



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 21 OF 2019**

**MUSEMBI MANENO MATHEKA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence of Hon. A. Ndung'u (SRM) in Makindu Senior Principal Magistrate's Court Criminal Case No. 2 of 2017 where judgment was delivered on 30/01/2019 and sentence passed on 18/02/2019)*

**JUDGMENT**

1. The Appellant was charged with the offence of **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 the 17<sup>th</sup> day of February 2017 at [particulars withheld] Village, Kawala location, Nzau Sub-County within Makueni County, the Appellant intentionally and unlawfully caused his male genital organs namely penis to penetrate the female genital organ namely vagina of MM, a girl aged 3 years.

2. He faced an alternative charge of **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.** The particulars were that on the same day and at the same place, the Appellant willfully and unlawfully touched the vagina of MM using his penis.

3. After a full trial, the learned trial magistrate convicted him on the alternative charge and sentenced him to 10 years' imprisonment.

**The Appeal**

4. Aggrieved by that decision, the Appellant filed an amended petition of appeal and listed 12 grounds stating that the learned trial magistrate erred in law and fact by;

*a) Convicting him when the evidence on record was manifestly insufficient, inconsistent and had glaring gaps and inadequacies hence incapable of sustaining a conviction.*

*b) Ignoring the inconsistencies in the evidence tendered.*

*c) Convicting him on the alternative charge when the same had not been proved as required.*

*d) Convicting him on the alternative charge when the evidence tendered did not support the same.*

*e) Convicting him on the strength of hearsay evidence when the same was inadmissible.*

*f) Taking into account information from persons not called as witnesses hence committing an error.*

*g) Finding that there was corroborated evidence that he was found committing the offence yet there was no such corroboration.*

*h) Taking into account extraneous matters.*

*i) Convicting him against the weight of the evidence on record.*

*j) Failing to give due and/or adequate consideration to his defence.*

*k) Sentencing him as she did.*

*l) Selectively applying the evidence tendered and thereby aiding the case of the respondent against him.*

*m) That the learned magistrate's decision does not conform to relevant laws.*

5. The prosecution case was premised on the evidence of five (5) witnesses. Pw1 HNM is the mother of the complainant (MM) who testified as Pw3. Her evidence was that Pw3 was born on 13<sup>th</sup> June, 2013 while her brother Pw2 was born on 5<sup>th</sup> December, 2010. It was her evidence that on 17<sup>th</sup> February, 2017, 4:00 pm she fed Pw2 and Pw3 after which they went out to play. She later checked on them and found Pw3 missing and Pw2 did not know where the sister was. She went to the front part of the market where she found KK and NM who upon inquiry informed her that they had seen the Appellant leaving with Pw3.

6. She sent Pw2 to go and call Pw3 from the Appellant's house, as she continued selling to customers. When she next went to check on the children, she found each of them holding two pieces of cake but she did not ask where they got them from. At 6:00 pm, she called the children inside the house.

It was while seated on a bench that Pw2 told her how he had found the Appellant holding Pw3 in his laps with his penis inserted in her anus.

7. She left to look for the Appellant but did not find him. She reported to her husband, chief, Matiliku A.P post before taking the child to Matiliku Sub-county hospital. It was confirmed at the hospital that the child's hymen was broken. She identified the treatment notes EXB 1, PRC form EXB2; P3 form EXB3 and birth certificate EXB4. She further stated that the chief called KK and MN who examined the child and found her to have male dirt. In cross examination, she reiterated what she had stated in her evidence in chief.

8. Pw2, M.A.M gave sworn testimony after a voire dire examination had been conducted. He identified the Appellant as a neighbor. That he had gone and found Pw3 where the Appellant was fetching water, and that the Appellant had removed "Sehemu yake ya kukojoa" and inserted it in the child. Pw2 explained that Pw3 was seated on the Appellant's laps and he had inserted his penis "kwa matako" in the buttocks.

9. He added that Pw3 was not wearing clothes. The Appellant then gave each of them Kshs.10/= with which they bought cakes. Further that he waited for the Appellant to finish before he left with Pw3 and they continued playing. At another point he stated that the Appellant was inside the house with the door open and he was seated on the ground with his penis inside Pw3 buttocks.

10. Pw3 while unsworn told the court that she lived in [particulars withheld] with her father, mother and older brother M (Pw2). She identified the Appellant and said he did something to her. That the Appellant removed her panty and put in her, his thing for urinating and then gave her Kshs10/=. On cross examination, she reiterated that the Appellant gave her Kshs.10/= but she did not answer any other question from the Appellant.

