



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 65 OF 2016

MUNYOKI MUSEMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original conviction and sentence in Kyuso Principal Magistrate's Court Criminal Case No. 258 of 2013 by E. M. Mutunga R M on 08/03/16)

J U D G M E N T

1. **Munyoki Musembi**, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Sub-Section (2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **9th day of November, 2013** in **Kyuso District** within **Kitui County**, intentionally committed an act which caused penetration of his penis into the vagina of **M M** a child aged **10 years**.

2. In the alternative he was 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 were that on the **9th day of November, 2013** in **Kyuso District** within **Kitui County**, did commit an indecent act with **M M** a child aged **10 years** by causing his penis touch her vagina.

3. Facts of the case were that on the **9th day of November, 2013** at about **10.00 a.m.** **M M** the Complainant was sent by her mother to buy some maize flour. On her way back a person she identified as the Appellant grabbed her, dragged her into the bush and violated her sexually. She went home and informed her mother what had befallen her. They went in search of the Appellant. He was arrested by members of public and handed over to the area Chief who in turn took him to the police station where he was re-arrested and charged.

4. When put on his defence the Appellant stated that he was working on the farm on the **13th October, 2013** when a mob of people went, beat him up and took him to the village elder amidst accusation that footprints belonged to him. In the process he lost **Kshs. 7,500/=**. He was taken to Kyuso Police Station and charged.

5. The learned trial Magistrate analyzed evidence adduced and concluded that the Appellant committed the offence. He was convicted and sentenced to serve **life imprisonment**.

6. Aggrieved, the Appellant appealed on grounds that:

- The case was not proved beyond reasonable doubt.
- There was a possibility of mistaken identity.
- Admitting the Doctor's evidence that was not proved to the required standard was erroneous.
- The alibi defence was not considered.

7. The Appellant canvassed the Appeal by way of written submissions. He argued that the Complainant was attacked by a person that was known to her and the manner in which he (Appellant) was arrested was questionable. That crucial witnesses were not called to testify and the age of the Complainant was not proved. That the Clinical Officer who adduced medical evidence was not a qualified Medical Officer and the evidence adduced was contradictory.

8. In response, the State opposed the Appeal. Through learned State Counsel **Mr. Mamba** it was argued that the Appellant threatened to kill the Complainant and defiled her. Her age was proved by a Health Card that was adduced in evidence and she identified the Appellant as the person who defiled her.

9. This being a first Appellate Court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. (See **Okeno vs. Republic (1973) EA 32**).

10. The Appellant having been charged with the offence of Defilement, the Prosecution was duty bound to prove:

- (i) The age of the Complainant.
- (ii) The act of penetration.
- (iii) Positive identification of the perpetrator.

11. In the case of **Alfayo Gombe Okello vs. Republic Criminal Appeal No. 203 of 2009 (KSM)** it was stated that:

“.....the age of the victim is a necessary ingredient of the offence of defilement which ought to be proved beyond reasonable doubt.”

12. PW3 **J M**, the mother of the Complainant adduced in evidence a child Health Card issued at birth. Per the entries on the card, the Complainant was born on the **11th August, 2013**. This was sufficient proof of the Complainant’s age.

13. The Complainant returned home crying and told PW3 that she had been violated sexually. She was taken to Kyuso District Hospital. On examination she had inflamed labias with a freshly broken hymen. A broken hymen is evidence of penetration by an object. Penetration of the Complainant’s genitalia was proved beyond doubt.

14. After the Complainant’s mother established that she could not walk properly following injuries sustained, she carried her to the elder’s place. The Complainant led them to the scene of the incident. They noticed some shoeprints that they followed. They went to a homestead where they found the Appellant. On seeing him, according to PW2, the village elder, the Complainant was frightened. She wanted to run away from him. She identified him as her assailant.

15. In his defence the Appellant argued that he must have been mistaken for somebody else. However, he gave an account of the **13th October, 2013** instead of the **9th day of November, 2013** when the act was committed and he was arrested.

16. The learned trial Magistrate considered evidence adduced by both the Prosecution and Defence and found that the minor had positively identified the Appellant. The Complainant was a minor aged ten (10) years old. The proviso to **Section 124** of the **Evidence Act** provides thus:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory

Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

17. The learned Magistrate heard and believed the Complainant. The Magistrate opined that the Complainant saw the Appellant carrying a wooden tool used for making bricks prior to being sexually molested and he was found in possession of the same tool that was produced in Court as an exhibit. Other than claiming that it was a case of mistaken identity the Appellant failed to give any explanation regarding the tool. The offence was committed in broad day light. The Complainant gave the description of the clothes the Appellant was wearing and ultimately identified him.

18. In his submissions the Appellant argues that his alibi defence was disregarded. This was an implication that he could not have committed the offence because he was somewhere else when the act of defilement was committed against the person of the Complainant. In his defence the Appellant gave an account of what he was doing on the **13th October, 2013** but not on the fateful date.

19. Further, it is argued that the medical evidence was not adduced by a real Medical Officer, but a Clinical Officer therefore it was not sufficient. In the case of **Kavoi Kiilu vs. Republic (2010) eKLR** the Court of Appeal stated thus:

“Under Section 2 of the Clinical Officers Act a clinical officer means:-

“a person who having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by the institution and is registered under the Act.....”

Section 7(4) of the Act states:-

“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice on the Gazette.”

20. PW6 was a Clinical Officer working at the Kyuso Sub-County Hospital. He had the necessary knowledge and skills to examine the Complainant and fill the P3 form (Medical Report). In the premises that ground of Appeal fails.

21. From the foregoing, it is apparent that the learned Magistrate did not misdirect himself in reaching the conclusion to convict the Appellant. In the circumstances the Appeal lacks merit and is dismissed in its entirety.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 16th day of May, 2018.

L. N. MUTENDE

JUDGE