



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 216 of 2009

ERICK NOAH MUEMA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate T.M. Mwangi delivered on 11/12/2009 in Kitui Criminal Case No. 619 of 2008)

(Before George Dulu J)

J U D G M E N T

The appellant Eric Noah Muema was charged in the subordinate court with defilement contrary to section **8 (1) (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge being that on 17th September 2008 at around 10.00 a.m. at [withheld] in **Kitui** District of the **Eastern** Province defiled **YMJ** a child aged 8 years. In the alternative, he was charged with indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the same day and place committed an act of indecency with **YMJ** a child aged 8 years by touching her private parts namely vagina.

He denied the charges. After a full trial, he was convicted on the main count of defilement and sentenced to serve 21 years imprisonment. Being dissatisfied with the decision of the trial court, he has appealed to this court. His appeal was filed through counsel **Onesmus N Makau & Company Advocates**. Though the petition of appeal has listed six grounds, at the hearing of the appeal, **Mr Mulei** for the appellant argued the grounds of appeal together as one ground.

Counsel argued that there was no evidence to support the conviction. The doctor PW1 testified that there was no evidence of penetration. The hymen was intact. However, the magistrate wrongly found that there was penetration. The doctor also found that there was no connection between the bleeding of the complainant and the blood of the appellant, as the discharge found on the underpant of the complainant was not analysed.

Counsel further submitted that there were contradictions in the evidence. Though PW5 the teacher of the complainant stated that the complainant came back from the shop after 5 minutes, PW4 stated that she came back after 10 minutes. PW4 also stated that it was after 10 minutes that the complainant was dragged to a backroom at the shop and defiled. Counsel emphasized that infact PW5 stated that the complainant went back to school looking normal. In addition, the mother of the complainant came back home at 5.30 p.m. and found the complainant playing, which meant that there was no defilement or trauma. Counsel felt that the evidence of the complainant, who was a child of 8 years, needed corroboration under **section 124** of the **Evidence Act (Cap 80)** for it to be relied upon. Counsel

emphasized that the alleged scene which was a shop was not a convenient place for the appellant to have committed such an offence. The shop was visible from the school, and therefore it was not possible to commit such an offence.

Counsel also submitted that the alibi defence of the appellant was not shaken or displaced. The appellant had testified in his defence, that during the time of the alleged incident he had gone to water his uncle's mango seedlings. Counsel felt that the learned magistrate had dismissed the defence without giving any reasons. In counsel's view, if the complainant was defiled, such was not done by the appellant.

Lastly, counsel submitted that the appellant was not brought to court within 24 hours of his arrest, which contravened his Constitutional rights.

The learned State Counsel **Mr Mwenda**, opposed the appeal. Counsel submitted that the doctor found blood stains and signs of infection on the complainant and concluded that a penis was inserted into the complainant's vagina. Though the hymen was intact, counsel opined that it was possible that a penis had penetrated the vagina.

Counsel emphasized that the complainant had stated that the appellant pulled her into the shop, not a backroom. Though the evidence was that the complainant did not report to the teacher and also did not inform her mother of the incident until 6 p.m, the magistrate attributed that conduct to trauma. In counsel's view, the failure of the complainant to report the incident earlier did not weaken the prosecution case. Counsel stated that the evidence of the complainant PW4 was consistent and reliable. Under the Children Act, counsel emphasized, evidence of a minor did not require corroboration provided the court believed the same.

Counsel lastly submitted that the magistrate gave reasons for not believing the defence of alibi. The alibi should have been raised early. With regard to violation of Constitutional rights, counsel argued that the remedy for violation would not be an acquittal but a claim for compensation.

In response to the State Counsel's submissions, the learned counsel for the appellant **Mr Mulei** submitted that the requirement for raising the alibi defence early was only applicable in murder cases, where the proceedings were commenced by way of a preliminary inquiry.

