REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO 67 OF 2017

ERICK JAMES MUTUNGA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the original Conviction and Sentence in **Mutomo Senior Principal Magistrate's Court S.O No. 13 of 2017** by **Hon. S.K. Ngii (SRM)** on **05/12/17)***

J U D G M E N T

1) **Erick James Mutunga**, the Appellant, was charged with the offence of defilement Contrary to **section 8(1)** as read with **section 8(4)** of **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the night of **25th** and **26th** day of **August, 2017** at **[particulars withheld] village**, **Kyatune Location** in **Mutomo Sub County** within **Kitui County** intentionally caused his penis to penetrate the vagina of **V M** a child aged **17 years**.

2) In the alternative, the Appellant is charged with the offence of committing an **indecent act** with a child contrary to section **11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the night of **25th** and **26th** day of **August, 2017** at **[particulars withheld] village**, **Kyatune Location** in **Mutomo Sub County** within **Kitui County,** intentionally touched the breasts and vagina of **V M** a child aged **17 years** with his penis.

3) After full trial he was convicted for the offence of defilement and sentenced to **fifteen (15) years** imprisonment.

4) Aggrieved, he appeals on grounds that; the Appellant's fundamental rights were violated and he was not subjected to medical examination to establish any nexus with the subject matter; identification evidence was doubtful; essential witnesses were not called to testify; he was implicated by **Amos Kalulu** and such evidence was inadmissible.; the alibi defence put up was rejected without any cogent reason being given; medical evidence exonerated the Appellant and the case was not proved to the required standard.

5) Evidence adduced by the prosecution was that on the **25th August 2017,** PW1, **V.M.** was passing by the kiosk of **Amos Kalulu** when he called her. As she approached the door, he held her hand, pulled her inside and pointed at a person who was inside, the Appellant herein. Both of them caressed her. The Appellant held her neck and threatened to kill her if she shouted. They lifted her and carried her away and she felt sleepy. Ultimately she found herself in a house with the Appellant. Later on **Amos** took to them her tea and chapati. Thereafter the Appellant molested her and told her to leave. Since it was at night she did not go home. She stayed at an undisclosed place until morning. As she had intended to have her hair shaved she went to baber's shop and was shaved. She stayed there until evening. She left going to another homestead but there were no people. Therefore, she slept outside. At dawn she went to **Kyatune Market** and found a lady who was married at her home area, namely **Kaliku.** She stayed at her shop. Later on her aunt and sister went in search of her. They took her to Mutomo Police Station. She was subjected to medical examination and treatment. Investigations were carried out that culminated into the arrest of the Appellant.

6) Upon being put on his defence the Appellant stated that he travelled from **Nakuru** on **25th August, 2017** destined for his wife's **Mwingi** home. He slept at his home and left for his wife's maiden home the following day. They discussed issues pertaining to their marital differences. They left for their matrimonial home where they arrived at 5.30pm. While at home, he was arrested following allegations that he had been seen with the Complainant a person he did not know.

7) He called witnesses, DW2, **Kalivu Kyatune** who testified that he accompanied him to his wife's home and was present when the Appellant was arrested and DW3, **Frank Mbai Mutisya,** his uncle who testified that the Appellant travelled home on **25th August, 2017** following plans to visit their in-law.

8) The appeal was canvassed by way of written submissions.

9) It was urged by the Appellant that; he was held in custody for **three (3) days** prior to being produced in court; he was not examined to prove that he did penetrate the Complainant; identification of the offender was questionable since the Complainant alleged that she did not know the perpetrator of the act and she did not give any description of the individual and his manner of dressing and the circumstances that prevailed did not favour positive identification.

10) He faulted the court for not reaching a finding that key witnesses mentioned by the Complainant were not availed to testify.

11) That the age of the Complainant was not sufficiently proved and no *voire dire* examination was conducted and the alibi defence was disregarded

12) The State/Respondent opposed the appeal. It was urged that the age of the minor was proved. In this regard learned State Counsel **Mr. Mamba** relied on the case of **J.K.N. vs. Republic [2015] eKLR** where it was held that:

> ***"I find the child health card for PW2 indicating her date of birth and which was used for her immunization as a child was sufficient proof of PW1's age. I am satisfied that she was indeed 17 years at the time of this offence. The learned trial magistrate's conclusion on this point was correct. I find nothing turns on this point."***

13) On identification he submitted that the circumstances were tenable to enable the Complainant identify the perpetrator as the Appellant and his accomplice led the police to where he left him with the Complainant.

14) This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

15) To prove the case to the required standard the prosecution was required to prove:

i. The age of the Complainant

ii. The act of penetration into the Complainant's genital organs

iii. Positive identification of the perpetrator **(Also see Fappyton Mutuku Ngui vs. Republic (2014) eKLR).**

16) A Child Health Card (immunization card) was adduced in evidence. Per the document, the child was born on **1st August, 2000.** It was issued to **V.** This was proof that at the time of the incident the Complainant was 17 years.

