



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 58 OF 2020**

**DANIEL MUSYOKI KAVEVO.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. A. Ndungu (S.R.M)***

***in Makindu Principal Magistrate's Court PMCR (S.O) No. 28 of 2017 issued on 12<sup>th</sup> May, 2020).***

**JUDGMENT**

1. The appellant was charged before the magistrates' court with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 26<sup>th</sup> June 2017 at [Particulars Withheld] Sub-location Kibwezi Sub-county in Makueni County intentionally and unlawfully caused his male organ namely penis to penetrate the anus of MR (*name withheld*) a child aged 13 years.

2. In the alternative, he was charged with indecent act with a child contrary to section 11(A) of the Sexual Offences Act, the particulars of which were that on the same day and place unlawfully touched the penis and or anus of MR a child aged 13.

3. He was also charged with count 2 for giving false information to a person employed in the Public Service contrary to section 129 of the Penal Code. The particulars of offence were that on the same day at Kibwezi police station within Kibwezi Sub county within Makueni county informed No.82104 PC Andrew Okal, a person employed in the Public Service as a Police Officer that his full official names were MUTUA MUTISYA information he knew and believed to be false intending thereby to deceive the said Police Officer.

4. He denied the charges. After a full trial he was convicted of defilement and sentenced to 15 years imprisonment.

5. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal relying on the following grounds –

*1) That the learned magistrate erred when she convicted and sentenced him without regard to his basic right for disclosure of the prosecution evidence which was intended to be brought against him as laid down in Article 50(2)(j) of the Constitution.*

*2) The trial magistrate erred by failing to observe that the trial was conducted in contravention of section 19 of the Oaths and Statutory Declarations Act concerning the reception and admissibility of evidence of a child of tender years, Article 4 of the Constitution and section 2 of the Sexual Offences Act.*

*3) The trial magistrate erred both in law and fact by convicting him without considering that there was no evidence to prove the offence of defilement to the required standard in law of beyond reasonable doubt.*

*4) The learned magistrate erred in law and fact by failing to observe that the prosecution case was full of contradictions and inconsistencies which rendered their case unbelievable.*

*5) The trial magistrate erred in law and fact when he dismissed his sworn defence which alleged the possibility of being framed up due to an existing grudge without giving cogent reasons as provided under section 169 of the Criminal Procedure Code.*

6. Both the appellant and the Director of Public Prosecutions filed written submissions to the appeal, which I have perused and considered.

7. This being a first appeal, I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see **Okeno –vs- Republic [1972] E.A 32.**

8. In proving their case, the prosecution called five witnesses. The appellant tendered sworn defence testimony, and did not call additional witnesses.

9. This being a case of defilement, the prosecution had to prove first the age of the complainant who should be below 18 years, secondly the prosecution was required to prove penetration however partial. Thirdly, the prosecution was required to prove that the appellant was the culprit.

10. Starting with the age of the complainant, age can be proved medically, or through documentary evidence like birth certificate or even through other admissible evidence. The complainant testified as Pw1 and said he was 13 years old and in class seven. He did not mention his date of birth nor rely on any documentary evidence. Pw5 Dr. Antony Masila produced medical records prepared by doctor Wahome who had gone for training, in which the PRC treatment notes merely show that the victim was 13 years. The source of the age is not indicated. In my view, the evidence on age of the complainant was so sketchy such that it cannot be said that his age of the complainant was proved to the required standards. I find that the prosecution did not prove beyond reasonable doubt that the complainant was 13 years old.

11. I now turn to penetration which is also an important ingredient of the offence of defilement. Penetration can be complete or partial, and either will suffice to establish the offence. I note that the evidence of the complainant Pw1 with regard to penetration tendered before the trial court was as follows –

***“He wanted to insert his penis in my anus. I felt him try to insert it in my anus. It was then that people emerged when I was laying on the ground before tying my legs with a scarf he inserted his penis inside my mouth. When people emerged he ran away.”***

12. In addition to the above, the medical evidence produced by Dr. Antony Masila Pw5 was that there was minimal penetration with minimal damage on tissue, as there was slight swelling on left buttock which was one (1) hour old, while the evidence of Pw3 MM an eye witness was that he saw the complainant in the bush with another person on 26/06/2021 at 8am, and merely the shots of the complainant were lowered.

13. In my view, the prosecution did not prove beyond reasonable doubt that there was penetration through the anus of the complainant, even of a partial nature. From the evidence on record however, there was certainly an indecent act proved by the prosecution committed against the complainant, thus the alternative charge was proved.

14. Who was the culprit? The evidence connecting the appellant to the offence is that of the complainant Pw1 and Pw3 MM. Both put the appellant at the scene at 8am that morning. It is the prosecution evidence that he tried to run away but was arrested by the public. Though the appellant has emphasized existence of contradictions of the evidence of the complainant in saying at one point that he knew names of the appellant and at other places that he knew him only by appearance that in my view is a minor contradiction which is not fatal. As for members of the public not being called by the prosecution to testify, I do not see any gap in the prosecution evidence that they would fill, as the appellant was seen and restrained at the scene of incident. So just like the trial magistrate, I disbelieve the defence of the appellant. I find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit and that he committed the offence of indecent act with an adult contrary to section 11(A) of the Sexual Offences Act, and I will thus convict him accordingly.

15. With regard to sentence, the sentence under section 11A is imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both. I will set aside the sentence of the trial court and impose an appropriate sentence for indecent act on an adult.

16. I thus quash the conviction and set aside the sentence of the trial court and instead, I enter conviction against the appellant for indecent act with an adult contrary to section 11A of the Sexual Offences Act and order that the appellant will serve three (3) years imprisonment from the date he was sentenced by the trial court.

**DELIVERED, SIGNED & DATED THIS 14<sup>TH</sup> DAY OF JULY, 2021, IN OPEN COURT AT MAKUENI.**

.....

**GEORGE DULU**

**JUDGE**