11. **PW4 Dr. Charles Mwendwa Mutisya**, a medical officer at Sultan Hamud Sub-County hospital, testified that he filled the P3 form for the child on 28/02/2017 and that on examination, there were no physical injuries and the external genitalia were okay. The hymen was broken though not freshly broken and there was no discharge. She was HIV negative, urinalysis revealed epithelial cells 3/5 which is normal, while a high vaginal swab revealed no spermatozoa. He produced the P3 form, PRC form and treatment notes, as EXB3, 2 and 1 respectively.

12. On cross examination by the court, he said that there were no signs of freshly broken hymen because there was no blood redness, wound or swelling on the genitalia. The treatment note was the first document to be filled and it only stated that the hymen was ruptured. The PRC form stated that the hymen was broken and nothing else. That if there was blood, it should have been in the urinalysis, high vaginal swab or observation.

13. **PW5 was P.C Rosemary Achieng'**, the investigating officer. She testified that on the material day at about 2300hrs Pw1 in the company of Pw3, Appellant and AP officers reported that Pw3 had been defiled by the Appellant while playing with her elder brother Aaron. That the Appellant asked the child to accompany him to his house where he removed her pant and defiled her. That the child's family has no relationship with the Appellant and they are not neighbors.

14. On cross examination, she said that the Appellant was found defiling the child by Pw2 who had been sent by his mother to look for the child. That when the child's mother found out what had happened, she informed the chief and the chief informed AP officers at Kalamba. It was her evidence that the doctor confirmed that the child had been defiled.

15. In his unsworn statement of defence, the Appellant stated that on the material day, he was at his usual work of fetching water with his bicycle. While at [particulars withheld], a lady at Iveke called and told him that her bicycle had no pressure. While pumping the bicycle, the lady asked him whether he had seen KK so that he could cut a padlock that had refused to open. He responded in the negative and said he could cut the padlock for her.

16. He charged her Kshs.150/- for breaking the padlock and the lady said she would pay the following day. He then requested for fresh maize for roasting from the lady's farm and was given. He left at around 6.00pm and proceeded to [particulars withheld] where he found Pw1 and the grandmother sitting. He gave the maize to Pw1 promising to return and pick it.

17. As he proceeded, Faith called and requested him to escort her home. He carried her luggage, escorted her and returned to [particulars withheld]. He had left his bicycle where he keeps his jerry cans. He saw two people coming towards him and they asked him to accompany them. They took him to Pw1's home at Kalima where she also has a shop. They told him that they had information that he had defiled the child.

18. All of them went to Matiliku AP camp and Pw1 was referred to the hospital. She returned after finding that the doctors were on strike. He was detained at the AP camp and then moved to Musuuni police post. Pw2's parents proceeded to Sultan hospital where the child was examined. He didn't know the findings as he had been detained.

19. Mr. Muumbi for the Appellant filed written submissions which she highlighted. On whether the trial Court took into account inadmissible evidence [*grounds (e), (f) and (m)*], he submitted that parts of the prosecution evidence which the trial magistrate took into account was inadmissible for being hearsay i.e when KK and NM told Pw1 that they had seen the child leave with the Appellant and when KK and MN checked the child and allegedly found male dirt, on her.

20. It was his submission that because the two women who allegedly found male dirt on the child were not called as witnesses, Pw1's statement, that male dirt was found on the complainant, was inadmissible, as there was no proof of that.

21. Counsel submitted that Pw1 was informed by KK and NM (who never testified) that the Appellant was seen leaving with the child and as such, it was erroneous for the trial magistrate to rely on Pw1's statement to establish that he (Appellant) was positively identified. He relied on **Kinyatti –vs- R (1984) eKLR** where the Court of Appeal held;

*“Hearsay of indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence. The rule against hearsay is that a statement other than the one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact. The evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement.”*

22. It was his submission that the statements relied on by the trial magistrate do not fall under the exemptions contemplated in the law.

23. On whether the trial magistrate failed to comprehensively analyze and evaluate the Appellant's evidence [*grounds (j) and (l)*], he submitted that the trial court erred in finding that his testimony failed to controvert or displace the prosecution evidence. That the trial magistrate casually glossed over his testimony and simply dismissed it as wanting yet she was under a duty to comprehensively evaluate and give reasons for disagreeing with it. He relied on **Karukenya & 4 others –vs- R (1987) KLR 458** cited with approval in **Kenns Maxwell Getange –vs- R (2018) eKLR** where the Judges of appeal held;

*“It is the duty of the court to analyze the alibi by weighing and testing it intrinsically as against the prosecution evidence, to see if it might reasonably be true or if it can safely be rejected as false. It is not sufficient for the court to dismiss it as a perfunctory phrase.”*

24. He also submitted that the Appellant raised the defence of *alibi* which showed his whereabouts at the time the offence is said to have been committed and that Pw1's statement corroborated the fact that a lady called N had sent him to pump pressure into her motor cycle. He submitted that the trial magistrate erred by finding that he had failed to allude to leaving maize with Pw1 in his cross examination of Pw1. Further, that is was an irrelevant consideration for the trial magistrate to conclude that since there was no reason for Pw1, Pw2 and Pw3 to lie against him, they must have been telling the truth.

