



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 82 OF 2014**

**CHARLES MURAGE MUINDI..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against original conviction and sentence in Karatina Senior Resident Magistrates' Court Criminal Case No. 17 of 2013 (Hon. D.M. Musyoka, Ag. Principal Magistrate) delivered on 29<sup>th</sup> May, 2014)*

**JUDGMENT**

The appellant was charged with the offence of defilement contrary to **section 8 (1)** as read with **section 8(2)** of the **Sexual Offences Act No.3 of 2006**. The particulars were that on 23<sup>rd</sup> day of September, 2013 at about 4:30 PM at [particulars withheld] village in Mathira East district within Nyeri County, the appellant intentionally caused his penis to penetrate the anus of IMM a child aged 6. In the alternative, the appellant was charged with the offence of indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act** the particulars being that on the 23<sup>rd</sup> day of September, 2013 at about 4:30 PM at [particulars withheld] village in Mathira East district within Nyeri County, the appellant intentionally touched the anus of IMM, a child aged 6 with his penis.

He was convicted of the main count and sentenced to life imprisonment. He appealed against both the conviction and sentence citing the following grounds against the judgment of the trial court:

1. The learned magistrate erred in law and in fact in relying on the doubtful evidence of minors;
2. The learned magistrate erred in law and in fact by misdirecting himself on the evidence of PW1, PW4 and PW5;
3. The learned magistrate erred in law and in fact in basing the appellant's conviction on a charge that was not proved beyond reasonable doubt; and,
4. The learned magistrate erred in law in dismissing the appellant's alibi.

The prosecution case was that on 23<sup>rd</sup> September, 2013, the complainant's mother, **PW1**, came back home from work and found her son in the house while other children, including **EW(PW3)** were outside. She overheard E say "do not tell mum" and out of curiosity she enquired from the children what it was that she shouldn't be told. It is then that E told her that a shepherd, who turned out to be the appellant, had done "tabia mbaya" (bad manners) to the complainant. The complainant himself told her that the appellant had accosted him in a toilet and sodomised him. Upon checking his anus, she noticed that it had

reddened and was sensitive because the complainant expressed pain whenever she touched that part of his body. According to her, there were bruises at the same anal area. Together with the husband, the complainant's mother, went to the police station to report and thereafter proceeded to Karatina hospital where the complainant was treated. She produced a birth certificate showing that the complainant was born in 2007 and therefore he was six years old on 23<sup>rd</sup> September, 2013 when the offence was committed.

She also testified that when the appellant was confronted by members of the public he admitted having defiled the complainant. This aspect of her evidence was corroborated by the area assistant chief **Beatrice Samla Mwangi (PW4)** who also stated in her evidence that indeed the appellant admitted that he had defiled the complainant.

The **complainant(PW2)** himself testified that on the material day at about 4:30 PM he went to the field to play after he came from school. He found the appellant in the field. The appellant told him to go the toilet where he immediately followed him. He undressed the complainant and also removed his own trousers. According to the complainant, the appellant then "did bad things to him"; he explained that the appellant did these "bad things" as he stood while the appellant himself was in a kneeling position. He gave the complainant bread and biscuits to buy his silence. When he returned home, he informed **E (PW3)** and later informed his mother after she came back. Indeed, **E W (PW3)**, also a minor aged 6 testified and stated that the complainant had told her that the appellant had done "bad things to his behind" and enticed him with biscuits and bread.

The complainant was treated at Karatina district hospital; apparently, he was examined by two people; one of them was **Masela Nyawira (PW6)** who testified that she worked at the hospital though the capacity in which she was engaged was not disclosed. She attended to and examined the complainant on 23<sup>rd</sup> September, 2013. The examination established that there were what she described as "small bruises" and "whitish things" on the complainant's genitalia. A swab she took did not reveal any spermatozoa. In her assessment, the complainant's genital organ was normal with no obvious injuries except for the "two small tears" around the genital area.

Apart from examining the complainant, this witness also examined the appellant; she established that there were no injuries on his genitalia.

The second person who testified as having examined the complainant was **Dr. Geoffrey Muigai (PW7)**; unlike Masela Nyawira he was more specific that he was a medical officer who at the time of the incident was stationed at Karatina hospital; however, his findings were in every respect similar to those which Nyawira established on examination of the complainant-that his genital was normal, there were tears in the anal region and what looked like semen. A swab was taken but it did not reveal anything unusual. He exhibited the complainant's P3 form to support his findings.

**Corporal Mary Mueni (PW8)** then attached at Karatina police station investigated the complaint against the appellant and largely narrated what the complainant had told her. She, however, added that the complainant screamed when he was assaulted but the appellant threatened to beat him up. To appease him he bought him biscuits and bread.

