



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 286 OF 2013**

**KENNEDY MULI SILA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the judgment of Principal Magistrate's Court at Makindu delivered by Honourable E. Muiru, (Resident Magistrate) on 1<sup>st</sup> November, 2013 in MAKINDU PM.CR.CASE 341 of 2013)*

**JUDGEMENT OF THE COURT**

1. The Appellant **KENNEDY MULI SILA** was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act 2006. The particulars were that on the 1<sup>st</sup> day of April, 2013 at [particulars withheld] within the Makueni County intentionally and unlawfully caused his male genital organ namely penis to penetrate the female genital organ namely vagina of C.M.M. a child aged 12 years. He also faced an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act on the same facts by unlawfully touching her vagina.
2. The Appellant was sentenced to twenty (20) years imprisonment. He now appeals against the conviction and sentence on the basis of the grounds of appeal filed herein which may be summarized as follows: - ***that there was no proper identification, that there was mistaken identify, that the conditions at the scene were not favourable as lighting was poor, that the medical evidence was not satisfactory, that the case was not proved beyond reasonable doubt and that the court did not consider his defence.***
3. The appeal is opposed by the Respondent. It is the submissions of the Respondent that their case was proved beyond any reasonable doubt and the appeal ought to be dismissed.
4. As this is a first appeal, I am obliged to review and evaluate the evidence afresh and reach an independent conclusion as to whether to uphold the conviction. In so doing an allowance should be made for the fact that I neither heard nor saw the witnesses testify. (see **OKENO =VS= REPUBLIC [1972] EA 32**) and **PANDYA =VS= REPUBLIC [1967] EA 336**) as well as **KARIUKI KARANJA =VS= REPUBLIC [1986] KLR 190**).
5. The Complainant, PW.1, testified on oath that she was aged 12 years and in Standard five (5) at a local primary school. She further testified that she was sleeping when the Appellant herein crept onto her bed and started touching her and then removed her underpants and defiled her. She screamed for help and Appellant tried to persuade her with Kshs.100/= so as not to reveal the ordeal but she had rejected the same. She stated on cross – examination that she knew and recognized the Appellant who was their

immediate neighbour and who had earlier joined her and her siblings and watched 9 p.m. news. The complainant further stated that she was able to identify and recognize Appellant when he spoke to her and shone a mobile phone torch light on the money he had attempted to silence her with.

6. The Complainant's father, PW.2 testified that he had been away during the incident but that on arriving home, he was informed by his daughter that the Appellants had defiled her. He escorted her to Makindu Police Station where a P.3 form was issued and that he escorted her to Makindu District Hospital where she was examined. He also assisted in the arrest of the Appellant.

7. The Complainant's younger brother, PW.3, stated that he was sleeping with the Complainant when the Appellant crept onto their bed and removed Complainant's underpants and slept on top of her. He stated that upon the Complainant screaming the Appellant tried to give her Kshs.100/= to placate her but which she rejected. He further stated that the Appellant had dropped his trousers at the door. The witness further stated that the Appellant had a torch which he lit and he was able to see and recognize him.

8. Bosco Mohammed, PW.4 stated that he was heading home when he heard screams from a neighbour's home. He rushed there and spotted the Appellant outside Complainant's home and standing by the door. He then enquired from him as to what he was doing there only for him (Appellant) to melt away into the darkness. The witness found the door ajar and learnt that the Complainant's parents were not in at the time. He also learnt from the Complainant that the Appellant had defiled her.

9. Dr. Shallen Khaleed, PW.5 testified that he examined the Complainant and noted some friction burns around the genitalia and that the hymen had been broken and which was slowly healing and tender and put the age of the injuries as three days.

10. The investigating officer Sergeant Bernard Mburia (PW.6) testified that he issued a P.3 form and referred the Complainant to Hospital for examination and after recording statements of witnesses, he preferred the charges against the Appellant.

