



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
Criminal Appeal 172 of 2009

(Being an appeal from original conviction and sentence of the SRM's court at Nyamira in criminal case No. 866 of 2008 – L.
Komingoi, SRM)

BETWEEN

MARK OIRURI MOSE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with defilement contrary to **section 8 (1) (2)** of the **Sexual Offences Act**. The particulars of the offence were that on the 11th day of November, 2008 in Nyamira District within Nyanza Province, he unlawfully caused his genital organ to penetrate a child, L.M., who was aged 6 years. He faced an alternative count of indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act**. It was alleged that on the same day and place as in the main count, he indecently assaulted the said child by touching her vagina.

The appellant denied the charge. He was tried and convicted on the alternative count and sentenced to 10 years' imprisonment. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to this court.

The evidence adduced before the trial court may be summarized as hereunder:

The complainant was 6 years old and in class one (1). She knew the appellant prior to the material day. He was working in a nearby home. On the material day she had gone to their farm to get weeds for a cow. She was with one G M but he had gone to fetch a sweater. While there, the appellant surfaced, put her down and proceeded to defile her. She felt a lot of pain and started crying. The appellant stopped the assault and went to the complainant's home to get a panga to cut nappier grass. When the complainant went home she told G what the appellant had done to her. She did not tell her mother.

Her mother, PW2, also said that the complainant was 6 years old. She also knew the appellant. On the morning of 12th November, 2008 she realized that the child was walking in an unusual manner, her legs apart. She asked PW1 what was wrong with her but the child did not tell her anything. PW2 went to her farm and returned in the evening. On the following day she went to the shamba before PW1 woke up. When she returned in the evening she found the child lying down, she said she had a headache. She was given some painkillers. On the following day she went to school.

In the evening PW2 realized the girl could not walk properly. The mother asked her to disclose what was wrong with her and she said she was feeling pain in her private parts. When her mother examined her, she realized there was a whitish discharge mixed with blood. PW2 told her mother in-law who looked at the girl's genitals and said that she may have been defiled. PW2 bathed the girl with warm water and started interrogating her. She opened up and said that she had been defiled by the appellant on 11th November, 2008.

On that day PW2 had gone to a funeral. PW2 went to the appellant's employers and told them. The appellant wanted to run away but he was apprehended. PW2 added that the appellant owned up that he had defiled the child. The matter was reported to the area Assistant Chief and eventually to the police. Meanwhile the child was taken to Nyamira District Hospital for treatment.

The complainant's grandmother, PW4 said that on 12th November, 2008 at about 6.00 a.m. she heard PW1 crying. When she asked her why she was crying she said she had been defiled by the appellant. When she looked at the girl's private parts she saw some discharge and bruises. She then raised an alarm and neighbours went to her home. The appellant was later arrested.

Police Constable Mary Dayo, PW5, then attached to Nyamira Police station, testified that the appellant was taken to the station by Administration Police. They reported the incident that was alleged to have taken place on 11th November, 2008. She visited the scene where the offence was allegedly committed. She realized the maize crop there had been disturbed.

Victor Nyambati, PW6, a Clinical Officer who was based at Nyamira District Hospital, examined the complainant on 16th November, 2008. He assessed her age to be 6 years. He said she had bruises on the labia minora with blood oozing. The vagina walls were blood stained and there was a whitish discharge. He formed the opinion that she had been defiled.

In his defence, the appellant said that he had been employed as a herds boy. On the evening of 11th November, 2008 he was confronted by some people and a certain woman among them said that he had defiled her daughter. The woman had disagreed with his employer. They beat him up and thereafter took him to an Administration Police camp. He denied having defiled the complainant.

After analyzing the evidence, the learned trial magistrate was satisfied that the complainant was six years old. She further stated:

“I also believed her story as she had no reason to frame the accused person. There is no doubt that it is the accused who defiled her. She knew the accused before and called her his names.”

Having so found, the learned trial magistrate, in a rather unexplainable move, went on to state that the offence of defilement had not been proved! This is what she said:

**“From the medical evidence it appears no specimen from the girl were tested for any presence of spermatozoa. There is evidence to the fact that the girl's private parts were tampered with. The medical evidence is not consistent with the offence of defilement.
I find the accused not guilty of the offence of defilement contrary to section 8 (1) (2) of the Sexual**

Offences Act No.3 of 2006. And is acquitted accordingly under section 215 of the Criminal Procedure Code. However I find the accused guilty of indecent assault with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006 and is convicted accordingly under section 215 of the Criminal Procedure Code.”

The Attorney-General did not appeal against the acquittal in terms of **section 348 A** of the **Criminal Procedure Code**. However, Mr. Mutai, Senior State Counsel, submitted that it was wrong for the trial court to find that the offence of defilement had not been proved due to absence of spermatozoa. He urged the court to set aside the illegal sentence and mete out the appropriate one.

With respect, I think the learned trial magistrate misdirected herself in holding that the offence of defilement had not been proved. She first stated that **“there is no doubt that it is the accused who defiled her”** and then contradicted herself thus:

“The medical evidence is not consistent with the offence of defilement.”

Section 8 (1) of the **Sexual Offences Act** defines the offence of defilement as hereunder:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

The child had told the trial court that

“The accused then came to where I was, he put m down, he removed my underpants. He also removed his long trousers. He then went in between my legs then had sexual intercourse with me. He put his penis inside my vagina (she points at her private parts). He inserted his penis. I felt a lot of pain when he inserted his penis.”

The learned magistrate, having said that she believed the child’s evidence, how could she then turn around and say that the appellant did not defile the child, he only committed an indecent act with the child?

An **“indecent act”** is defined to mean **“an unlawful intentional act which causes –**

- (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.**
- (b) Exposure or display of any phonographic material to any person against his or her will.”**

The particulars of the alternative charge as drafted were not proper in law. They were that:

“MARK OIRURI MOSE, on 11th day of November, 2008 in Nyamira District within Nyanza Province, intentionally and unlawfully by use of his genital organ namely, Penis, caused penetration to L.M. a girl aged 6 years.”

Where there is intentional and unlawful penetration into a child, that is not just an indecent act, it is defilement.

In the circumstances, this court, pursuant to the provisions of **section 354 (3) (ii)** of the **Criminal Procedure Code** is under a duty to alter the finding by the trial court and pass the correct sentence as by law prescribed. I dismiss the appellant’s appeal against conviction and sentence and further set aside the trial court’s finding that he was not guilty of defilement but guilty of an `indecent act. The sentence to 10 years’ imprisonment is also vacated. I substitute therefore a finding of guilty of defilement contrary to **section 8 (1)** as read with **8 (2)** of the **Sexual Offences Act** and sentence the appellant to imprisonment for life. Right of appeal within fourteen (14) days from the date hereof.

DATED, SIGNED AND DELIVERED AT KISII THIS 12TH DAY OF JULY, 2010.

D. MUSINGA

JUDGE.

12/7/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Mutai for the State

Appellant present

Court: Judgment delivered in open court on 12th July, 2010.

D. MUSINGA

JUDGE.