



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KIAMBU**  
**CRIMINAL APPEAL NO. 103 OF 2016**

**STEPHEN KISILU KITUKO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in **Thika Chief Magistrate's Court Criminal Case No. 3169 of 2011 by D. A. Orimba P M on 14/09/12**)*

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

1. **Stephen Kisilu Kituko**, the Appellant, was charged before **Chief Magistrate's Court, Kiambu** 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**. Particulars of the offence were that on the **1<sup>st</sup> day of July, 2011** at **[particulars withheld] Village** within **Kiambu County**, intentionally caused his penis to penetrate the vagina of **R N**, a child aged **14 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 being that on the **1<sup>st</sup> day of July, 2011** at **[particulars withheld] Village** within **Kiambu County**, intentionally touched the buttocks, breast, vagina of **R N**, a child aged **14 years** with his penis.

3. He was tried, convicted and sentenced to **twenty (20) years imprisonment**.

4. Aggrieved by the conviction and sentence he appeals on grounds that:

Evidence was neither credible nor consistent.

The Appellant was not examined by a Doctor to ascertain his guilt pursuant to the provision of **Section 36(1)** of the **Sexual Offences Act** as read with **Section 122A(1)(2)** of the **Penal Code**.

Vital witnesses were not availed to testify.

Investigations conducted were shoddy.

The case was not proved beyond reasonable doubt.

5.5. The Appellant canvassed the Appeal by way of written submissions.

6. The Respondent (State) through learned State Counsel, **Ms. Maundu** opposed the Appeal. She

submitted that the Complainant identified the Appellant as the person who defiled her. There was no need for DNA test. Vital witnesses alluded to were not specified. The arrest of the Appellant was not in dispute. Therefore, the case against the Appellant was proved to the required standard.

7. This being a first Appeal, I am duty bound to review and re-evaluate the evidence afresh and reach an independent conclusion. In so doing I must bear in mind the fact that I neither heard nor saw witnesses testify (**See Pandya vs. Republic (1957) EA 336 and Kariuki Karanja vs. Republic (1986) KLR 190**).

The case as presented by the Prosecution was that PW2 **R N**, the Complainant, was on her way to school when she encountered the Appellant a person well known to her who held her hand and led her into the bushes. He made her lie on her back, removed her school uniform and pant then removed his pair of trousers. He inserted his genitalia into hers. He penetrated her. The act was painful. She bled.

9. PW5, **L W M** encountered the Complainant as she came from the bush who told her she had been defiled. As she interrogated her she saw the Appellant running, coming from the bush. She recognized him as he was well known to her. She took the Complainant to her school and reported the issue to PW4 **M N M** a Teacher at the school. The Complainant was subjected to medical examination by PW3 **Dr. Maina Stephen**. Dried blood was observed on the external area of the genitalia and the hymen was ruptured. He concluded that the Complainant was defiled.

10. When put on his defence, the Appellant made an unsworn statement. He stated that on the material date he was at home. He went to the farm where he worked until **1.00 p.m.** when he returned home. He denied having committed the offence.

11. In his submissions the Appellant merged all grounds of Appeal.

12. The learned trial Magistrate has been faulted for not acting in an endeavour to gather evidence to ascertain whether or not the Appellant committed the offence. The basis of the argument is the provision of **Section 36(1)** of the **Act** which provides thus:

***“(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.” (Emphasis mine).***

It is important to note that the provision of the Law in respect of evidence of Medical or Forensic nature is couched in discretionary terms. The Court is not obligated to give directions as to taking of samples for purposes of testing.

13. The Appellant faced a charge of **Defilement**. In the case of **George Kioji vs. Republic – Nyeri Criminal Appeal No. 270 of 2012 (unreported)** the Court of Appeal stated that:

***where available, medical evidence arising from the examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed under Section 124 of the Evidence Act, Cap 81 Laws of Kenya, a court can convict an accused person in prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”***

14. The Complainant herein was a minor aged **fourteen (14) years**. PW1, her mother adduced in

evidence a child health card issued at the Complainant's birth. She was born on **3rd March, 1997**. This was proof of her age. At the time the Complainant age was **14 years and three (3) months**.

15. The trial Court was faulted for failure to comply with **Section 19(1)** of the **Oaths and Statutory Declaration Act** that

provides thus:

*“(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.”* Further, that that he failed to conduct *voire dire* examination to ascertain as to whether the Complainant possessed sufficient intelligence to understand the duty of speaking the truth. Therefore, the question to be answered is whether the trial Court was obligated to question the Complainant herein to ascertain if she was seized of sufficient intelligence to testify and if she understood the nature of oath that she subscribed to prior to testifying. (Also see **Samuel Warui Karime vs. Republic (2016) eKLR**).

16. The argument of the Appellant hinges on the allegation that the Complainant was a child of tender years. In the Court of Appeal case of **Patrick Kathurima vs. Republic (2015) eKLR** it was held thus:

*“We take the view that this approach resonates with the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given in different contexts of the two (2) statutes.”*

17. This is a case where the Complainant (PW2) testified after her mother adduced in evidence her child health card which was proof that she was above **fourteen (14) years** of age. She was not a child of tender years. Therefore, failure to subject her to *voire dire* examination was not fatal to the Prosecution's case.

18. It is alleged that vital witnesses were not availed to testify. The Appellant's written submissions are silent on this ground of Appeal. That notwithstanding, **Section 143** of the **Evidence Act** is clear. There is no requirement of particular number of witnesses to prove any fact. There may be cases where a single witness proves a case to a required standard. In any case the Prosecution would not be compelled to call witnesses who may not have been necessary. In the case of **Julius Kalewa Mutunga vs. Republic, Criminal Appeal No. 31 of 2005 (unreported)** the Court of Appeal held thus:

*“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”*

19. The Complainant was examined by **Dr. Maina** who confirmed that she was defiled. At the point of examination her vagina had dry blood and the hymen was broken. For a hymen to be broken there must have been penetration of her vagina.

20. The issue to be determined is therefore whether the person responsible was the Appellant. The

Complainant identified the Appellant as the person who took her to the bush and had penetrative sex with her. She referred to him by the name ‘Kisilu’ and gave a vivid account of what transpired. She concluded by stating that she knew the Appellant before as he had engaged in the act with him previously and he was a casual labourer within the area.

21. The Appellant denied having been at the scene of the incident. He put up an alibi defence, stating that he was working on the farm elsewhere at the time when the alleged offence was committed. In the case of **Victor Mwendwa Mulinge vs. Republic (2014) eKLR** the Court of Appeal stated that:

*“It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution. See Karanja V R (1983) KLR 501 ..... this court held that on a*

*proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”*

22. The Prosecution called evidence of PW5 that corroborated evidence adduced by the Complainant which put the Appellant at the scene of the incident. She saw the Complainant coming from the bush and soon thereafter the Appellant followed. He was a person well known to PW5. The Complainant told her that she had been defiled by the Appellant. The Complainant was examined soon thereafter and evidence of penetration into her genitalia confirmed. The Complainant must be believed when she states that she was defiled. 23. The sentence meted out is the minimum prescribed sentence for the offence.

24. Having considered the grounds of Appeal raised by the Appellant and the Lower Court record, I am satisfied that the conviction was not erroneous. In the result the Appeal lacks merit and is hereby dismissed in its entirety.

25. It is so ordered.

**Dated, Signed at Kitui this 19<sup>th</sup> day of April, 2017.**

**L. N. MUTENDE**

**JUDGE**

**Dated, Signed and Delivered at Kiambu this 12<sup>th</sup> day of June, 2017.**

**PROF. J. NGUGI**

**JUDGE**