11. After hearing the Prosecution's evidence, the Appellant was put on his defence. He gave an unsworn statement. He stated that he was woken up by the clan elder and ordered to appear before a village baraza. He obliged and on arrival, he met a large group who included the Complainant's father who alleged that he (Appellant) had defiled the Complainant. The Appellant claimed that Complainant's father had had a grudge against him and wanted to settle scores.

12. In order to prove its case under Section 8(1) of the Sexual Offences Act, the Prosecution must show that the Appellant did an act that amounted to penetration of a child. **'Penetration'** under Section 2 of the Act means ***"the partial or complete insertion of the genital organs of a person into the genital organ of another person."***

13. I have evaluated the evidence presented before the Subordinate court and I find that the Prosecution proved its case beyond reasonable doubt. As regards penetration, PW.1 gave clear and credible evidence of how the Appellant crept onto her bed, removed her underpants and defiled her. She had felt pain and screamed forcing the Appellant to order her to stop making noise and even attempted to silence her by giving her Kshs.100/= which she rejected. The complainant's younger brother (PW.3) was also in the room and witnessed the incident. The Appellant had been their immediate neighbour and who had been with them a few minutes earlier listening to 9 p.m. news together before she retired to bed. The doctor confirmed that the complainant had been defiled. Again another neighbour Bosco Mohammed (PW.4) arrived at the scene upon hearing screams by the Complainant and her brother and met the Appellant at the door to complainant's home and who on seeing him took off into the night. The complainant and her brother mentioned the name of the Appellant as the perpetrator and she even pointed him out at the village elder's baraza. Again the complainant, her brother and the neighbour all stated that they had recognized the Appellant on the night in question and therefore the issue is not one of a mistaken identity. The complainant was quite consistent in her testimony and was not shaken at all even on cross-examination. The Appellant had been their immediate neighbour and was well known to her. Again, it is highly unlikely for the Complainant's father to use his own young daughter to act as victim of Sexual

violence in a bid to settle scores with Appellant over alleged differences. The complainant spoke of what had really happened to her and she was truthful. I am unable to fault the learned trial magistrate in arriving at the decision that he did. The Appellant was none other than the perpetrator.

14. The Appellant's contention that he was only charged due to a grudge he had with the Complainant's father does not negate the elements of the offence of defilement proved by the Prosecution. Furthermore the issue was not even put to PW.2 during cross-examination.

15. The issue of the age of the child ought to be established in sexual related offences involving minors. Indeed there was no birth certificate or baptismal card produced nor an age assessment report done in regard to the Complainant except what was stated on the P.3 form. The girl herself stated that she was aged 12 years old. Indeed the age of a child is a question of fact. The court of appeal held in the case of **MOSES NATO RAPAHEL =VS= REPUBLIC - NAIROBI CRIMINAL APPEAL NO. 169 OF 2014 [2015] eKLR** as follows:-

*“On the challenge posed by the uncertainty in the Complainant's age, this court had occasion to deal with a similar issue in TUMANI MAASAI MWANYA =VS= REPUBLIC - MOMBASA CRIMINAL APPEAL NO. 364 OF 2010 where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes into sentencing. The contradiction in respect of the child's age cannot therefore assist the Appellant to avoid the criminal culpability.”*

The Complainant stated that she was aged 12 years and in class five at a certain school within [particulars withheld] . The doctor who examined her stated that she was aged 12 years old. Hence the Complainant was a child as described under Section 2 of the Children's Act. There was therefore sufficient proof that that the complainant was aged 12 years.

16. In the result I affirm the conviction and sentence of the trial court. The sentence imposed is the minimum possible in law under Section 8(1) as read with Section 8(3) of the Sexual Offences Act of 2006. Consequently, the appeal lacks merit and is dismissed.

It is so ordered.

Dated, signed and delivered at Machakos this 4<sup>TH</sup>, day of MAY 2017.

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

Appellant in person.....

Saoli for Respondent .....

.C/A: Kituva .....