



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 39 OF 2016

MUSILA KANGOLA MUTIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 134 of 2015 by G. W. Kirugumi R M on 15/06/16)

J U D G M E N T

1. The Appellant, **Musila Kangola Mutia** was charged thus:

Count 1: Defilement contrary to **Section 8(1)** as read with **8(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **27th** day of **February, 2015** in **Mwingi Central District** of **Kitui County**, intentionally caused his penis to penetrate the vagina of **NM**, a child aged **10 years**.

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 **27th** day of **February, 2015** in **Mwingi Central District** of **Kitui County** committed an indecent act which caused the contact of his male genital organ namely penis to the female genital organ namely vagina of **NM**, a child aged **10 years**.

Count 2: Defilement contrary to **Section 8(1)** as read with **8(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **27th** day of **February, 2015** in **Mwingi Central District** within **Kitui County** intentionally and unlawfully caused his penis to penetrate the vagina of **DN**, a child aged **13 years**.

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 **27th** day of **February, 2015** in **Mwingi Central District** within **Kitui County** committed an indecent act which caused the contact of his male genital organ namely penis to the female genital organ namely vagina of **DN**, a child aged **13 years**.

2. Facts of the case were that on the **17th February, 2015**, **PW1, NM** and **PW2, DN** were on their way from school in company of **PW3 SM**. They encountered the Appellant who pulled them inside a house leaving **PW3** and **PW4 MK** at the gate. He put them on the bed and removed their underwear. He violated them sexually as their colleagues who were left outside screamed and went to the door. He went out and chased them away. One of the children, **K** informed **PW5, TWM** her aunt what they witnessed. The matter was reported to the police. Both children were subjected to medical examination. The police investigated and arrested the Appellant who was subsequently charged.

3. When put on their defence the Appellant denied knowing the Complainants. It was his defence that he saw them in Court. He recollected having seen some children while fencing the land near the gate. They insulted him and he told them that he would beat them. At about **4.00 p.m.** on the **4th February, 2015** some children threw stones at him. He reported to **DN** who reported the matter to parents. A meeting was held at school where parents were advised to warn the children. One of the parents alleged at the meeting that he had defiled some two (2) children. He was arrested while on his way home.

4. The learned trial Magistrate considered evidence adduced, convicted the Appellant on both Counts and sentenced him to **life imprisonment**.

5. Aggrieved by the conviction and sentence the Appellant appealed. In the Supplementary Grounds of Appeal he stated that the learned trial Magistrate failed to consider that the Appellant was framed up following the warning given by his employer to the Complainants due to their threats. That the P3 form did not show any ruptured hymen, his alibi defence was not considered and the case was not proved to the required standard.

6. The Appellant canvassed the Appeal by way of written submissions.

7. The State through learned State Counsel **Mr. Mamba** who restated the facts as presented before the trial Court and summed up by saying that the case was proved to the required standard.

8. 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).**

9. To prove the case beyond any reasonable doubt the Prosecution was duty bound to prove:

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

10. The age of the Complainant must be proved as it is an essential ingredient of the offence of defilement. In the case of **Alfayo Gombe Okello vs. Republic Criminal Appeal No. 203 of 2009 (Kisumu)** the Court of Appeal stated that:

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

11. PW1, **NM** was subjected to *voire dire* examination due to her tender age. She told the Court that she was ten (10) years old. PW6 **LM** her mother adduced in evidence her Birth Certificate and testified that she was ten (10) years old. The Birth Certificate **Serial No. [Particulars Withheld]** shows that the Complainant was born on the **7th May, 2004**.

12. PW4 told the Court that she was thirteen (13) years old. Her age was assessed by **Doctor Mundia** who ascertained that she was thirteen (13) years old. In the case of **Francis Omuroni vs. Uganda Criminal Appeal No. 2 of 2000** the Court held that:

“..... in defilement cases, medical evidence is paramount in determining the age of the victim and the Doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense.”

13. Evidence adduced proved the age of the Complainants beyond any reasonable doubt.

14. The Complainants were subjected to medical examination right at the outset. PW7 **Doctor Comma Nzioka** examined both of them on the **12th March, 2015**. On examination PW1’s hymen was broken. PW2’s hymen was also broken. The fact that their hymens were broken was evidence of penetration into their genitalia.

15. Both Complainants knew the Appellant. In his defence he appreciated that fact. Both of them identified him as the person who pulled them inside the house, locked them inside and proceeded to violate them sexually. Their evidence was corroborated by that of PW3 and PW4 who were independent witnesses whose evidence implicated the Appellant as a person who forcibly took the Complainants into his house. Their attempt to assist the Complainants by screaming to seek attention of any good Samaritan was thwarted by the Appellant who chased them away.

16. It is argued by the Appellant that he was victimized because his employer raised concerns regarding how the children treated him. PW9 **J N K** the Deputy Headmaster of **[Particulars Withheld] Primary School** where the Complainants attended confirmed that one **Ngula Nzoka** reported to him that he had received a report from his employee that school children passed through his homestead on the **5th June, 2015** and abused his employee, the Accused. He investigated and confirmed that the employee (Appellant) had molested the Complainants and it was already a police case. Probably this explains why the Appellant did not call his employer as a witness.

17. It is also argued that the Appellant’s alibi defence was not considered. In a nutshell the Appellant argues that he could not have committed the offence because he was elsewhere at the time the alleged offence was committed. He has maintained that he was not involved in the crime. He stated that on the material date and time he was fetching water for the livestock therefore he never saw the Complainants. He does not deny having been at the home where the offence was committed and the evidence adduced by the Prosecution witnesses, innocent children who could not have any spite against him was not watered down.

18. From the foregoing I find that the learned Magistrate reached a correct finding. Therefore I have no basis to interfere with the findings of the trial Magistrate. The Appeal lacks merit. Accordingly, it is dismissed.

19. It is so ordered.

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

L. N. MUTENDE

JUDGE