



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 531 OF 2010

MSAFIRI SWALEH MBARUK APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No.530 of 2008 of the
Senior Resident Magistrate's Court at Marikani i – **Hon. Machage - SRM**)

JUDGMENT

MSAFIRI SWALEH MBARUK hereinafter referred to as the Appellant herein was charged with and Convicted of defilement of a child contrary to section 8(1) as read with section 8(3) of the Sexual offences Act No. 3 of 2006.

The particulars being that on the 5th day of October, 2008 at **[particulars withheld]** area of Kaloleni Kilifi County, he committed an act which caused penetration of his male organ namely penis into the female organ namely vagina of W.C.J. a girl aged fifteen (15) years.

Brief facts of the case. At the time of this incident the complainant was aged fifteen (15) years and was a class six pupil at **[particulars withheld]** Primary School. On 5th October, 2008 which was a Sunday she had gone to church at around 8:00 a.m. She had told the Court that on the way she had met the appellant and another. Later at 6:00 p.m. on her way home she met the two who were armed with a knife and proceeded to have sexual intercourse in the bushes. She later reported the matter to police and her parents and the appellant in this case was arrested after a month.

A perusal of the record of proceedings shows that the investigating officer and the clinical officer did not avail themselves in Court to testify in this case. It was important for the investigating officer to avail himself so as to produce the clothes the complainant was wearing on the day of the incident. These clothes were said to have been soaked with blood. Production of the P3 form by the clinical officer and his testimony would have gone along way in corroborating complainants evidence.

There was need to corroborate the complainants evidence because it was unclear or rather sketchy in many areas.

It was her evidence that the rapist was a shabbily dressed haggard man with long braided hair. The man who was arrested and arraigned in Court was close shaven and neat person. His co-accused was a student in the same school and was well-known to her yet she did not mention his name to her rescuers, her mother and father at the time but mentioned him after considerable length of time.

This should have created doubt in the mind of the trial magistrate.

Mr. Dzumo for the state concedes to this appeal and I find it is with good reasons. The Conviction was not safe in the circumstances of this case. The appeal has merit and it succeeds.

The Conviction is quashed and the Sentence is set aside.

The Appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed in open Court this **16th** day of **December, 2013**.

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M. MUYA

JUDGE

16TH DECEMBER, 2013

In the presence of:-

The learned State Counsel Mr. Mureithi

The appellant present

Court clerk Badru