



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Criminal Appeal 185 of 2008**

**JAMES MUTISYA MUSYIMI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Yatta Senior Resident Magistrate's Court Criminal Case No. 691/2007 delivered on 2/9/2008)*

**JUDGMENT**

The appellant, **James Mutisya Musyimi** was charged before the Senior Resident Magistrate's Court at Yatta with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences. He also faced an alternative count of indecent act with a child contrary to section 11(1) of the same Act. The particulars of the main count were that the appellant on 27<sup>th</sup> June, 2007, defiled one, **M.M.**, a juvenile aged about 6 years. Alternatively on the same date and place, he is alleged to have committed an indecent act by touching the complainant's private parts, namely her vagina. The appellant denied both counts and was soon thereafter put on trial.

**M.M.**, hereinafter "*the complainant*" was coming from school on 27<sup>th</sup> June, 2007 at about noon. She met the appellant who offered to give her lift home on his bicycle. Instead he rode her into the bush and defiled her. At about 1pm the complainant went home and found her mother (PW2) and told her that she had been sexually assaulted by a man. PW2 got to learn from other children who were with the complainant at the time that the man who allegedly assaulted the complainant was known as **Mutisya**, the appellant herein. She went to the appellant's home and confronted him over the incident. The appellant denied having defiled the complainant. Thereafter PW2 informed her husband, one, **M.** about the incident. Together they caused the arrest of the appellant by PW3 who subsequently issued a P3 form to the complainant; who was thereafter examined by PW4, a clinical officer on 27<sup>th</sup> April 2008. This was more than 9 months after the alleged incident. He observed that the complainant's vagina had raw ages and concluded that there was evidence of defilement.

Put on his defence, the appellant elected to give unsworn testimony and called no witness. Essentially the appellant denied committing the offence.

The learned magistrate having evaluated the evidence can record for both the prosecution and defence, found for the prosecution, convicted the appellant and sentenced him to life imprisonment.

Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal in person. Subsequently, however he engaged **Messs L.N. Ngolya & Company Advocates** to prosecute the appeal on his behalf. The appellant's principal complaint is that the trial court erred in law and fact by

convicting and sentencing him when there was no evidence to connect him with the commission of the offence. The prosecution evidence was so weak, incredible highly doubtful such that it could not be relied on to reach a finding of fact that the complainant had been defiled or indecently assault.

When the appeal came before me on 12<sup>th</sup> June, 2012 for *interpartes* hearing, **Mr. Ngolya** and **Mr. Mukofu**, learned counsel for the appellant and the Republic respectively agreed to canvass the same by way of written submissions. They subsequently filed and exchanged the written submissions which I have carefully read and considered.

As a first appellate court, it is my duty to subject the evidence tendered in the trial court to afresh and exhaustive examination so as to reach my own independent conclusion as to the guilt or otherwise of the appellant. See **Okeno vs Republic [1972] E.A. 32**.

The appellant was charged with defilement contrary to section 8(1) (2) of the Sexual Offences Act Section 8(2) of the said act requires that the victim of the offence be aged 11 years or less. It is therefore of critical importance in the offences of this nature that the age of the victim be proved beyond reasonable doubt and by credible evidence. Failure to do so means, that one of the major ingredients of the offence had not been proved thereby rendering any subsequent conviction unsafe.

In this case, the trial court found as a fact that the complainant was a minor. As a result it conducted a *voire dire* examination and found her unable to understand the meaning of an oath. She therefore gave an unsworn testimony. In her own testimony she was unable tell her age. On the other hand, her mother testified that her daughter was aged 7 years old, attended [particulars withheld] Primary School and was in class 2. However, she did not have any documents in support of this assertion. It was just not enough for her to stand in court and proclaim the age of her daughter without documentary backup. This she could easily have done by production of a birth certificate, church documents or such other like documents. The investigating team in this case too could easily have subjected the complainant to age assessment by a qualified medical officer. In the absence of full proof evidence as to the age of the complainant, a major ingredient of the offence was not proved. Accordingly the conviction of the appellant cannot be said to have free from possibility of error.

It is also not lost on me that the trial magistrate was very casual in the manner she reached the conclusion that the complainant had been defiled. She simply stated in her judgment that the complainant's mother saw a tear and blood stained pant and petticoat. There was no evidence as to where the blood was from. The alleged blood stained clothes were not tendered in evidence. Nor was any attempt made to subject them to forensic examination. More puzzling was the fact that no spermatozoa was found in the complainant's private parts yet she was said to have been examined in the immediacy of the alleged defilement. There was no suggestion that the appellant did not ejaculate, was impotent and or used protective device such as a condom.

Although the complainant's father was said to have been actively involved in the case, he never testified before court. The children, the complainant was said to have been coming from school with and who told the complainant's mother about the appellant were also not called to testify. Similarly no investigating officer was called to tell the court whether there were any further investigations conducted in the case. No explanation is forthcoming from the record as to why these crucial witnesses were not summoned.

From the record, the complainant's mother stated that the complainant arrived at home at about 1 p.m on the material day. Why then did she not notice or detect something unusual or amiss about the complainant. The complainant did not tell her that a man called **Mutisya** had defiled her. The information allegedly came from other people who did not testify. One then wonders where the trial magistrate got the evidence that the complainant knew the appellant's name as **Mutisya**.

The appellant denied committing the offence. I think that the trial court stretched too far the appellant's remarks that the matter was being discussed at the family level. This did not amount to an admission or confession as the trial court put it.

All in all, I am of the firm view that there was no sufficient evidence, medical or otherwise to support the trial court's findings. The age of the complainant was not proved. Persons whose evidence would have assisted the court were never summoned. This left numerous doubts and loose ends in the prosecution case which should have been resolved in favour of the appellant. On the basis of the foregoing, I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should forthwith be set at liberty unless otherwise lawfully held.

**DATED, SIGNED** and delivered at **MACHAKOS** this **28<sup>TH</sup>** day of **SEPTEMBER, 2012**.

**ASIKE MAKHANDIA**  
**JUDGE**