



ANTHONY IRUNGU MUTOKAAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The appeal before me arises from the trial and conviction of the appellant, **Anthony Irungu Mutoka**, on two counts of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**.

2. The brief facts were that on the 28th February 2008 and the 29th February 2008 at Nairobi area, he unlawfully and intentionally committed an act which caused penetration of his male genital organ into the female genital organ of L.M.K. a girl aged 10 years. (initials substituted for her name to protect the identity of the minor)

3. The learned trial magistrate handed the appellant two concurrent life imprisonment terms on 3rd March 2010, whereupon the appellant immediately filed an appeal.

4. His appeal was premised upon seven grounds of appeal which I have compressed, as hereunder:

(1) His constitutional rights under Section 72 (3) Constitution (repealed) and Article 49(1)(f) were violated as he was detained in police custody for four months before being arraigned in court;

(2) The court relied on a defective charge sheet to convict him;

(3) Crucial witnesses were not summoned as enshrined under Section 150 of the Criminal Procedure Code;

(4) He was convicted on a name that was not his nor was it his nickname;

(5) He was not notified the details of the amended charge sheet contrary to Section 207 of the Criminal Procedure Code.

The learned state counsel Miss Maina, opposed the appeal on behalf of the state. She gave a brief summary of the case and submitted that there was sufficient evidence to support both conviction and sentence.

5. I have perused the record and I am of the view that this appeal can be determined just by considering ground No. 6 alone. The appellant urged that he was convicted on the evidence of identification by the

name **“Kiambu”** which was an alias and which was not proved to refer to him.

6. The record shows that the minor presented to **PW2** Dr. Ketra Muhombe with a history of having been defiled by two different men on separate occasions. One was known as **“Kiambu”** and the other as **“Irungu”**. Upon examination the Dr. Muhombe found old healed tears on her hymen. **PW3** the older brother of the minor, who was himself a minor, testified about a man named **“Kiambu”** who was his football coach.

7. He once saw him go behind a latrine at the playing field in the company of his sister **PWI**. On another occasion the sister reported to him that **“Kiambu”** had been defiling her. It was **PW3** who advised **PWI** to report the matter to their father. **PW3** did not however, in his testimony identify the appellant to be the said **“Kiambu”** or by whatever other name he knew him.

8. **PW4** the Investigating Officer testified that the minor was brought to the police station by her father, who reported that she had been defiled by two different men. According to **PW4** one of the the men was called **“Anthony Irungu”** and he knew the other man only as **“Irungu”**. The officer testified that he also arrested the minor’s father because the minor reported that her father too had been defiling her.

9. What is disturbing is that the minor first reported to her father that a man had defiled her in February of 2008. Her father took no action. He only took action in May because a Child Rights Activist named Naomi took the initiative to take the matter forward. Neither the father nor the said Naomi were called to testify in the case. The minor herself told the court that at the police station she only talked about the incident that occurred in April 2008 because that was what her father had told her to do.

10. It is not clear how the learned trial magistrate came by the information that the minor’s father was a known jail bird. None of the witnesses deposed such evidence in their testimony. But in his judgment he stated that there were three different men charged with instances of defiling the minor and one of them was the minor’s father.

11. There is therefore no doubt that the minor was defiled. There is however some confusion as to the identity of the defiler. If there were two different men, one known as **“Kiambu”** and the other as **“Irungu”** it is not clear which man the appellant now before the court is. Or if he is any of those. For that reason alone the appellant is given benefit of the doubt created in the prosecution case.

The appeal is therefore allowed. It is ordered that the appellant be and is hereby set at liberty unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this **26th** day of **July 2012**.

L. A. ACHODE

JUDGE