



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 179 of 2013**

**MUTINDA NGUNDO MUTWIKA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(An appeal from the original conviction and sentence in the Chief Magistrate's court at Makadara Cr. Case No.1990 of 2008 delivered by Hon. T. Murigi, SPM on 18<sup>th</sup> February, 2011).*

**JUDGMENT.**

**Background**

Mutinda Ngundo Mutwika was charged with the offence of defilement contrary to **Section 8(1)(2) of the Sexual offences Act**. The particulars of the offence were that on 27<sup>th</sup> April, 2008 at Dandora Phase Five Estate in Nairobi East District within Nairobi Area, committed an act which caused penetration with his male genital organ into a female genital organ of MMN, a child aged 10 years.

He was in the alternative charged with an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act** in that he intentionally and unlawfully committed an indecent act with MMN, a child aged 10 years by touching her private parts namely vagina.

The appellant was dissatisfied with both the conviction and sentence as a result of which he filed the current appeal. In his amended grounds of appeal filed on 9<sup>th</sup> May, 2017, he is dissatisfied that the medical evidence did not support penetration and that his defence was not considered.

**Submissions.**

The appellant filed brief written submissions on 9<sup>th</sup> May, 2017. In summary, he submitted that the prosecution did not prove penetration. This was in view of the fact that the blood stained pant of PW1 which was recovered under her bed was not subjected to forensic examination to prove that the blood on it belonged to her. Furthermore, PW4, the doctor who produced the medical examination report from Nairobi Women's Hospital and PW3, Dr. Kamau of Police Surgery confirmed that PW1's genitalia were normal. As such, the prosecution had failed to demonstrate that she had been defiled. His further contention was that although PW1's hymen was found widened, it was not established what had caused the widening. He further submitted that the learned trial magistrate failed to take into account his defence that the case was instigated by a grudge between himself and PW2, the mother of PW1. He urged the court to allow the appeal.

Learned State Counsel, M/s Nyauncho opposed the appeal. She submitted that PW1's oral evidence that she was defiled was corroborated by the medical examination report adduced. Furthermore, the prosecution through the testimony of PW5, a Government Analyst demonstrated that the blood stains on PW1's pants belonged to PW1. Counsel also dismissed the appellant's defence that he was implicated in the case due to a grudge between himself and PW1. She urged the court to uphold both the conviction and the sentence.

### **Evidence.**

In total the prosecution called 6 witnesses. Their case is majorly premised on the evidence of both PW1 and 2 who were the complainant and her mother respectively. On the material date, 27<sup>th</sup> April, 2008, PW1 was at their home alone doing her homework. The appellant who was her uncle entered the house and defiled her. She could not scream because he gagged her mouth and warned her that if she told anyone he would kill her. She heeded the warning and did not tell her mother what had happened to her.

On 18<sup>th</sup> May, 2008, PW2 was cleaning the house when she stumbled on PW1's blood stained pant under her bed. PW1 confirmed to her that she was not on her menses. She then disclosed to PW2 what had happened and why she had not informed her about the incident. PW2 reported the matter at Kinyango Police Post from where they were referred to Nairobi Women's Hospital where PW1 was examined and treated. She was also issued with a P3 form that was filled by PW3, Dr. Kamau of Police Surgery. The appellant was thereafter arrested and charged accordingly.

PW3 examined PW1 on 3<sup>rd</sup> June, 2008. He found her genitalia normal. Her hymen was intact and had no sexually transmitted diseases. He also examined the appellant whose private parts were also normal. His blood sample was taken to the Government chemist for analysis. The witness produced both P3 forms for the appellant and PW1.

**PW4, Dr. Aden Rilwan** from Nairobi Women Hospital produced the medical report on behalf of Dr. Muhombe who was since diseased. The latter had examined PW1 on 20<sup>th</sup> May, 2008. She found her genitalia normal but the hymen was widened for her age. Her vulva was red but she had no tears or lacerations. No spermatozoa were seen and she had not contracted any sexually transmitted disease. She was treated accordingly. In the doctor's opinion, the widening of the hymen was a sign of penetration.

**PW5, Stephen Mahinda Joel Weibe** was a Government Analyst. He was charged to analyst PW1's underpants, her blood, the Appellant's blood sample and saliva. He found that the underpants had no seminal fluid or spermatozoa but was moderately stained with blood from blood group O. He also found that both the appellant and PW1 belonged to blood group O. He presented a report to that respect.

**PW6, PC Thomas Simiyu** was the investigating officer. He summed up the case for the prosecution and preferred the charges against the appellant. He also accompanied Sergeant Maina and PC Irene in arresting the appellant. He is also the person who forwarded the samples from the appellant and PW1 that were analyzed by the Government Chemist.

