



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Criminal Appeal 156 of 2009**

ROBERT NASI MULONGO APPELLANT

~VRS~

REPUBLICRESPONDENT

JUDGMENT

The Appellant Robert Nasi Mulongo was convicted by Bungoma Chief Magistrate for the offence of defilement of a child contrary to section 8 (3) of the Sexual Offences Act No. 3 of 2006. He was sentenced to serve 20 years imprisonment. The appeal is against both conviction and sentence.

Mr. Ateya for the Appellant argued the six (6) grounds of appeal in the petition. The counsel submitted the evidence of PW1 and PW2 which was contradictory on what happened at the scene. The report of the incident to the police was done about one week later which casts doubt as to whether any medical evidence would be in existence on examination. The accused was arrested about two months after the incident and no explanation was given for the delay.

The state conceded to the appeal on all the issue raised by the Appellant.

According to the record, the offence was allegedly committed on the 29th March 2009. The Appellant and the complainant are neighbours. There is no evidence that the Appellant disappeared from home after the incident. Police received the report on 04/04/2009. It remains an unexplained issue why police delayed to arrest the Appellant until 25/5/2009 when he was available. The delay to report the incident was not explained either. It took the complainant and her parents one (1) week to report. After receiving the report, police took two days to take the complainant to hospital for medical examination. These delays may lead to a conclusion that the police developed cold feet because the evidence in their possession was wanting from the beginning. When the complainant was finally examined there was no medical evidence to prove that carnal knowledge had taken place. The P.3 form was filled on 9/04/2009 and it indicated that the complainant had inflamed labia majora. It is not easy to relate that finding with the incident which led to the charges due to the time lapse. The doctor in the P.3 form further notes that initial treatment notes show that the complainant had semen stains on her genitalia. This examination was done one (1) week after the incident and such a finding leaves a lot to be desired. The said treatment notes were not produced in evidence.

PW2 said the complainant on seeing him ran away from the scene. The Appellant remained behind and started chatting with the witness. The accused also pleaded with PW2 not to tell the complainant's father what

had happened. This is very unusual in a genuine case of defilement. Normally, it is the Appellant who would run away from the scene. It would be expected that the complainant would stick there and get help of such a witness. PW3 confirmed that he met the complainant at a distance from the scene while the Appellant and PW2 were walking together as they talked. The complainant's evidence that it is the Appellant who ran away from the scene could not be true. It contradicts that of PW2 and PW3.

The Appellant denied the offence. He said that there is a land dispute between him and the complainant's parents. The police arrested him on 25/05/2009 from his house where he had been all through.

I find that the trial court reached a wrong finding that the evidence of the complainant was well corroborated by that of PW2, PW3 and also the medical evidence. The court failed to address the glaring contradictions in material particulars. It also failed to address the delay in reporting the incident, the delay in taking the complainant for medical examination and in arresting the accused. If those issues were addressed, the court would have reached a different finding.

I find that the conviction was not safe and allow the appeal. I quash the conviction and set aside the sentence.

**F. N. MUCHEMI
JUDGE**

Dated, delivered and signed at Bungoma this 15th day of July, 2010 in the presence of the Appellant and the State Counsel Mr. Ogoti and Mr. Onchiri for Ateya for the Appellant.

**F. N. MUCHEMI
JUDGE**