17) Following the complaint raised, the Complainant was subjected to medical examination. PW5 **Teresia Mbula** the Clinical Officer who examined her found her hymen missing but there were no injuries or lacerations noted on the genitalia. She was not specific as to when the hymen was broken. In the case of **P.W.K. vs Republic (2012) eKLR** it was stated thus:

> ***"Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen."***

18) The fact of raptured hymen *per se* is not proof of defilement. Therefore, the court had to find some other evidence to confirm the fact of defilement. In the instant case the evidence available was that of the Complainant. PW1 told the court that **Amos Kalulu** who lured her to enter his kiosk where he sold tea and mandazi carried her away from the kiosk jointly with the Appellant. At the point of entering the kiosk it was during the day. Therefore, she was able to identify the person who was with **Amos Kalulu**. The individual, according to her, had sexual intercourse with her. When he committed the act there were no lights in the house but she had seen the person responsible for the act.

19) Following instructions from **OCS, Mutomo**, PW4, **No. 2008115697 APC Famau Juma** arrested **Amos Kalulu** who was one of the suspects. Later, he called a village elder who told him that he had seen **Erick Mutunga** at home and he went to his homestead and arrested him. Initially he had received a report from **G M** in respect of her sister, the Complainant.

20) According to PW6, **NO. 96720 PC Defence Mghoi,** it was after the Complainant was traced at **Kyatune** that she gave the name of the person who molested her as **Erick Mutunga.** This was a suggestion that the Complainant knew the Appellant prior to the incident. The officer stated thus:

> ***"The girl was traced from Kyatune shopping centre. When interrogated, she disclosed that she had been defiled by Erick Mutunga during the night of 25th and 26th August, 2017. We linked up with the Aps Kyatune to arrest the suspects. It was also established that Amos Kaluli who runs a food kiosk, is the one who had called and locked up the girl inside his kiosk in the company of the accused."***

21) The question to be answered is, if at all the Appellant was known to PW1, why would she allege that she did not know him and would

only identify him by facial appearance.

22) This brings into question her credibility as a Complainant. The question I must address is if evidence adduced by the Complainant should have introduced doubts in the mind of the court that would have made the conviction unsafe or that notwithstanding, if the conviction resulted from the satisfaction on the part of the court of the Appellant's guilt.

23) The Complainant alleged that after she went to the kiosk of **Amos** and saw an individual she identified in the dock as the Appellant and one she had not known before, the two (2) persons took her to a house. Her attempt to run away was thwarted by the Appellant's threats to kill her. After having sex she left and stayed somewhere until dawn. The fact of having stayed "*somewhere*" was vague and unexplained.

24) Circumstances that inhibited her from going home remained unexplained. She did not state any reason why she neither went home nor reported the matter to any administrator or even her school administrator. She chose to have her head shaved and allegedly stayed at the Barber's shop until evening and proceeded to stay outside until morning. This was at an undisclosed unoccupied homestead. Her evidence as to where exactly she slept was contradicted by that of PW6 who said the Complainant disclosed that she was defiled by the Appellant for two consecutive nights.

25) In the case of **Philip Nzaka Watu v Republic [2016] eKLR** it was stated that:

> ***"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the Appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

26) PW2 **G M** her sister gave hearsay evidence that ultimately led her to **Kalulu.** When she confronted him he admitted having seen the Complainant, or interacted with her and even escorted her for a distance at **6.00 p.m**. This information made her report the matter to the **AP Post Kyatune** where PW4 advised her to report to **Mutomo Police** Station. Although PW2 stated that the Administration Police Officers (APs) pressed **Kalulu** until he volunteered information that he had taken the Complainant to **Kakhenu** alias **Mutunga** and even led them to his homestead; PW6 stated that by the time they were giving the APs instructions to arrest the Appellant, the Complainant had disclosed the name of the Appellant and it is for that reason that PW4 stated that:

> ***"The suspects were identified by names to us."***

27) Evidence analysed so far depict the Complainant as an untruthful witness. Medical evidence adduced did not establish beyond reasonable doubt the fact of penetration. The fact of sexual intercourse having taken place would have been proved by the Complainant herself or by circumstantial evidence. However, the identity of the perpetrator of the act is in question by virtue of the fact that the only witness called who could have proved that fact was not straightforward whereby whatever she stated should have been called into question.

28) In the result, I find that the conviction in the circumstances was unsafe. Therefore, the appeal succeeds. The conviction of the Appellant is hence quashed and the sentence imposed set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

29) It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **19th** day of **November, 2019.**

L.N. MUTENDE

JUDGE