The appellant gave an unsworn statement of defence in which he denied committing the offence. He stated that he was arrested on 29<sup>th</sup> May, 2008 from his place of work in Dandora. His defence was that he was implicated by PW2 because he had accumulated a lot of debt in her shop. He was thus shocked to be charged with the offence of defilement.

### **Determination**

I have accordingly considered the respective submissions and the evidence on record. It is now this court's task to determine whether the case was proved beyond a reasonable doubt and whether the appellant's defence was considered.

On the first issue for determination, this court is enjoined to determine whether key elements for the

offence of defilement namely; penetration, identification of the appellant and age of the complainant were sufficiently established. With regard to penetration, the evidence for PW1 was that when the appellant entered the house he removed his trousers and proceeded to remove her dress and pant. He then laid on her on a sofa set and defiled her. Of course there was no other person in the house who would have witnessed the incidence. According to PW4, PW1 was examined on 20<sup>th</sup> May, 2008 at Nairobi Women's Hospital. Whereas all her other parameters were normal, the doctor found that her hymen was widened for her age and the vulva was red. According to PW3, the hymen was intact at the time he examined her on 3<sup>rd</sup> June, 2008. The question then is whether the widening of the hymen constitutes penetration. Under the Sexual Offences Act, penetration is defined as:

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

This definition is replicated by an Indian High Court in the case of ***Smt. Sudesh Jhaku vs K.C.J. And Others (1998) CriLJ 2428 (1996) DLT 563*** which held that:

***“...the law as to the meaning of “sexual intercourse” and “penetration” has been no different from that in England. In Natha v. The Crown, AIR 1923 Lahore, 536:(1925(26)Cri LJ 1185)..., it was held that to constitute penetration it must be proved that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. The law admittedly remains the same to date.”***

In my view then the widening of the hymen was indicative that something had partially penetrated PW1's vagina and the partial penetration constituted penetration under the Sexual Offences Act. This was confirmed by PW4 as well. Although PW3 did not mention about the widening of the hymen, it suffices to note that he examined PW1 on 3<sup>rd</sup> June, 2008 which was two weeks after her examination at Nairobi Women's Hospital. At that time PW1 must have completely healed. Hence, the absence of a broken hymen did not vitiate the fact that PW1 was defiled. I therefore find and hold that PW1 told the truth that she was defiled. The question now is whether it is the appellant who committed the offence.

In her own testimony, PW1 stated that the appellant who was her uncle found her alone in the house when she was doing her homework. For no apparent reason, he defiled her. Although the appellant advanced a defence that he was implicated by PW2, he did not adduce sufficient evidence to substantiate the claim. Just as the learned trial magistrate found that PW1 told the truth, on the part of this court, I have no reason to doubt the same. Accordingly, the identification of the appellant was by way of recognition. Furthermore, at her age, being 11 years, I find no reason why PW1 would implicate the appellant.

With regard to the age of PW1, of course no documentation was adduced to establish her age, but as was held in the case of ***in Uganda v. Mwebaze Wilber [2005] UGHC 16***, that:

***“As far as the age of the victim is concerned, it is trite law that the best way of proving age of a child is by producing a duly certified birth certificate coupled with evidence of identification. In the absence of a birth certificate, age can be proved by any admissible evidence. [A]ge can also be determined by observation and common sense: See Uganda Vs James Byakatonda; Criminal Session Case No. 205/1994 per Berko J(as he then was).”***

In the instant case, PW1 herself testified that she was 11 years old and in Standard six at the time she testified. She gave her testimony on 23<sup>rd</sup> February, 2009. According to the charge sheet she was defiled on 27<sup>th</sup> April, 2008 which placed her age then at ten years. Although her mother did not confirm her age, PW1 at the time was capable of adducing her own age. In any case, her age conformed to the class in school she was at the time. Therefore, even in the absence of a Birth Certificate, it is the view of this court that her age was not questionable.

The last issue for determination is whether the appellant's defence was considered. I have looked at the judgment of the trial magistrate and he dismissed the appellant's defence which he highlighted as a mere

denial and an after-thought. It is the view of this court as well that the prosecution's evidence dislodged the appellant's defence that he was implicated in the case by PW2.

After carefully evaluating the evidence, I find that the prosecution discharged its burden in proving the case beyond a reasonable doubt. The upshot of my findings is that I dismiss the appeal. I uphold both the conviction and the sentence. It is so ordered.

**Dated and Delivered at Nairobi this 7<sup>th</sup> day of June, 2017.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

- 1. Appellant present in person*
- 2. M/s Kimiri for the respondent.*