



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 136 OF 2017**

**SAMMY MUSEMBI MULI.....APPELLANT**

**-VERSUS-**

**REPUBLIC..... RESPONDENT**

**JUDGEMENT**

1. The accused was charged with **the Offence of Defilement Contrary to Section 3 of the Sexual Offence Act No. 3 of 2006.**

2. The particulars being that on diverse dates between 08/11/2011 and 10/11/2011 in [particulars withheld] village Makueni County, he intentionally and unlawfully caused his penis to penetrate the vagina of T M K a child aged 14 years.

3. Alternatively, the accused is charged with **Offence of Committing an Indecent Act with a child Contrary to Section 11 of Sexual Offence Act No. 3 of 2006.**

4. The particulars being that on diverse dates between 08/11/2011 and 10/11/2011 at [particulars withheld] village, Makueni County, he intentionally and unlawfully did an indecent act to T M K a child aged 14 years by touching her private parts namely vagina with his penis.

5. The prosecution called 9(nine) witnesses and the accused gave unsworn statement and called one witness.

6. The trial court thereafter convicted the Appellant and sentenced him to 20 years imprisonment. The Appellant being aggrieved by the above verdict lodged instant appeal and set out 4 grounds of appeal namely :-

*- The offences were not proved beyond reasonable doubt,*

*- The Appellant Constitutional Rights to a fair hearing under Article 50 (2) (b) (c) (i) were violated,*

*- The PW5 evidence was in admissible in law **under Section 48 of evidence act,***

*- And: The court disregarded Appellant's defence. During the hearing the Appellant relied on his Amended Grounds attached to his written submissions.*

7. The amended grounds are:-

- *The prosecution case was full of contradictions and inconsistencies,*
- *The case was not proved beyond reasonable doubt,*
- *And the court failed to consider and did disregard Appellant defence of alibi and thus breached **Section 169(1) Criminal Procedure Code.***

8. The Appellant and the prosecution agreed to canvass the appeal by way of the submission.

9. The Appellant filed and served his submissions. However, the state counsel opted to reply to the submissions by the Appellant orally.

10. This being the first Appellate court, it is enjoined to look at the evidence before the trial court afresh, re-evaluate and examine the same and reach its own conclusion whether or not to uphold the conviction of the Appellant.

11. In reaching its decision, the reaching its decision this court has to bear in mind the reaching its decision, the court has bear in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore is not expected to make any findings as to the demeanor of the said witnesses.

12. Finally, this court is expected and mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment. See **KINYANJUI –VS- R (2004) 2KLR P.364.**

13. The evidence tendered was by 9 witnesses. PW1 the complainant testified that she was born 1997. She showed her child health card which indicated that she was born on 04/09/1997. At the time of the testimony she was 15 years and in class 8.

14. She testified that on 08/11/2011 at 6.00 p.m. she went to Appellant house whom she knew. He had asked her to visit him. They stayed together up to 8.00 p.m. They went for supper and returned to his home where he had 6 year old son but the wife had left him. She spent with him and had sex.

15. The following day they went to market and later he left her at his home, later came and after super they went to sleep and they had sex as they spent the night together.

16. Her mother and other people stormed the house and arrested her and the Appellant. They were taken to police station and then to the hospital. She was issued with a P3 form.

17. On cross examination, PW1 said that Appellant asked her to visit her on 08/11/2011 and then he forced her to have sex.

18. PW2 is a medical officer who examined the PW1 and produced a P3 form which disclosed the hymen was broken and epithelia cells were noted after the vaginal swab. The same was evidence of penetration. The same cells are a product of friction when it occurs at the female genital region.

19. PW3 was the PW1 mother who testified that on 08/11/2011 she came home from women meeting at 5.00 p.m. and found PW1 who was in standard 7 was not at home. At 8.00 p.m. one Monicah Njine told her that she met PW1 and the Appellant going to Wenjeni market. She went to Appellant house and found the door closed.

20. On the following day PW3 went back but she did not find him or PW1.

21. On 10/11/2011, she went with a village elder to accused house and found the door locked from the inside. The elder knocked but the Appellant said PW1 was not in the house. PW3 entered the house and found PW1 seated on the bed. The village elder closed the outside door. PW3 went and called the PW1 grandfather and went to Appellant house.

