



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CRIMINAL APPEAL NO. 13 OF 2017**

**MUI KITSULI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the Sentence in Mutomo Senior Principal Magistrate's Court*

*Criminal Case No. 23 of 2016 by Z. J. Nyakundi S P M on 08/02/17)*

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

1. **Mui Kitsuli**, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **14<sup>th</sup>** day of **September, 2016** at about **3.00 p.m.** within **Kitui County**, intentionally and unlawfully caused his penis to penetrate the vagina of **N K** aged **17 years** a child with mental disability.
2. In the alternative he was charged with the offence of **Committing and 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 **14<sup>th</sup>** day of **September, 2016** at about **3.00 p.m.** within **Kitui County**, intentionally and unlawfully touched the vagina of **N K** aged **17 years** a child with mental disability.
3. He was tried, convicted of the main Count and sentenced to serve **fifteen (15) years imprisonment**.
4. Aggrieved by the conviction and sentence the Appellant appealed on grounds that the learned trial Magistrate relied on *voire dire* evidence from PW1 who did not know how to state the truth or lie; and hearsay evidence. Medical evidence adduced was not conclusive. The alibi defence presented was rejected yet it was strong.
5. Facts of the case were that the Complainant **N K** a child aged **17 years** was dumb. On the **14<sup>th</sup>** day of **September, 2016**, **S K** a minor returned home to find the Appellant lying on the Complainant his sister. Later on he informed PW2 **R M K** their mother who reported to the PW3 **Christopher Katheke** the Assistant Chief who advised her to take the Complainant to hospital. The matter was reported to PW4 **No. 91695 PC Samson Mindoti** who issued her with a P3 form. PW5 **Teresia Mbula** the Clinical Officer examined her and filled a P3 form. The Appellant was subsequently arrested and charged.
6. When put on his defence the Appellant stated that he was at **Katembani** when he was arrested following allegations that he had defiled the Complainant. He denied the allegation.
7. The Appellant canvassed the Appeal by way of written submissions. He urged that PW1 did not appreciate the importance of either telling the truth or lying therefore his evidence was not believable.
8. That the Magistrate relied on age assessment by the Doctor to convict him without considering that a Birth Certificate was the only conclusive evidence that he could rely upon. That there was nothing to link him to the commission of the offence and that his rights were violated as he was in custody for eight (8) days prior to being charged.
9. The State through learned Counsel **Mr. Mamba** opposed the Appeal. He urged that PW1 found the Appellant lying on the minor and on seeing him he ran away therefore he was positively identified. That the age of the Complainant was **17 years** and the trial Court observed her demeanor and that of the Appellant.
10. This being the 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**).

11. In his opening address the Prosecuting Officer stated that:

***“The complainant N K is before court. She does not talk and she is dumb. She is 17 years old. We have a Mental Report.”***

12. Following the information given the learned trial Magistrate ordered that:

***“N K who is dumb shall talk through S K, a minor who does not know his age.”***

13. PW2 the mother of the Complainant stated that the Complainant cannot speak fluently. Procedurally this was a witness who should have been declared vulnerable by the Court on account of impairment. (See **Section 31(2) of the Sexual Offences Act**). Such a witness should have testified through an intermediary. (See **Section 31(4)(b) of the Criminal Procedure Code**).

14. **Section 2** of the **Act** defines an intermediary as:

***““intermediary” means a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children’s officer or social worker;”***

PW2 understood the Complainant, she could have been considered for appointment by the Court as an intermediary through whom the Complainant would have adduced evidence.

15. The learned Magistrate did state that the Complainant was to testify through **S K**. The stated child who did not know his age, though his mother (PW2) stated that he was six (6) years old was a purported eye witness to the act of the Appellant lying on the Complainant. He gave his evidence. The Complainant did not testify through him.

16. There is a report filed by **Dr. Mutisya Cosmas** who commented that she was dumb but not deaf. **Section 126** of the **Evidence Act** provides thus in respect of dumb witnesses:

***“(1) A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as, for example, by writing or by signs; but such writing must be written, and the signs made, in open court.***

***(2) Evidence so given shall be deemed to be oral evidence.”***

It is common knowledge that the Courts have retained services of sign language interpreters who interpret in such cases. This option was not considered by the trial Court. Alternatively, the Complainant, a competent witness, could have testified through an interpreter who was conversant with her signs and noises like any of her relatives (See **Hamisi s/o Salum vs. Republic (1951) EACA 217**).

17. This was a case where the conviction was vitiated by a mistake of the Court. The question to be posed is therefore whether a retrial should be ordered?

18. In the case of **Muiruri vs. Republic (2003) KLR** the Court of Appeal considered the issue and had this to state:

***“(i) Generally whether a re-trial should be entered or not must depend on the circumstances of the case.***

***(ii) It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the Appellant. Other factors include illegalities or defects in the original trial, length of time having lapsed since the arrest and arraignment of the Appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”***

19. The Complainant was subjected to medical treatment. It was proved that her hymen was missing and she had laceration of the labia minora. It was opined that she had been defiled. It would have been imperative for her to testify.

20. The Appellant was convicted and sentenced to serve **fifteen (15) years imprisonment**. He has been in incarceration for **1½ years**. No prejudice shall be caused to him if a retrial is ordered. In the premises, I allow the Appeal, quash the conviction, set aside the sentence meted out. The Appellant shall remain in custody and be produced before **Mutomo Senior Principal Magistrate’s Court** on **24<sup>th</sup> September, 2018** for a retrial by a Magistrate of competent jurisdiction other than **Z. Nyakundi SPM**.

21. It is so ordered.

**Dated, Signed and Delivered at Kitui this 19<sup>th</sup> day of September, 2018.**

**L. N. MUTENDE**

JUDGE