25. On whether the prosecution evidence was adequate to support conviction on the alternative charge [*grounds (a),(b),(c),(d),(g) and (i)*], he submitted that for the alternative charge to have been proved to the required standard, evidence must have been tendered to show, beyond reasonable doubt **“that the**

***Appellant willfully and unlawfully touched the vagina of the child with his penis”.***

26. He contended that the prosecution failed to establish the part of the child's body that was touched by the Appellant's penis and that the evidence failed to corroborate in material particulars; how he encountered the child and where the offence was committed. He relied on **Lucas Omondi Omole –vs- R (2016) eKLR** where it was held;

*“...it therefore follows for an offence of ‘indecent act’ to be proved; the prosecution has to prove the following;*

*a) The act is unlawful and intentional.*

*b) Contact between any part of a body of a person with genital organs, breasts or buttocks of another.*

*c) The contact does not cause penetration”*

### **The Respondent's Submissions**

27. Mrs. Owenga for the State opposed the appeal and submitted that the evidence was credible and linked the Appellant to the main count. That Pw1 and Pw3 testified on the main count and their evidence was corroborated by the doctor's (Pw4) evidence. That failure to call the two ladies referred to by Pw1 was not fatal. Further, she submitted that the hearsay evidence was corroborated by that of Pw3 and Pw4.

28. She also submitted that from page 29 of the Record of Appeal, it is clear that the learned trial magistrate considered the defence. Further, that the evidence of Pw2 is quite clear on what he found the Appellant doing to Pw3 and that it amounted to an indecent act. That the complainant's clothes had been removed and the Appellant touched her private parts. She submitted that the appeal has no merit and prayed for its dismissal.

29. This is a first appeal. It is now settled that the duty of a first appellate court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses. **See Okeno- V- R 1972 E.A 32; Soki –v- R (2014) eKLR, Kiilu & Anor –V- R (2005) 1 KLR 174.**

30. Having considered the grounds of appeal, record of appeal and the rival submissions, it is my considered view that the following issues arise for determination;

**a) Whether age was proved.**

**b) Whether penetration was proved?**

**c) Whether the Appellant was positively identified?**

**d) Whether the alternative charge was proved to the required standard.**

**(a) Whether age was proved**

31. Pw3 was seen by the court and it was confirmed she was a minor. Her mother (Pw1) produced her birth certificate (EXB4) which shows that she was born on 13<sup>th</sup> June, 2013. It confirms that as at 17<sup>th</sup> February, 2017 which is the alleged date of incident she was aged three (3) years eight (8) months.

**Section 8(2) of the Sexual Offence Act provides:**

***“That a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”.***

I am therefore satisfied that age was proved as required.

**(b) Whether penetration was proved**

32. The evidence available to the court on this is that of Pw2 and Pw4. There are two old women (KK and MN) who are said to have examined Pw3 and confirmed that she had been defiled. These two ladies were not called as witnesses. Furthermore, Pw1 did not at any point examine the child (Pw3).

33. The evidence of Pw2 on this is contradictory. At one point he says the penetration was in Pw3's anus and at another point he says it was inside of her. In this case the medical evidence became very critical. Pw3 was taken to hospital on the same day of the alleged incident and one would expect the results to be of great assistance.

34. Pw4 is the doctor who examined Pw3. His evidence was that:

***- There were no physical injuries and the external genitalia was okay.***

***- The hymen was missing but not freshly broken.***

***- There was no discharge.***

***- Pw3 was HIV negative***

***- Urinalysis revealed epithelia cells 3/5 which is normal.***

***- High vaginal swab revealed no spermatozoa.***

The treatment notes (EXB1), PRC form (EXB2) and the P3 form (EXB3) all confirmed this.

35. Pw2 testified that when he found the Appellant having inserted his penis inside of Pw3 he did not withdraw. He waited for him until he finished whatever he was doing. Thereafter, he gave them Kshs.10/= each and they left they went and continued playing.

