



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 25 OF 2017**

**BENSON MWOLOLO NGELA ..... APPELLANT**

**-VERSUS-**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

1. The Appellant was charged with an offence of **Defilement Contrary to Section 8(1) and (2) of the Sexual Offence Act No. 3 of 2006 BENSON MWOLOLO NGELA**: On the 21<sup>st</sup> day of April 2015, at [particulars withheld] Sub-County within Makueni County intentionally caused his penis to penetrate the vagina of W P a child aged seven (7) years.

2. Alternative charge was **committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006. BENSON MWOLOLO NGELA**. On the 21<sup>st</sup> day of April, 2015 at [particulars withheld] Sub-county within Makueni County intentionally touched the Vagina of W P a child aged seven (7) years with his penis.

3. The Appellant pleaded not guilty and the matter went into full trial. The Appellant was convicted and jailed to life imprisonment.

4. Being aggrieved by the above decision, the Appellant lodged the instant appeal and set out the following grounds.

- **THAT** the lower court erred substantially in law and fact by convicting him on the basis of skewed deconstruction/misinterpretation of the Section 124 of the evidence act.
- **THAT** the lower court magistrate erred in law and fact by convicting him despite inconsistent, insufficient as well as contradictory evidence.
- **THAT** the medical evidence adduced by PW4 was obscure and professionally dysfunctional.
- **THAT** the lower court magistrate erred in law and fact by determining the case without giving him (the accused) time to defend himself as stipulated in our constitution.
- **THAT** he wished to be furnished with trial proceedings for more grounds.

5. When the matter came for hearing, the Appellant lodged amended grounds of appeal together with his submissions. The amended grounds are:-

1. **THAT** the case for the prosecution was not proved to the required standard needed in law.
2. **THAT** the charge was defective in nature due to the omission of the word “unlawful”.

3. **THAT** my conviction was manifestly unsafe as the same was founded on unsound evidence.

4. **THAT** the provisions of **Section 169(1) of the C.P.C** were not complied with in relation to my defence statement.

6. The appeal was canvassed by way of submissions. The Appellant tendered his submission which he had prepared. The Assistant Director of Public Prosecution responded orally in court.

7. 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. See **KINYANJUI –VS- REPUBLIC (2004) LKLR 364.**

8. The prosecution called five (5) witnesses to prove its case. PW1 was the complainant. After *voire dire* was conducted, the PW1 tendered unsworn statement.

9. She stated that on 21/04/2015, the Appellant went to their home and asked her for fire wood that was burning for lighting his cigarette. He then did her “*tabia mbaya*” (had sex) with her. He did this by removing her pant and his own. They were in the bushes. He did *tabia mbaya* (sex) in her place she uses to pass urine with using his which he uses to pass urine.

10. She then left and went home. She did not tell anyone what had happened. Her mother learned later that she had done *tabia mbaya* (sex) and took her to hospital. They also went to the police. She identified Appellant. She knew him as he used to go to their home to fetch water.

11. On cross examination, she said that she did not tell her mother. PW2 E M Psaid that she was the mother of the PW1. On 14/04/2015, she had left her two (2) children W PW1 and G at home.

12. She returned at 11.00 a.m. She found them playing but PW1 was feeling unwell yet when she left PW1 was fine. She asked her what was wrong but she kept quiet. She touched her and noted that PW1 had fever.

13. They slept later and at 11.40 p.m., she heard soil pouring and went to check and she found nothing. She went to cover up child and noted PW1 slept nude. She observed her and noted dirty substance at her genital organs. It was like the dirty substance after a man had sex.

14. She did not wake her up. Next day early in the morning she asked her what happened and PW1 replied that the Appellant Mwololo called her where he was grazing and asked her for a piece of burning wood to light cigarette. He did her (*tabia mbaya*) had sex with her.

15. PW2 told a village elder who advised her to take child to hospital. They took PW1 to Kambu Health Centre and also reported to the District Officer’s office and later to Mtito Andei police station. A P3 form was issued and filed in hospital later.

16. PW2 said PW1 was born on 24/02/2009 as per the birth certificate produced. She knew Appellant as a neighbor. He was employed to graze goats.

17. On cross examination, she said that the minor told her at 11.00 a.m. what happened. She informed village elder on 22/04/2015. They went to hospital her, child and village elder. The child said Appellant defiled her. PW1 was taken to hospital next day.