As a first appellate court, I have to start by reminding myself that I am required to re-evaluate the evidence on record afresh and come to my own conclusions and inferences, but taking in mind that I did not have the opportunity to see the witnesses testify to determine their demeanour – See **Okeno –vs- Republic (1972) EA 32**.

I have evaluated the evidence on record. This is a case of defilement. In such a case, penetration even if partial has to be proved. There is obviously no dispute that the complainant (PW4 **YM**) went to the shop of the appellant on that day 17/9/2008. She says she went to the shop at 10 a.m. during school break. The appellant says that she went there at 7 a.m. In effect both the prosecution and the defence agree that the complainant went to the shop of the appellant that day to buy a book and scones.

The complainant said that the appellant took her behind the counter and defiled her. PW1 Dr **Musembi Paul** from **Muthale Hospital** who treated and examined the complainant stated in evidence as follows:-

“I examined vagina introitus (upper part of vagina) was hyperhemic meaning that it was very red in colour which was a sign of inflammation. There was no blood discharge from vagina. We took vaginal swab for examination at laboratory and there were pus cells per high power, meaning that there was infection. There was moderate red blood cells. No sperm cells were detected. We took urine sample of complainant which yielded 5 – 10 pus cells and few red blood cells. The range of pus cells proves infection and presence of few red blood cells is a sign of both infection and trauma. HIV test was negative. My conclusion was that a blunt object a penis was pushed into the complainant's vagina. The hymen was intact. There was no semen sperms detected from the swab taken. It's possible for penis to be forced inside vagina and the hymen to remain intact basically

hymen is deep.”

The incident occurred on the same date of examination of the complainant by the doctor (PW1). In my view, the doctor’s conclusion on penetration of the penis is not scientific. In my view, if indeed forced penetration was done, then there would have been some lacerations of whatever minor nature on the opening of the vagina. The redness on the upper part of the vagina, the doctor found, was caused by an inflammation. It was not due to the alleged defilement. The conclusion of the doctor that there was penetration into the vagina not being based on facts, but conjecture, in my view, cannot be the basis for a conclusive finding by a court that defilement took place. This is because, the prosecution has always got the burden to prove the acts supporting the charge beyond the position of mere suspicion – **See Sawe –vs- Republic (2003) KLR 364.**

In our present case, the evidence regarding the scene of the incident convinces me that it is very unlikely that the appellant would have committed the offence. It was a shop which was actually visible from the nearby school, less than 100 meters away. It was open to the public. It is alleged that the incident took place at that shop during the day when the shop was open. I give the benefit of the doubt in my mind to the appellant, as the prosecution did not prove on evidence beyond reasonable doubt that the incident occurred in the shop.

In addition to the above, the magistrate seems to have based the conviction on perceptions which were not part of the prosecution evidence. In particular, the learned magistrate stated thus in the judgment:-

“No adverse finding can be made against PW4 for failing to report immediately after her defilement ordeal at 10 a.m. PW4 was a girl of 7 years or 8 years then. At her age she must have been traumatized and/or confused by her experience which was probably an experience she had not experienced before. Even adults are known not to disclose a rape ordeal upon them out of trauma. Failure by the complainant to disclose her ordeal at the earliest opportune time does not in any way weaken the prosecution’s case.”

The above observations by the learned magistrate were not supported by any evidence tendered by the complainant on record. Such observations should have arisen from evidence. Otherwise, it is not the function of a magistrate or a judge to create evidence for a party. This was a misdirection and a fatal error.

The offence is a serious offence, and the prosecution’s burden to prove the case beyond reasonable doubt had to be discharged. In my view, the evidence of the prosecution fell short of proving the appellant guilty beyond reasonable doubt. The fact that there was no known grudge between the family of the complainant and the appellant is not *per se*, a reason to convict the appellant. The prosecution still had to prove the case beyond reasonable doubt.

I find that the appeal has merits. 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 **18th** day of **December** 2012.

George Dulu
Judge

In presence of:-
N/A for State

Ms. Ngatia holding brief for Mulei for Appellant

Appellant present
Mutinda – Court clerk