



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL 156 OF 2010**

SALESIO NJERU MUNYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Being an Appeal from the Conviction and Sentence by S.N. MOKUA Principal Magistrate Siakago in Criminal Case No. 32 of 2010 on 29<sup>th</sup> October 2010)**

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

SALESIO NJERU MUNYI the appellant herein was charged with the offence Incest by a male person contrary to Section 20(1) of the Sexual Offences Act No. 3/2006. The particulars as stated in the charge sheet are:-

***On the 11<sup>th</sup> day of January 2010 at Mbeere North District of Eastern Province committed an act namely defilement which caused penetration to a female person namely AM who to his knowledge was his granddaughter.***

**ALTERNATIVE COUNT**

**INDECENT ACTS WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**

**SALESIO NJERU MUNYI: On the 11<sup>th</sup> day of January 2010 at Mbeere North District of Eastern Province committed an act of indecency with AM a child aged 9 years by touching her private parts.**

The matter was fully heard and the appellant was acquitted of the principal count and convicted on the alternative count and sentenced to 10 years imprisonment.

This being a 1<sup>st</sup> appeal, I am duty bound to re-evaluate and reconsider the evidence adduced and come to my independent conclusion. I am also live to the fact that I never saw nor heard any of the witnesses.

Ref. 1. ***NGUI VS REPUBLIC [1984] KLR 729***

***2. SIMIYU & ANOTHER VS REPUBLIC 1 KLR 192***

The appellant is the grandfather of PW1 and PW2. He is also the father in law of PW3 and the husband of PW4. It was the evidence of PW1 that the appellant had sexual intercourse with her on 11/1/2010. She

was aged 9 years then. She gave unsworn evidence. She explained graphically what the appellant did to her and there was no doubt left that she was actually defiled.

PW2 who was aged 14 years said she was looking for PW1 when she found her and appellant between mango trees. The appellant was lying on top of PW1. She called PW1 who came with 2 mangoes and explained what had happened.

PW2 and PW4 only got reports from PW2. PW3 examined her daughter (PW1) and saw no injuries on her genitalia. PW5 the Clinical Officer found the following:-

- ***No alcohol and drugs detected***
- ***external genitalia was normal (no injuries)***
- ***hymen missing***
- ***no spermatozoa seen***
- ***few pus cells seen/some bacteria seen***
- ***HIV negative***

The appellant in his defence denied the charges, saying he was framed because of family grudges. He never knew of this issue until a neighbour informed him. DW1 confirmed of some family meeting he attended in December 2009 at the appellant's home over an issue between him, his daughter in-law and granddaughter.

The learned trial Magistrate found that there was no penetration. And that though there was no hymen there was no testimony by the medic as to whether the same was freshly broken. (page 17 lines 6-9 of the record).

According to the learned trial Magistrate there was evidence that there was body contact between PW1 and the appellant. He relied on the evidence of PW1 and PW2. The evidence of the 2 girls (PW1 & PW2) was that PW1 was defiled. PW1 gave details of what had happened.

It is only the medical evidence of PW5 that confirmed that indeed there was nothing near or close to what PW1 was saying. Had her hymen been freshly broken, blood would have been seen oozing from her private parts. Nothing of this kind was detected. Even the mother of these girls examined PW1 and saw nothing strange in her genitalia.

When the learned trial Magistrate dismissed the count of defilement and relied on the same evidence to convict the appellant, that was wrong. The alternative count stated thus

***“On the 11<sup>th</sup> day of January 2010 at Mbeere North District of Eastern Province committed an act of indecency with AM a child aged 9 years by touching her private parts.”***

The evidence before Court from PW1 & PW2 never indicated that the appellant touched PW1's private parts. Secondly, PW1's evidence having been disproved by the medical evidence ought to have been treated cautiously. Did the learned trial Magistrate believe PW1 any more? Her credibility came into question by virtue of the evidence of PW3 & PW5. What went wrong? If what she told the Court was true, there is no way the medical report would have come out the way it did. The appellant in his evidence stated that there are family problems involving PW2 and PW3 and himself. PW1 confirmed it. PW2 admitted there having been a problem between her and the appellant.

Had the learned trial Magistrate considered the defence raised by the appellant and the evidence of PW1 in particular he could have noticed that there was good reason for PW1 to lie. And indeed she lied to

Court. Even PW2 was not a truthful witness.

There was no basis for the conviction of the appellant. The appeal is therefore allowed. The conviction is quashed and the sentence set aside.

The appellant to be released unless otherwise held under a separate warrant.

**DATED AND DELIVERED AT EMBU THIS 28<sup>TH</sup> DAY OF DECEMBER 2012.**

**H.I. ONG'UDI  
JUDGE**

**In the presence of:-**

**Ms. Macharia for State**

**Appellant**

**Njue CC**