REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 345 of 2008

MWENDWA MUTUA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

****

JUDGEMENT

The Appellant herein **MWENDWA MUTUA**, was charged with the offence of **DEFILEMENT OF A GIRL UNDER THE AGE OF 11 YEARS CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(2) OF THE SEXUAL OFFENCES ACT, NO. 3 OF 2006**. In addition the Appellant faced an alternative charge of **INDECENT ASSAULT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**.

The prosecution led by **INSPECTOR ONGERI** called a total of five (5) witnesses in support of their case. The brief facts of the prosecution case were that on the material date of 14th January 2008 at about 3.00 p.m. the complainant **P.N** aged 10 years was out in the fields near River Njoro herding goats with her companions **M.M PW2** and **N.M PW3.** The Appellant who was well known to the three children emerged from the bushes and grabbed the complainant throwing her to the ground. **PW2** and **PW3** at that point scampered for safety. The Appellant removed his trouser and underwear and lay on the complainant whom he had pinned to the ground. She had no panties on. The Appellant proceeded to defile the child. He then later released her and warned her not to tell anyone what had happened. The complainant went and informed her father who together with others launched a manhunt for the Appellant. He was later apprehended to the police station. Both the Appellant and the complainant were later taken to Taveta District Hospital for medical examination.

At the close of the prosecution case the learned trial magistrate ruled that the Appellant had a case to answer and he was placed on his defence. The Appellant chose to give an unsworn statement by which he denied the charges. On 28th April 2008 the learned trial magistrate delivered his judgement in which he acquitted the Appellant of Defilement but convicted him of the offence of Attempted Defilement contrary to Section 9(1) as read with S. 9(2) of the Sexual Offences Act. After listening to the mitigation the court sentenced the Appellant to serve twelve (12) years imprisonment. The Appellant being dissatisfied with both his conviction and sentence filed this present appeal.

This being a court of first appeal, I am mindful of my obligation to re-examine and re-evaluate the evidence of the lower court. (see **AJODE –VS- REPUBLIC [2004] 2 KLR 81**].

From the testimony of the complainant this incident took place at 3.00 p.m. It was broad daylight. The

complainant and her two companions all identify the Appellant as the man who came out of the bushes, grabbed **PW1** and threw her to the ground. Visibility was optimum and they were able to see the Appellant well. In addition the Appellant was well known to the children as ***'Mkamba'*** a charcoal burner. Both **PW1** and **PW2** confirm that the Appellant was wearing a white T-shirt on the material day. **PW2** ran away when the Appellant grabbed **PW1** but **PW2** states in her evidence in chief at page 4 line 9

> ***"I left the accused lying on P on the ground later P found us. She was crying. She said the accused had defiled her"***

It is evident from this that **PW2** saw the Appellant lie atop the complainant. There has in my view been a clear, positive and reliable identification of the Appellant as the perpetrator of the offence. In his judgement at page 10 line 6 the learned trial magistrate observes

> ***"PW2 M.M who was with the complainant also knew the accused. These 2 witnesses though children impressed the court as credible witnesses. In these circumstances the court accepts their testimony"***

I take note of the fact that the trial magistrate had the opportunity to see and observe the demeanour of the witnesses as they gave evidence an advantage which this court does not have. I have no reason to find fault with the trial magistrate's observations regarding the demeanour of the witnesses. I am equally satisfied that the Appellant was properly identified at the scene by both **PW1** and **PW2.**

The next question I have to consider is whether the act of defilement has been sufficiently proved to have occurred. The complainant herself told the court that the Appellant lay on top of her and defiled her for a long time. After the incident was reported to police the complainant was escorted to Taveta District Hospital for a medical examination. **PW4 DR. OMONDI AYORO** is the doctor who examined the complainant. He filled and signed her P3 form which was produced in court as an exhibit. **Pexb 1**. The findings of this medical examination were inconclusive. **PW4** told the court at page 5 line 32

> ***"I could not determine whether any defilement had occurred"***

In analyzing this evidence at page 2 line 13 of his judgement the learned trial magistrate found as follows –

"However the medical evidence did not provide any independent evidence in support of the complainant's testimony. The absence of injuries on the complainant's genitalia or other body parts does not support the case. The doctor did not indicate whether the complainant's hymen was broken or not though all this could be explained by the fact that the complainant was examined several days after the incident, the court finds it would not be safe to assume the complainant was used to sexual intercourse hence she did not suffer any injuries on her genitalia when the accused had sexual intercourse with her"

I do agree with the learned trial magistrate that given the inconclusive nature of the medical evidence, lack of torn clothing, lack of bruises or injuries on the child, and lack of any comment by the doctor on the presence or otherwise of her hymen, it would have been unsafe to convict the Appellant on the main charge of defilement. However I am surprised, and I do not agree with the decision of the trial magistrate to convict the Appellant of the attempt thereof. Why so? Firstly the Appellant did not face a charge of Attempted Defilement. Once the lower court found it unsafe to convict on the main charge, the next logical course of action would be to consider whether the evidence on record was sufficient to prove the alternative charge. In this case the alternative charge was **INDECENT ASSAULT ON A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT No. 3 of 2006**. In my view the evidence is more than sufficient to prove this charge. **PW1** told court that the Appellant grabbed her, threw her to the ground, removed his trouser and underwear, lifter her own dress placed his penis into her vagina and lay atop her for a ***"long time"*** – why would an adult man lie half-undressed on a young girl like this? His clear intent was to defile her.

All this was done in broad daylight and witnessed by **PW2.** Both witnesses were found by the learned trial magistrate to be ***"credible"***. Notwithstanding proof of penetration, the Appellant's actions clearly amounted to an indecent assault of a sexual nature on the child. In my view the trial magistrate erred in failing to consider the evidence in the light of the alternative charge. I do therefore quash the Appellant's conviction for Attempted Defilement and substitute instead a conviction for Indecent Assault on a child contrary to Section 11(1) of the Sexual Offences Act 2006 S. 11(1) provides

> ***"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years"***

As such the minimum sentence upon conviction under this provision of the law is ten (10) years. The trial magistrate had imposed a twelve (12) year sentence upon the Appellant which in the circumstances was quite lawful but inappropriate given that he was a first offender. I therefore set aside the Appellant's twelve year sentence and instead I substitute the lawful sentence of ten (10) years imprisonment.

Thus this appeal is only partially allowed. The upshot of my decision is that the Appellant is convicted of the alternative charge of Indecent Assault on a child for which he will serve ten (10) years imprisonment.

Dated and Delivered in Mombasa this 14th day of June 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Onserio for State

Appellant in person

M. ODERO

JUDGE

14/06/2010