



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 61 of 2007

MUTUA KIVAYA NTHENGE APPELLANT

VERSUS

REPUBLIC RESPONDENT

**(From original conviction and sentence in Criminal Case No. 243 of 2008 of the SRM's Court,
Yatta - A.W. Mwangi)**

JUDGMENT

1. The Appellant was convicted after trial of **defilement** contrary to **section 8(1) and (2)** of the **Sexual Offences Act, No. 3 of 2006**. He was sentenced to **life imprisonment**. He has appealed against both conviction and sentence.

2. The particulars of the offence were that on 29th February 2008 at *{particulars withheld}* Yatta District within the Eastern Province, he had carnal knowledge of **J.K.M.**, a girl under the age of 16 years.

3. The prosecution case was fairly brief and straight forward. It was as follows. **M.W.** (PW2) was the complainant's mother. She testified that the complainant was seven years old at the material time and attended primary school in class one. She further testified that on 1st March 2008, she noticed that the complainant was sick. The following day she examined her after which she bought her some drugs from the shop. On 3rd of March 2008 she took the complainant to a dispensary called *{particulars withheld}*. She identified in court the complainant's treatment card at that dispensary. The complainant was given some drugs.

4. PW2 further testified that the complainant's condition did not improve, and that on the 10th March 2008 she examined her vaginal area and noted that there was a lot of blood oozing there-from. She had also noted that the complainant was urinating frequently.

5. PW2 asked the complainant what the problem was, and the complainant told her that it was **Musyoki wa Kalekye** who had defiled her. PW2 said that in their village there was no other **Kalekye** apart from the Appellant's mother. She further said that the complainant explained to her the home of this Musyoki, and that thereby she (PW2) knew which **Musyoki** the complainant was talking about. The complainant then led PW2 to the home of this Musyoki who was the Appellant.

6. PW2 further testified that the complainant told her that she had been defiled on 29th February 2008 at about 1 p.m. while on her way from school.

7. PW2 then again examined the complainant's vaginal area. She noticed that the vagina appeared

large and was swollen. She then reported the matter to Yatta Police Station where the complainant was issued with a medical examination form (P3). PW2 identified the P3 report. She and the police escorted the complainant to Matuu Hospital on 13th March 2008 where she was examined and treated. PW3 identified in court the complainant's treatment card issued at Matuu Hospital.

8. The Appellant was subsequently arrested on 18th March 2008. PW2 said that the Appellant was also known as **Mutua Kivati**, though in the village he was known as **Musyoki wa Kalekye**, the name that the complainant had given her. PW2 also stated that her home and the Appellant's home were separated by only two plots, and that there were no differences between her family and the Appellant's family.

9. The complainant, **M.W.**, testified under oath as PW1 after the trial court was satisfied in a *voire dire* examination that she understood the nature of the oath and the duty to tell the truth. Her testimony was as follows.

10. On 29th February 2008 at about 1 p.m. she was going home from school when she met the Appellant along the way. The Appellant stopped her and said she wanted to send her. He was carrying a panga. She stopped but the Appellant did not send her. Instead he held her and led her to a trench, and when she attempted to scream he threatened to kill her.

11. The Appellant then removed the complainant's under-pants. He laid her on the ground and removed his clothes. He then lay on her and did "bad things" to her. It was very painful. The "bad things" were done to her vaginal area. After doing the "bad things" to her, the Appellant hit her on the shoulder.

12. The complainant did not know what the Appellant used to do the bad things to her. But her whole body pained and she saw blood streaming on her legs.

13. The complainant then went home and found her siblings outside. Her mother later came home, but she did not tell her what had happened because the Appellant had told her that if she reported him he would kill her.

14. She was then taken to hospital. Her body was aching. Her stomach was paining. The doctor examined her vagina and her knees which were paining.

15. The complainant further testified that she later told her mother that Musyoki wa Kalekye had done bad things to her. She stated that she knew Musyoki very well as he used to pass her home on his way to the river.

16. The complainant and her mother then went to Kithimani Police Station, and she (the complainant) told the police that it was Musyoki who had done the "bad things" to her. It was the first time that she had experienced the "bad things". She said the Appellant was her neighbor.