The appellant made an unsworn statement and denied having defiled the complainant. His evidence was that on 20<sup>th</sup> September, 2013, at 4.30 PM he was taking care of sheep; while he was at Karindudu grounds the complainant's, mother told him that he had defiled her son. She then escorted him to the police station after he had taken the sheep back to their enclosure.

**Section 8 (1) and (2) of the Sexual Offences Act** under which the appellant was charged provides as follows:-

## **8. Defilement**

*(1) A person who commits an act which causes penetration with a child is guilty of an offence*

termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

Two critical elements which must be established before one is convicted of the offence of defilement under this section are first, the penetration and second, the age of the victim. "Penetration" as a technical term is defined in **Section 2** of the Act to mean "*the partial or complete insertion of the genital organs of a person into the genital organs of another person*".

The central evidence to proof of "*the partial or complete insertion of the genital organs of a person into the genital organs*" of the complainant was that of the complainant himself and that of the doctor. The complainant started it all and stated as follows in this regard:-

***He removed my trouser and also removed his and started doing bad things to me. He did it on my behind while I was standing and the accused was kneeling down.***

Two questions whose answers appear not to be quite apparent from the complainant's, and indeed the entire prosecution evidence are first, what are "the bad things" that the complainant was referring to and second, which part of the complainant's "behind" was subjected to the "bad things". My humble view is that, by the very nature of definition of the act of penetration which, obviously is a vital component of the offence of defilement, a victim of this form of assault must be as explicit as possible so as to leave no doubt that the genital organs of the assailant were partially or completely inserted into his or her genital organs. Since the Act itself is specific that certain or particular organs of both the culprit's and the victim's bodies must be involved, the trial court must be satisfied, beyond peradventure, that those organs were engaged. A criminal trial court cannot assume that an accused person who removes his trouser and positions himself behind a complainant in a certain manner inserted his genitals into those of the complainant. The prosecution must strive to bring out from the complainant the evidence that the undressing and positioning of both the complainant and the accused person led to some overt act involving particular organs of their bodies. It is not up to the trial court to imagine or speculate what could possibly have happened; it can only act on the evidence before it for only then can it be said that the fact in issue has been proved beyond reasonable doubt.

My very humble view is that it was not enough for the complainant to simply say that the appellant "did bad things" to him from his behind and leave it to court to make out on its own what these things were and the specific part of the complainant's behind that was affected. There may have been a myriad of "bad things" that the appellant could probably have done on the complainant's behind that may not amount to the offence with which the appellant was charged; the burden on the prosecution was to demonstrate to court that the bad things complained of were those contemplated in **section 8(1) and (2)** of the Act. I am not satisfied that it discharged this burden to the required standard.

I am minded that the trial court is enjoined to consider and evaluate the evidence as a whole and no particular piece of evidence should be considered in isolation from the rest. As far as the act of penetration is concerned, the medical evidence was crucial to the extent that it would be corroborative of any evidence of the sexual assault. However, the available evidence was, in my view, not conclusive that the complainant was sexually assaulted for two reasons; while it is indicated in one part of the P3 form, (**section C, part 3(b)** thereof) that "there were perianal tears seen" to the anus, another part (**part 4(d)** of the same **section C**) is specific that there were no anal injuries. It is appreciated Dr Muigai testified that there were tears in anal region but this evidence was not wholly consistent with his findings as captured in the P3 form.

Again, although the P3 form itself has a provision for the age of the injuries, the age of the anal tears was not given so that it could not be concluded with any certainty whether the alleged tears were secondary to an act of penetration at a specific time.

In any event, the probable type of weapon causing the injury was not given; in the absence of this

evidence, it could not be assumed that the so-called tears were caused by partial or complete penile insertion into the complainant's anus.

In the ultimate I am not satisfied that the act of "penetration" as understood under **section 2** of the **Act** was proved beyond reasonable doubt. Having so held it is unnecessary for me to consider the other aspect of age of the complainant which is also a necessary element in the offence of defilement. In the absence of proof of penetration, it follows that the offence of defilement itself was also not proved irrespective of whether complainant was within the prescribed age category. Accordingly, based on my own evaluation of the evidence on record, I have to arrive at a different conclusion from that which the learned trial magistrate reached and allow the appellant's appeal. I find the appellant's conviction unsafe and therefore I quash it; his sentence is set aside and he is set at liberty unless he is lawfully held.

**Signed, dated and delivered in open court this 14<sup>th</sup> day of February, 2017**

**Ngaah Jairus**

**JUDGE**