



PETER MBOTI MUCHINA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

### JUDGMENT

The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Sub Section (2) of the Sexual Offences Act No. 3 of 2006. 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. After a full trial the appellant was convicted and sentenced to life imprisonment.

This is an appeal against both the said conviction and sentence. In his petition of appeal the appellant states that the learned trial magistrate erred in law and fact by basing the conviction on circumstantial evidence which did not have independent witnesses to corroborate the same. He also states that the learned trial magistrate relied on the prosecution which did not fully investigate the case to the required standards. Further, the court relied on medical reports made by a medical officer who was below the rank of "Government Police Medical Officer". He also faults the learned trial magistrate for relying on uncorroborated evidence of P.W. 1 and P.W. 2 who were from the same family. Lastly, he complains that his defence was not rebutted by the prosecution yet it was disregarded and that the sentence imposed is too harsh to bear.

As the first appellate court, it is my duty to evaluate the entire evidence and come to independent conclusions. This I have done. In convicting the appellant the learned trial magistrate had the following to say,

***"I have considered and examined the evidence in its totality. The complainant's testimony although unsworn was forthright and unwavering. She was confident and impressed me as she was able to recall in great detail what transpired. She even explained satisfactorily her reasons for not reporting the incident to her mother; embarrassment and fear. This was confirmed by her mother P.W. 2 who testified that P.W. 1 was reluctant to reveal what had happened to her until persuaded to. Her brother P.W. 4 saw the accused at the scene of incident and did see him cover P.W. 1's face with a piece of cloth and the Doctor P.W. 3 confirmed and indicated on the P3 form that there had been penile vaginal penetration.***

***I have perused the P3 Form and noted the finding. It corroborates the testimony of P.W. 1 that she was indeed defiled. The complainant was categorical that she identified the accused as he left the scene once he pulled the cloth from her eyes. P.W. 4 corroborated this that after he did the bad thing to P.W. 1, the accused ran away. Both of them knew the accused well by referring to him by name. He is a neighbour and a relative. They could not have mistaken his identity. The accused did not impute any bad blood or grudge on the part of the complainant or her family. There is therefore no basis for fabrication. I found the prosecution witness reliable and convincing. I find their testimony credible and I believe them.***

***On the other hand, the defence by the accused person was vague. He did not state which dates he was referring to when he alleged he worked the whole day. It was on the day that the complainant mother***

***learnt of the incident then it was said to be 8 days after it happened. He did not explain his whereabouts on 1<sup>st</sup> September, 2009. I find his defence that he knew he had done nothing wrong simplistic and merely evasive and I dismiss it. I am convinced that he took advantage of the complainant aged only 10 years of age whom he knew well, violated and defiled her not caring much about the presence of P.W. 4 her brother aged 4 years who he probably considered too young to grasp the happenings. I am satisfied that the prosecution have proved the case against the accused person on the main count beyond reasonable doubt as required”***

The complainant is a young girl aged 10 years at the time she gave evidence on 15<sup>th</sup> February, 2010. She had gone to get her brother called B from a farm owned by Mama M. On the way she found the appellant cutting nappier grass. After she found her brother they returned using the same route and when they reached where the appellant was, she felt someone holding her eyes who proceeded to blind-fold her. This person pulled her into a coffee farm removed her trouser and pant, pushed her down and defiled her. Thereafter this person left and the complainant pulled down the cloth that was used to blindfold her. It is at that point that she saw the appellant running away. It was the same person who she had seen earlier cutting nappier grass. Her brother B was still there.

They left for their home but did not inform her mother what had transpired. After a few days, her mother noticed that she was not walking properly and on being examined and questioned she confirmed what had happened to her, where upon she was taken to the Police Station and to the health centre. Her brother B. P.W. 4 confirmed what her sister told the court. Their mother P.W. 2 also told the court how she noticed her daughter walking in an unusual manner whereupon she examined her and found that she had some whitish discharge and on questioning her she revealed what the appellant had done to her. She is the one who took her to Gitunguri health centre and subsequently the police station.

Dr. Caroline Ngunu P.W. 3 examined the complainant and confirmed that she had been defiled. The appellant was subsequently arrested and charged with these offences. In his defence the appellant denied the offences and in his unsworn statement stated that he was at work and left in the evening whereupon he found the complainant's mother at home who claimed that he had destroyed her child and hurt her. As he knew he had not done anything of the sort, he did not bother with the mother. After 3 days he was arrested from his place of work and later charged in court.

The alleged offence took place at about 2 p.m. The appellant was known to both the complainant and her brother. Other than being a neighbour he was a close relative according to the evidence of P.W. 1 and P.W. 2. Both P.W. 1 and P.W. 4 saw the appellant at the scene. The complainant removed the cloth which was used to blindfold her immediately after the act. She saw the appellant running away and confirmed that it was the same person she had seen on the way to get her brother. There was therefore no question of mistaken identity.

It is true that the complainant did not reveal to her mother of what had transpired immediately. However, in her evidence she has given the reasons as to why and this is; because she was embarrassed, ashamed and afraid. That the complainant was defiled was confirmed by the doctor who examined her and produced a P3 form as evidence.

It is true that P.W. 1, P.W. 2 and P.W. 4 are closely related but that does not mean that their evidence was compromised at all. If anything, the evidence was corroborative in all material particulars. The graphic details given by the complainant cannot be faulted even though she was of tender age. This also can be said of the evidence of P.W. 4, the brother. The doctor who examined the complainant did not have to be a “Government Police Medical Officer” as stated by the appellant. In any case, this was not put to her by the appellant under cross-examination.

The learned trial magistrate considered the defence of the appellant. In that consideration it would appear the burden of proof was shifted to the appellant. However, that did not cause any prejudice to the appellant because the defence advanced by the appellant was a simple denial and even if the learned trial magistrate had not commented on it, the evidence adduced by the prosecution was sufficient to sustain the conviction handed down by the learned trial magistrate.

The penalty for this offence is mandatory and the learned trial magistrate having reached the conclusion that she did, she had no alternative but to impose the same.

On my part I believe that sufficient evidence was adduced against the appellant and that the conviction cannot be faulted and so is the sentence. This appeal is accordingly dismissed.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 26<sup>th</sup> day of June, 2010.*

**A. MBOGHOLI MSAGHA**

**JUDGE**