17. In cross-examination she said that she saw the Appellant well. He was coming from the field when they met. He stopped her and told her that he wanted to send her. It was about 1 p.m. He pulled her towards the trench and he was carrying a panga. She asserted that she knew the Appellant very well and that he was the one who did the "bad things" to her. She even recalled that he was wearing the same clothes as he was wearing in court.

18. Medical evidence was provided by PW4, **Benjamin Maingi**. He was a clinical officer at the hospital where the complainant was examined and treated. PW4 examined her on 13th March 2008, that was 13 days after the alleged defilement.

19. PW4's findings were as follows. The complainant had a torn hymen though it was not a fresh tear. No spermatozoa or infection were found. An **HIV** test was negative. In his opinion the torn hymen indicated recent sexual penetration. PW4 also noted that the complainant had earlier been treated for

urinary tract infection at a dispensary. He assessed the complainant to be 7 years old, and that she had been defiled.

20. PW4 produced in evidence the complainant's treatment note and the medical report (P3).

21. One police officer, **PC James Ndegwa**, testified as PW5. He had taken over the case from the investigating officer, another police constable, who had been transferred. He produced in evidence the complainant's treatment notes from the dispensary where she had been taken first by her mother.

22. In his own defence the Appellant gave an unsworn statement. He stated that on the day of his arrest a policeman accompanied by the local assistant chief had gone to his place of work. They arrested him without telling him the reason for his arrest. He was taken to the police station and subsequently arraigned in court where he was informed of the charge against him. He denied committing the offence.

23. I must state at the outset that the medical evidence available was not satisfactory. It is doubtful that a clinical officer is a **medical officer**, within the legal meaning of that term, capable in law of giving medical evidence.

24. Be that as it may, the testimonies of the complainant and her mother, corroborated by the treatment notes from the dispensary at which the complainant was initially treated, establish beyond reasonable doubt that the complainant was indeed defiled on 29th February 2008. Her mother (PW2) examined her private parts and noticed her distended and swollen vagina, as well as the blood that was oozing there-from. It was clear that the complainant had been penetrated.

25. The Appellant was essentially convicted upon the testimony of the complaint as there was no eye-witness to the incident. As will be recalled, the complaint testified under oath after the trial court was satisfied that she understood the nature of the oath and the duty to tell the truth. Her testimony as recorded by the trial court is clear, candid and unambiguous. The young girl obviously knew what she was testifying about and her memory of the incident was vivid. She was never shaken at all in cross-examination.

26. The defilement took place in broad day-light at about 1 p.m. The Appellant, a neighbor, was well known to the complainant by the name **Musyoki wa Kalekye**. The complainant had seen him frequently as he always passed by her home on his way to the river. The complainant had led her mother to the home of the Appellant. It was significant, as testified by the mother, that, in their village, there was not any other **Kalekye** apart from the Appellant's mother.

27. There cannot therefore be any doubt regarding the identification (in this case by recognition) of the Appellant by the complainant.

28. It is not of any significance the fact that the complainant took sometime before telling her mother that she had been defiled, and by the Appellant, considering that he had threatened to kill her if she ever disclosed those facts to anyone.

29. **Section 124 of the Evidence Act, Cap 80**, provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory declarations Act, where the evidence of an alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

30. In the present case, the main evidence against the Appellant was the testimony of the complainant, the victim of the offence. In its judgment the trial court was satisfied, for reasons it recorded, that the complainant was telling the truth. Those reasons were the very cogent and clear testimony that the complainant gave, and also the corroborative evidence provided by her mother. Upon my own examination of the testimony of the complainant, and also all other available evidence, I am satisfied that the trial court was satisfied that the complainant was telling the truth for very sound reasons. That court was therefore enjoined by law to convict the Appellant.

31. Upon appraisal of all the evidence placed before the trial court, I am satisfied that the Appellant was convicted upon good and sound evidence, and that the conviction is free from error. There is no merit in the appeal against conviction.

32. There is also no merit in the appeal against sentence. The Appellant was awarded the only punishment provided for by the law. See **section 8(2)** of the Sexual Offences Act.

33. In the result the Appellant's appeal is dismissed in its entirety. It is so ordered.

34. The delay in preparation of this judgment is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully regained my health.

DATED AT NAIROBI THIS 12TH DAY OF SEPTEMBER 2012.

H. P.G. WAWERU

JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS

28TH DAY OF SEPTEMBER 2012

ASIKE-MAKHANDIA

JUDGE