



**REPUBLIC OF KENYA**

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

**HCCRA NO. 18 OF 2018**

**SIMON MURITHI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against conviction and sentence by Resident Magistrate HON. S.M. NYAGA at Marimanti in the Principal Magistrate's Court Criminal Case No. SOA 2 of 2018 dated 26<sup>th</sup> April, 2018.)***

**J U D G M E N T**

1. **SIMON MURITHI**, the Appellant herein was charged with offence of defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge were that on 8<sup>th</sup> January, 2018 at Gaceneka Sub-Location Tharaka South District the Appellant defiled a child (name withheld) aged 11 years. The Appellant denied committing the offence but after a full trial, he was found guilty convicted and sentenced to life imprisonment.

2. The Appellant felt aggrieved by conviction and sentence and preferred this appeal raising the following grounds namely:

***(i) That the learned magistrate erred in both law and fact by taking into consideration the cogent defence of the accused which, in his view, "unshakably" pointed out that there was a frame up by the complainant's parents to settle personal scores.***

***(ii) That the learned magistrate erred in law and fact by not convicting and sentencing the appellant and giving a severe sentence without taking into account that the qualifications of the clinicians were not on record.***

***(iii) That the complainant was coached on the evidence to give.***

***(iv) That failure to call some witnesses was prejudicial to the appellant and the sentence awarded was harsh and excessive.***

3. Before delving into the above grounds, a look at the brief summary of evidence presented to the trial court shows that the minor or the victim of the offence was a girl (PW2) aged 11 years old. The original birth certificate tendered in evidence (P. Exhibit 3) shows that the girl was born on 24<sup>th</sup> June, 2007 which means that at the material time of the incident (8<sup>th</sup> January, 2018), she was 10 years 6 months old. She testified that she was in class 4 at [particulars withheld] School. The issue of age apparently is not one of the issues contested in this appeal.

4. There was direct evidence from the minor (PW2) and an eye witness (Isaac Murimi- PW4) which linked the appellant with the offence.

The minor told the trial court that she was grazing goats when the appellant, a watchman in a school neighbouring the grazing field, approached her while seated under a tree and grabbed her before defiling her. While on the act, Isaac Murimi (PW4) who happened to have been passing by saw them. The boy (PW4) questioned the girl on what they were doing and later reported the matter to her mother who took action by reporting the incident and taking the minor to hospital for check up and treatment.

5. The medical evidence tendered by George Murerwa Abutho (PW1) a Clinical Officer at Tharaka Level 4 Hospital, (P3 tendered as P. Exhibit.) indicated that the minor had been defiled.

6. In his defence, the appellant denied committing the offence. He testified that he was a watchman in a nearby school where the minor schooled. He alleged that the evidence tendered was not true alleging that the motive could have been due to a land dispute between him and the victim's father. He further told the trial court that he was framed in order to facilitate grabbing of his land.

7. In its judgment, the trial court noted that the age of the minor had been established. The trial court noted that the appellant was positively

identified by the victim and PW4 who both schooled in the school where the appellant worked as a watchman. On the question of a land dispute or a grudge, the trial court found that PW4 had no grudge or personal difference with the appellant. The trial court also found that the land dispute was resolved in the 1990s and title deeds issued to individuals. It saw no connection between the alleged dispute and the case facing the appellant. The trial court therefore found that the case against the appellant had been proved to the required standard and convicted him.

8. In his first ground of appeal, the appellant has questioned the professional qualification of the medical officer who tendered medical evidence and P3. He has contended that the witness did not shed light on his qualifications that of his colleague who filed the P3. This court has looked at the proceedings and has noted the Clinical Officer, George Murerwa Abutho gave his Registration Number as P/NO1995000168 and that he had worked as a Clinical Officer for 20 years. He further told the trial court that he was coming to testify on behalf of his colleague one Andrew Kinyua, who was said to be on leave. The appellant did not question him on his qualifications nor put him to task to explain or account for the qualification of his colleague who examined the victim and filled the P3. In my view, the appellant is raising the qualification of the medical officer at this stage and belatedly as an afterthought. He should have brought up the issue during trial if he really had reasons to opine that the clinical officer who testified or who examined the victim was not qualified.

9. The other ground raised in this appeal, is that the learned trial magistrate did not consider the "*unshakable*" defence put forward. However a perusal of the Judgment clearly shows that the trial court considered at length the allegations of existence of bad blood between the appellant and the victim's parents. In my considered view, the appellant did not tender any evidence to back up his claims that there was bad blood or feuds between him and the girl's parents. Furthermore, he did not fault the evidence of PW4 (Isaac Murimi) on that ground and did not connect him with any conspiracy to frame or set him up. The evidence tendered showing that the minor was found to have a swollen and reddening vagina indicative of penetrative sex clearly showed that the evidence relied on by the prosecution could not have been a frame up by any stretch of imagination.

10. This court finds that the trial court considered the defence put forward and which I have re-evaluated and I must say the same is far from what the appellant refers to as "*unshakable*". The defence was weak and uncorroborated.

11. On the 3<sup>rd</sup> ground that the complainant was coached to testify against him, this court has not found any evidence to support the appellant's claims. The evidence of PW4 in my view was key in the prosecution's case because he not only witnessed the act of defilement and recognized the appellant but also went ahead and reported the incident to her mother (PW3 LMG). According to the mother when she looked at her daughter's genitalia later at the hospital she observed:

***" Her genitalia was reddish. There was whitish dry substance on her stomach"***

Her observations were in tandem with what the medical officer noted in the P3 form;

***" Her vaginal walls was reddish and swollen, hymen missing. There was whitish fluid on her public hair and vagina. This could have been spermatozoa."***

The evidence given by the minor (PW2) and the eye witness (PW4) was well backed with the evidence tendered by PW1 and PW3. The evidence clearly showed that the minor had been defiled and evidence tendered by the prosecution in my view proved beyond doubt there was positive penetration and the appellant was positively identified because he was well known. The incident occurred at around 6pm. The key ingredients of the offence in my view was well established and corroborated by consistent evidence by witnesses who testified at the trial.

12. I am not persuaded that there was a particular witness who ought to have been called and who was not called by the prosecution to testify. The appellant has not stated the identity of the witness who was not called. He himself did not call any witness to back up any of his claims in his defence.

13. On the question of sentence, this court finds that the age of the victim was clearly established as I have observed above. She was 6 months shy of being 11 years old. The section under which the appellant was charged and convicted (**Section 8(2) of the Sexual Offences Act**) provides that any person who commits the offence of defilement with a child of 11 years or less shall be sentenced to life imprisonment. The trial court's hands were tied by the statute since the statute binds the court upon conviction to any one sentence - life imprisonment. Of course it is apparent that the sentence is harsh but the policy behind the legislation was geared towards protecting the children from sexual predators and a deterrent sentence was thought at the time to discourage the vice and make minors safe.

In conclusion therefore, this court for the reasons aforesaid finds no merit in this appeal. The same is disallowed. The conviction and sentence are upheld.

**Dated, signed and delivered at Chuka this 4<sup>th</sup> day of March, 2019.**

**R.K. LIMO**

**JUDGE**

**4/3/2019**

Judgment dated, signed and delivered in the open court in presence of the appellant in person and Momanyi for Respondent.

**R.K. LIMO**

**JUDGE**

**4/3/2019**