



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 76 OF 2015

KIOKO DAUDIAPPLICANT

VERSUS

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in **Mutomo Senior Resident Magistrate's Court Criminal Case No. 15 of 2015** by **Hon. Z. J. Nyakundi PM** on 07/07/15)*

J U D G M E N T

1. The Appellant was charged with the offence of **Defilement** contrary to **Section 8(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **12th March, 2015** at unknown time at **[particulars withheld] Kiangwa Sub-location, Ikanga Location of Mutomo District** within **Kitui County**, intentionally caused his penis to penetrate the vagina of **GW** aged **3 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 **12th March, 2015** at unknown time at **[particulars withheld] Kiangwa Sub-location, Ikanga Location of Mutomo District** within **Kitui County**, intentionally touched the vagina of **GW** aged **3 years**.
3. He was tried, found guilty, convicted and sentenced to serve **Life Imprisonment**.
4. Being dissatisfied with the conviction and sentence, he appealed on grounds that:
 - The offence of defilement was not conclusively proved.
 - The Prosecution's case was based on suspicion.
 - The conviction was based on circumstantial evidence that was not proved to the required standard.
 - The Appellant was not positively identified as the perpetrator of the offence.
 - Charges as drawn are defective.
 - The age of the Appellant being below **18 years** was not considered.
5. Facts of the case were that PW1, **BW** went to church leaving the Complainant, her child aged 3 years in custody of PW2 **JM** who in turn left her under the care of one **SB**. She returned home from the market to find the child crying. She asked **S** why the child was crying and she stated that the reason was because her mother had gone to church. However, she sought to know why the child was mentioning the name '**Kioko**'. She removed the child's clothes and noticed some discharge in the anal region. The child was taken to **Ikanga Hospital** where she was examined by PW3 **Virginia Njoki**, a Clinical Officer who found anal laceration, blood and whitish discharge from the anus. On vaginal snoop being done, no spermatozoa was seen but Red Blood Cells were seen. The case was reported to PW4 **No. [particulars withheld] PC John Kavuti** and the Appellant, a suspect then, was arrested by **Dominic Winamu** and **APC Siro**.
6. When put on his defence the Appellant stated that he is a herder. On the **12th March, 2015** he was fetching water. Prior to going to fetch water he was at home with his aunt **S, M** was at the garden while **GW** was also at home.
7. The learned trial Magistrate reached a finding that when the child mentioned the name **Kioko** as she cried she was referring to the Accused person. That the Accused having worked at the home of the Complainant was a person well known to the child therefore there was no mistaken identity. He dismissed the defence put up and convicted the Appellant.

8. This being the first appellate court, It is duty bound to subject evidence adduced at trial to a fresh and exhaustive examination and come to its own conclusion bearing in mind that it did not see nor hear witnesses who testified at the hearing. (**See Okeno vs. Republic (1972) EA 32**).

9. To prove the offence of defilement the Prosecution was expected to prove:

- (i) The act of penetration of the Complainant's genitalia.
- (ii) That the Complainant was a minor.
- (iii) The act of penetration of the Complainant was done by the Accused/Appellant.

10. In the particulars of the offence it is stated that the Accused penetrated the vagina of the Complainant. Penetration is defined by the **Sexual Offences Act** as:

“The partial or complete insertion of the genital organs of a person into the genital organs of another person.”

The Complainant was subjected to medical examination and found having sustained lacerations on the anal orifice which was tender. Some discharge was noted that was blood stained. This was evidence of the anus having been interfered with. The anus is envisaged to be part of the genital organ although it is not a vagina that is expressly stated in the particulars of the offence. Looking at the Medical Examination Report (P3) when the Complainant was subjected to general physical examination, there were no sign of penetration. However the fact of there having been blood stained discharge may be evidence of partial penetration of the anus.

11. A Birth Notification **Serial No. BC [particulars withheld]** was issued to **WM** as a mother. The date of birth of the child was **2nd February, 2012**. However the Birth Notification document has no name of the child. However, the Clinical Officer who examined the Complainant estimated her age as **3 years**. The court had an opportunity of seeing the Complainant when it declared her a vulnerable witness and appointed her mother as an intermediary. This was evidence of the Complainant being a minor.

12. **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.”

The Court treated PW1 the mother of the Complainant as an intermediary. However, all she stated was how she left the child with PW2, her mother. The evidence that the child was defiled by the Appellant needed corroboration which was lacking.

13. Evidence on record is that PW2 asked **Syomete Benard** why the child was crying mentioning **Kioko**. Although she did not answer her she formed the opinion that the person who was responsible for the act of defilement was the Accused. She called him and confronted him with the accusation and he allegedly took off. The officers who arrested him were not called as witnesses. None of the witnesses testified as to how the Appellant was arrested. The charge sheet erroneously indicate the offence was committed on the **12th March, 2015** but the date of arrest is indicated as **6th March, 2015**. The Appellant was arraigned in court on the **16th March, 2015**. There is no evidence on record to corroborate the allegation that the Appellant “took off”.

14. When PW2 allegedly confronted the Appellant S was present. This was the person she entrusted with custody of the child for the duration she was away from home. This person according to the Appellant was at home at the time he was there. She was however not called as a witness. She was a crucial witness as she would have told the court if she let the child get out of her sight. In the case of **Bukenya vs. Uganda (1972) EA 549** it was held that:

“..... The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; the court has the right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case; where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

15. Evidence adduced having fallen short of proving that the Appellant was the perpetrator of the offence, the only inference that should have been drawn is that the evidence that may have been adduced by the witness **Syomete** would have been adverse to the Prosecution's case.

16. From the foregoing it is apparent that the case against the Appellant was not proved to the required standard. The Appeal which is meritorious succeeds and is allowed. The conviction is quashed and sentence imposed set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

17. It is so ordered.

Dated, Signed and Delivered at Kitui this 19th day of January, 2017.

L. N. MUTENDE

JUDGE