



**JM ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of the Principal Magistrate*

*B. Ochieng PM delivered on 24/03/2010 in Makindu Criminal Case No. 1289 of 2007)*

**J U D G M E N T**

The appellant, Jonathan Musyoka, was charged in the Principal Magistrate’s Court at Makindu with defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 14<sup>th</sup> December 2007 at Kibwezi District within Eastern Province committed an act which caused penetration to MM a child below the age of 11 years. He denied the offence. After a full trial, he was convicted of the offence and sentenced to life imprisonment.

Being dissatisfied, he has now appealed to this court against both conviction and sentence. He filed his grounds of appeal and supplementary grounds of appeal in person. However, at the hearing of the appeal, he was represented by Mr Muema, who relied on the supplementary grounds of appeal. The grounds of appeal are that he was convicted on mere allegation by the complainant without scientific evidence, the public who arrested him were not called to testify, that the doctor examined the complainant on the same date of incident 14/1/2007 but found blood stains and vaginal discharge which were four days old, that the magistrate wrongly based the conviction on the P3 form made after a number of days, that there were flaws and shortcomings in the prosecution case, and that essential witnesses were not called to testify.

In his oral submissions in court, learned counsel for the appellant, Mr Muema, referred to the charge sheet which stated that the offence occurred on 14/12/2007. Counsel stated that there was a contradiction in dates as PW4, the doctor, stated that he examined the complainant 4 days after the defilement. In addition, PW5 stated that the mother brought the complainant on 10/11/2009.

The appeal is opposed. Learned State Counsel, Mr Mukofu, submitted that the charge sheet showed clearly that the offence was committed in 2007, and the appellant first appeared in court in the same year. Therefore, the reference to a date in the year 2009 was a topographic error. Counsel also argued that the doctor examined the complainant 4 days after the incident. Therefore, the variance in the dates was not material or core to the evidence of the case. Counsel further stated that the complainant positively identified the appellant. Counsel concluded by stating that the court analysed the evidence and conditions for identification in the judgment.

In summary, the facts of the case are as follows. On 10/12/2007, the complainant, PW1 MM was herding goats in the field. She was a standard 3 girl aged 7 years. The appellant, who was her mother’s former house help appeared, removed her clothes and told her to lie down. He covered her mouth with his hands and defiled her, then he left. The girl later returned home and reported the incident to her brother M (PW2) as well as her sister. They later reported the matter to their mother JNM (PW3).

A report was later made to the police at Kibwezi Police Station. The complainant was then medically examined by PW4 who filled the P3 form and produced the same in court as an exhibit.

In his defence, the appellant elected to give unsworn evidence. He denied committing the offence. He stated that, on the material date, he was unwell and on bed rest when the police came and arrested him on allegation of defilement.

This being a first appeal, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences- See **Okeno –vs- Republic (1972) EA 32**.

I have evaluated the evidence on record. I have perused the judgment of the learned magistrate. The complaint of the appellant is mainly on contraction of dates.

Indeed, the complainant and PW2 stated clearly that the incident occurred on 10/12/2007. However, the charge sheet states that the offence was committed on 14/12/2007. The appellant was also arrested on the same date, that is 14/12/2007. The P3 form shows, on page 1, that the incident was reported to the police on 10/12/2007. PW3 JM the mother of the complainant on her part, stated that the incident was reported to her on 14/12/2007 and that the complainant was then crying. She was the one who called the landlord who assisted in arresting the appellant and taking him to the police. The doctor's report in the P3 form, was filled on 14/12/07. I observe that there are cancellations in Section "C" which were neither signed, nor was an explanation given for the same. Even in evidence, no explanation was given for the cancellations.

In view of the foregoing, the only evidence implicating the accused person is one of the identification by a single witness, the complainant. The witness was a child of tender years, as she was aged 7. The court might convict on such evidence, but there is need for caution or other supporting evidence – See **Onserio v-s Republic (1985) KLR 618**. Where there are material contradictions from other evidence, a conviction cannot be found. The learned trial magistrate, in evaluating the evidence stated:-

**“It is PW1’s evidence that it was accused who defiled her. The incident, occurred in broad daylight, probably took a considerable length of time and she was in close proximity to the accused, who apparently made no efforts to conceal his identity. The conditions relating to opportunity and light were extremely favourable for proper identification .....**”

Having evaluated the record, as I am required to do in a first appeal, I find that the appeal of the appellant will succeed.

The first reason is with regard to the date of occurrence of the incident. Learned State Counsel has stated that the variance of dates is a clerical error. In my view, it is not. The charge sheet clearly states that the defilement occurred on 14/12/2007. However, both the complainant who testified as PW1, and PW2 MM her brother, stated that the incident occurred on 10/12/2007. PW2 stated that he took the complainant to their mother on the same day. PW3 JNM the mother of the complainant, stated that the report was made to her on 14/12/2007 at 3p.m. At that time of the report, the complainant was crying. She stated that they arrested the accused on the same day. The investigating officer, PW5 PC Muhoro, stated that the appellant was brought to Kibwezi Police Station on 10<sup>th</sup> November 2009. The P3 form states, on the first page, that the incident occurred on 10/12/2007. It is stated therein that the medical examination was done on 14/12/2007.

In my view, with all these inconsistencies that emerged, the prosecutor or the court should have amended the charge. They did not. In my view the only situation where a charge need not be amended when there is variance of evidence with the charge is when the variance is merely on time – see **section 214(2) of the Criminal Procedure Code (Cap 75)**. A variance in dates, especially of the magnitude exposed in this case, of necessity would require amendment of the charge and that a fresh plea to be taken.

In my view, failure to do so is fatal because, if an offence is said to have been committed on a particular date, and that is not the actual date of the offence, then an accused person cannot be said to have pleaded

to the particular incident complained of. Nor would he be able to have defended himself because he would not know whether to defend himself to the charge as read, or to the evidence on the date of charge as it emerges.

The second issue is with regard to the P3 form which was produced as an exhibit (though I note it was not marked). The space where the findings of the doctor (PW4) were entered, was cancelled without any signature to show who cancelled the same. Nor were there any notes or explanations given in that P3 form or in the evidence tendered in court by the doctor, on the said cancellations. In the result, the genuineness of the doctor's findings cannot be confirmed beyond reasonable doubt. In my view, the doubt created has to be given to the appellant, as it is trite law that the burden is always on the prosecution to prove the guilt on an accused person beyond reasonable doubt. I give the benefit of doubt to the appellant.

I appreciate that the offence is serious. However, there is no justice in convicting any person for whatever offence, if there are legal defects in the documents relied upon and proceedings, and the evidence does not reach the standard of proof required. I also cannot order a retrial.

For the above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty, unless otherwise lawfully held.

Dated and delivered at Machakos this **14<sup>th</sup>** day of **June** 2012.

**George Dulu**  
**Judge**

**In presence of:-**

Mr Kimeu holding brief for Mr Muema for Appellant

N/A for State

Nyalo – Court clerk.