *voire dire* and made the decision that the complainant gives sworn evidence. From the evidence on record the complainant is the daughter of the appellant. She told the court that her father came home drunk and sent two of her siblings to buy cigarettes. She was then taken into the house where her pant was removed. She was then placed on the bed and defiled. Thereafter she was told to wear her pant and have a seat. At that point, a neighbour known as C is said to have knocked at the iron sheet of the residence whereupon the appellant opened. However, there was no one outside. The appellant then gave the complainant Ksh. 150/= to hand over to her mother. This money was subsequently handed over to one Mama M to give to the complainant's mother.

When all this was taking place the complainant's mother was not in the house. When she came the complainant narrated what had taken place. Some ladies were called and together used some sticks to beat the appellant. Police were informed and took away the appellant who was locked in the cells. The complainant was taken to hospital.

It is the complainant's evidence that the appellant had defiled her previously on many occasions when her mother was away on duty, but whenever she told her mother, she just kept quiet. It is also her evidence that her father used to drink alcohol every day. The mother of the complainant gave evidence as P.W. 2 and narrated what the complainant told her. She however did not examine the complainant to see if there

were any sperms. She took the complainant to Nairobi Women's Hospital where she was treated. She had no grudge against the appellant.

The complainant was examined by Dr. Ketra Muhombe on the date of the alleged offence. She informed the doctor that she had been defiled and that was not the first time. On examination, her hymen was absent but she was not bleeding. A swab did not yield any spermatozoa. She was treated and sent for counseling. She produced her report in evidence. Dr. Kamau P.W. 5 also examined the complainant but this was many days after the alleged offence. He also noted that the hymen was not intact and produced a P3 form in evidence.

P.W. 3 is the police officer who received the complainant alongside members of the public who brought the appellant to Machakos Police Station. He also facilitated the examination of the complainant at Nairobi Women's Hospital and subsequently charged the appellant with this offence.

In his defence the appellant told the court that he had some mis-understanding with his wife due to some money she was misusing. On the date of the alleged offence he met her at the gate where she told him that he was mad. He then beat her whereupon she raised an alarm. Some men and women came and took him to the police station. The police however did not listen to him and was taken to Nairobi Women Hospital but was not examined. He was subsequently charged.

The complainant P.W. 1 gave a vivid account of what transpired on the day of the alleged offence. She denied that she had been coached to say what she told the court. She was emphatic that she saw the appellant send her siblings to buy cigarettes. Although the record shows that the appellant cross-examined the complainant, there was no question put to her about her age. The same goes with the evidence of P.W. 2, the mother.

Dr. Muhombe P.W. 4 confirmed that the complainant had been defiled. There is no doubt whatsoever that, that was the position. The learned trial magistrate had the opportunity to see and hear the complainant give evidence. That is a benefit I have not had. On her assessment of the complainant the learned trial magistrate said as follows,

**“Complainant while giving evidence in court looked genuine and in cross-examination by accused she told the court nobody told her to say what she told the court and that what she said is what she knew”**

Even if her evidence remained alone, the learned trial magistrate would be right to have based the conviction on her evidence alone by virtue of Section 124 of the Evidence Act.

I have observed that the age of the complainant was not an issue during the trial. The charge sheet indicated that she was six years old. The mother in her evidence said that she was seven years old. This was also the evidence of the police officer P.W. 3 and Dr. Muhombe P.W. 4. Whatever the case, the offence under the relevant section cited in the charge relates to children below the age of eleven years. Even if we were to assume that this was a contradiction, the age of the complainant remains within the bracket provided by the law. That issue cannot aid the appellant in this case.

It is true that the ladies referred to by the complainant as Mama C and Mama M were not called to give evidence. The fact remains that the evidence would be irrelevant considering the nature of the offence and the evidence tendered through the complainant and the doctors.

The learned trial magistrate considered the defence of the appellant. She found it an afterthought and therefore the appellant cannot rely on the allegation that his defence was not considered. The appellant has also complained that his name is not Peter Munyua but John Munyua. This case does not turn on the name of the appellant as this was not a case of mistaken identity. The complainant identified him as **“John Munyua”** as well as **“dad”** in the proceedings. There is no doubt that the complainant was referring to one and the same person. That ground also does not aid the appellant.

In the end I am persuaded that the charge of defilement was proved against the appellant beyond any reasonable doubt. The sentence is mandatory and I have no reason to disturb the same. This appeal is therefore dismissed.

Order accordingly.

**Dated and delivered at Nairobi this 18<sup>TH</sup> Day of December, 2013.**

**A. MBOGHOLI MSAGHA**

**JUDGE**