36. If the evidence of Pw2 was anything to go by, the medical evidence by Pw4 would have not been what is on record. The learned trial magistrate correctly found that there was no penetration of any of Pw3's genital organs on 17<sup>th</sup> February, 2017.

### **Whether the Appellant was positively identified**

37. Pw1's account of what she was told by KK and NM was hearsay and therefore inadmissible, since the two ladies did not testify. The only direct evidence on the fact of the child being with the Appellant on the material day was from Pw2. However, Pw2 fumbled on where exactly he found the Appellant and the child.

38. On one hand, he said that he found them where the Appellant was fetching water and on the other hand, he said that they were inside the house and the door was open. That the Appellant was seated on the ground and the child was sitting on the Appellant's laps. Pw1 noted that the child was not playing with her brother at about 4.00pm.

39. In his submissions, counsel for the Appellant stated that the Appellant raised an *alibi* defence in that he had been asked by a lady called I to put pressure in her bicycle after which he proceeded to KK's place to break a padlock. He contends that this fact was corroborated by Pw1.

40. At this juncture, I believe it is imperative to highlight what the Appellant and Pw1 stated in court. The Appellant stated as follows;

*"...on this day, I was at work as usual fetching water with my bicycle from the river. When at [particulars withheld], there is a lady at I who called me and told me her bicycle had no pressure and should pump the pressure for her..."*

41. On the other hand, PW1 stated as follows;

*"I found KK who was selling tomatoes and NM who had parked her motorcycle inside my shop and asked them whether they had seen M. They told me they saw her leave with the accused. N told me she had sent the accused pump to pump air into her motorcycle and they had taken long."*

42. From the extracts, it was a lady at a place called I and not a lady called I as submitted by the Appellant's counsel. The lady whose bicycle was parked inside PW1's shop was NM and there is no evidence to show that her other name was I. Further, because the Appellant testified that he pumped pressure into the motorcycle before proceeding to break the padlock, if it was N's motorcycle that he pumped, he would certainly have encountered PW1 because the motor cycle was parked inside her shop. I therefore do not agree that PW1's statement corroborated the Appellant's defence.

43. Be that as it may, the onus was still on the prosecution to prove beyond reasonable doubt that the Appellant was with Pw3 on the material day and at the material time. The only direct evidence being from Pw2, it was important for it to be consistent. Pw2 has two versions of where the offence took place thus casting doubt on whether the Appellant was with the child in the first place. If the 'place for fetching water' and 'inside the house' was one and the same place, the prosecution had a duty to establish a nexus which they failed to discharge.

44. It is therefore my considered view that the trial court's finding on the positive identification of the Appellant was based on hearsay evidence and inconsistent evidence from Pw2 hence erroneous.

### **Proof of indecent act with a child**

45. It is noteworthy that further reliance on hearsay evidence can be seen where the learned trial magistrate made a finding that an indecent act had been committed because male dirt had been seen on the child. She expressed herself as follows;

*"Touching by penis constitutes the offence of indecent act. PW3 was categorical the accused removed her pant and put in her his penis. PW2 confirmed he found the accused seated and PW3 without clothes seated on his laps with the*

*accused 'sehemu yake ya kukojoa' penis inserted inside Pw3's buttocks. Pw1 confirmed when the older women one MN and KK checked Pw3, they saw male dirt.' (emphasis added)*

46. The hearsay evidence on the issue of male dirt was sufficiently dislodged by the doctor (Pw4) who testified that high vaginal swab revealed no spermatozoa. The fact that the charge of defilement failed did not in itself mean that the alternative count had to succeed. Admissible evidence ought to have been adduced to show that indeed Pw3's vagina was appropriately touched by use of the Appellant's penis. Even Pw2 never mentioned Pw3's vagina as the point of contact.

47. I find Pw2's evidence to be wanting in material aspects. A place of fetching water is a public place. Did he really find this alleged action on going as he claims at such a place? Even in the Appellant's house with an open door and he stood there watching until the man finished what he was doing? Further that Pw3 went away to play without any signs of pain after the alleged encounter? Can't be true.

48. My finding is that both the principal and alternative counts were not proved beyond reasonable doubt. The conviction on the alternative count is therefore unsafe.

**49. I therefore allow the appeal, quash the conviction and set aside the sentence.**

**50. The Appellant shall be released forthwith unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

**DELIVERED, SIGNED AND DATED THIS 11<sup>TH</sup> DAY OF JULY, 2019 IN OPEN COURT AT MAKUENI.**

.....

**HON. H. I ONG'UDI,**

**JUDGE.**