22. The PW1 and accused were tied with the ropes and taken to Mbooni Police Station and later to the hospital.
23. PW4 testified that on 08/11/2011, PW3 went to his house and told him that PW1 was not at home and that she had information that she (PW1) was at Appellant home. The following day he proceeded there with PW3, where they arrested Appellant as they found him with PW1 in Appellant house. He was taken to the police station.
24. PW5 testified that on 05/09/2011 at 8.00 p.m. he met PW1 and Appellant going to Nengeni Market – she informed PW3 about it. She knew the Appellant before. On cross examination she said it was at 8.00 p.m. and there was moonlight.
25. PW6, a village elder was called by PW3 on 10/11/2011 and was told he was required by Ken Kitoke a village elder. She was told by PW3 that PW1 was at Appellant house. They arrested PW1 and Appellant and took them to the police station.
26. PW7 grandfather of PW1 narrated how they found Appellant and PW1 inside the Appellant house.
27. PW8 testified that PW1 was taken to him at the police station together with Appellant by members of the public. The Appellant was accused of defiling the PW1. He re-arrested him and recorded statement. PW1 was taken to hospital and so is the Appellant. PW1 was wearing Appellant's pants and her pant was left at Appellant's home.
28. The same was recovered. PW9 Deputy OCS Mbooni police station testified that, she got the report of defilement. She ordered PW1 to be collected from the Appellant house. She ordered PW1 and appellant to be taken to hospital.
29. After the close of the prosecution case, the court found Appellant had a case to answer and put him on his defence.
30. In his unsworn defence, the Appellant testified and called one witness. The Appellant stated that on 10/07/2011, PW1 went to his house towards morning and told him that she was chased away by her parents.
31. After taking tea, PW1 mother came to his house and held PW1 but they struggled and PW1 refused to leave. PW3 (complainant mother) left and a village elder closed the door from the outside. After 45 minutes the village elder came accompanied by many people opened the door and arrested PW1 and Appellant.
32. They were taken to the chief and then to the Mbooni police station. He denied ever intentionally assaulting PW1.
33. He further stated that on the first day, PW1 parents forced her to wear tattered clothes to prove Appellant had torn her clothes. One officer took Appellant under pant and then he was charged on the following day.
34. DW1 Mwema Muli from same village with the Appellant stated that accused was his brother and that he was not aware of the offence.
35. In his submission filed in court, the Appellant argued his 3 Amended grounds together.
36. The Appellant submits that there were contradictions in the prosecution case. First on issue as to who locked the door from outside when the Appellant was found with PW1 in his house, PW1 says it is her mother who did so but PW3 states that it was the village elder.
37. Further there is evidence saying PW1 and Appellant was seen going towards Nangine on 05/09/2011

at 8.00 p.m. which contradicts dates given by other witnesses.

38. On penetration, the Appellant submitted that PW2 stated that on examination of PW1, there was no bleeding laceration and tears noted nor presence of spermatozoa thus no prove of penetration or touching of the private parts of PW1.

39. Further, the Appellant submitted that the court erred in rejecting his defence of alibi without giving any cogent reasons **Contrary to Section 169 (1) Criminal Procedure Code**. He thus sought appeal to be allowed.

40. The state via Mr. Orinda the Assistant Deputy Public Prosecution submitted that PW2 via medical evidence proved penetration one of ingredients of the offence charged.

41. PW1 testified how Appellant invited her to his house after his wife had deserted him.

42. PW3 mother of PW1 narrated how PW1 disappeared and later traced at Appellant house.

43. The circumstances of arrest of the Appellant were narrated by PW4, 6 and 7 at the Appellant's house. PW3 narrated how they had to move to Appellant's house to extricate her (PW1). In his defence, the Appellant admitted PW1 was extricated from his house.

44. The trial court considered defence and found same merit less, thus convicted the Appellant.

45. After going through the evidence on record and the submissions tendered, I find the issues emerging are:-

- *Whether the prosecution proved its case beyond reasonable doubt?*

- *Whether Appellant defence of Alibi was considered?*

46. The production of both certificate proved PW1 was born on 04/09/1997 thus between 8<sup>th</sup> and 10<sup>th</sup> November 2011, PW1 was 14 years thus a child at the time of the incident.

47. It is not denied that PW1 knew the Appellant on 08/11/2011; PW1 went to Appellant house a fact admitted by the Appellant.

48. PW5 saw them together at 8.00 p.m. and informed PW3 and on 09/11/2011, PW3 went to Appellant house but did not find them.

49. On 10/11/2011 PW3 accompanied by PW4 went to the Appellant house. On 10/11/2011, PW3 and PW4 found PW1 and Appellant in his house and PW3 tried to get PW1 out of the house and she resisted.

50. They (PW1 and Appellant) were locked inside the house. PW3 went and called PW6 and PW7 who came and found PW1 seated on Appellant bed.

51. PW1 had spent two nights at Appellant house. PW1 stated that in the two nights she spent in Appellant's house they had sex.

52. The trial court believed PW1's testimony after observing her demeanor. No evidence was advanced that the PW1 was framing the Appellant.

53. At the police station, the PW1 was found to be wearing Appellant pant and her pant was recovered from the Appellant house.

54. The Appellant defence was that the PW1 defence was that the PW1 was found in his house on 10/11/2011 after she was chased away by her parents. He knew her parents and PW1.

55. He spent with her for two nights but never contacted her (PW1) parents. The DW1 did not know anything about the incident.

56. The P3 form disclosed that on examination result revealed presence of epithelial cells which proved there was friction within PW1 vagina proving penetration.

57. The totality of the evidence tendered proved the offence charged beyond reasonable doubt. The child had no capacity to consent to have sex with the Appellant thus the court finds no merit in the appeal and same is dismissed conviction affirmed and sentence confirmed.

**SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 6<sup>TH</sup> DAY OF JUNE, 2017.**

**C. KARIUKI**

**JUDGE**

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