18. PW3 Ann Ndunge said she is a village elder in [particulars withheld] village. She stated that on 22/04/2015 at 7.00 a.m., PW2 reported to her that PW1 had been defiled by Appellant. They took PW1 to Kombu Health Centre. They then went to Mtito Andei police station and reported the incident. She knew Appellant as employee of a neighbor.

19. On cross examination, she said the report was made on 22/04/2015 a Wednesday but incident took

place on 21/04/2015. The child said Appellant defiled her. She was told by PW2 that PW1 was six (6) years old.

20. PW4 a Doctor Hellen Mutie examined PW1 and filled P3 on 22/04/2015.

21. On examination she observed that high vaginal swab showed numerous pus cells. In the genitalia there was vaginal tear and that was evidence of penetration.

22. PW5 police officer Elizabeth Kombe testified that on 22/04/2015 while in the office PW1 was taken by members of public on allegation of defilement. Her mother PW2 was also in her company. She recorded complaint and took PW1 to Mito Andei hospital.

23. The P3 form was filled in her presence. A post rape form was also filled. The Appellant was later arrested by members of public. She produced exhibits:-

- **P3 PEX 1.**
- **Birth Certificate PEX 2.**
- **Post rape form PEX 3.**

24. On cross examination, she said that Appellant was arrested later and was not taken to hospital. The PW1 identified Appellant. He did not know (child) or the Appellant before.

25. The prosecution closed its case and the court found the Appellant had a case to answer.

26. When Appellant was put on his defence, he opted to make unsworn statement and called no witnesses. He stated that he was from Kambu and he was a bodaboda operator.

27. When he was arrested he was at the market and was arrested for nothing. He said he did not know the child.

28. In his submissions, the Appellant submit that the charge was defective as it omitted the WORD "UNLAWFUL".

29. Further, the charge was not proved as provided by the law. The child did not report the incident to anybody and the mother only saw *uchafu* later and asked the child about it.

30. Further, the examination on child showed pus cell and vaginal tear yet he was not examined to establish his link with the pus cells.

31. He relied on the case of **KILUNGI KITHEKA-VS- REPUBLIC** and submitted that PW1 evidence alone was not adequate to prove origin of pus cells detected in her vagina. He also relied on the case of **WOOLMINGTON –VS- DPP (1935) AC 462.**

32. Mr. Orinda a Director of Public Prosecution submitted that the offence was proved. PW1 knew Appellant and narrated what he did when PW1 took burning firewood to light cigarette.

33. He defiled her. He never raised issue of identification during cross examination.

34. The mother PW2 discovered the child was defiled. PW3 village elder was positive of the person the child was referring to as the one who defiled her. The defence was mere denial.

35. After going through the evidence on record and parties submissions tendered, I find the issues are?

- ***Whether the charge was defective?***
- ***Whether the prosecution proved its case beyond reasonable doubt?***
- ***Whether the Appellant defence was considered?***

36. The charge on the face of it omitted the word “*Unlawful*”. However it retained the words “*intentionally*” caused his penis to penetrate vagina.

37. Under **Section 8(1) of the S O A, a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

38. The bottom line is the penetration of the child. The omission does not negate the offence changed and in any case it is curable by virtue of Article 159 constitution.

39. It is a mere omission and that technicality cannot defeat the substance of the charge. The Appellant was not prejudiced nor was injustice occasioned.

40. On prove of the charge, the PW1 narrated how Appellant defiled her on 21/04/2015 when she took burning firewood to him to light cigarette. She knew him as he used to fetch water at their home. The penetration was established by PW1 testimony and PW4 on examination of PW1.

41. She had pus cells and vaginal tear a sign of penetration. The Appellant was arrested after some days thus he was not examined.

42. The Appellant was identified by PW1 even to the investigation officer PW5 at the police station. PW1 knew the Appellant.

43. In Criminal **CASE NO. 296 OF 2010 MUTUKU NGUI –VS- REPUBLIC HCRA MACHAKOS** the court held that: The ingredients for defilement are:-

- **Penetration of complainant genitalia.**
- **Whether complainant is a child.**

44. The medical report (P4) and PW1 testimony proved the defilement to the PW1. The birth certificate established PW1 was seven (7) years of age.

45. The court found the Appellant just denied the offence and even knowing the child.

46. The court finds that the charge under Section 8(1) as read with Section 8(2) of the Sexual Offences Act, was proved beyond reasonable doubt.

47. Thus, the appeal has no merit and same is dismissed. The conviction is affirmed and sentence confirmed.

**SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 13<sup>TH</sup> DAY OF JULY, 2017.**

**C. KARIUKI**

**JUDGE**

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