



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**HCCRA. NO. 11 OF 2015**

**PAUL MUTURI MUCHIRI.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

(Being an appeal from the original conviction and sentence by **Hon. T.W.CHERERE- Chief Magistrate** dated 19<sup>th</sup> September 2015 in Nanyuki Chief Magistrate's **Court Criminal Case No. 693 of 2015**)

**JUDGMENT**

1. This is an appeal against the conviction and sentence of **PAUL MUTURI MUCHIRI**, the appellant. He was charged before the Nanyuki Chief Magistrates court for the offence of defilement of a child age 13 years **Contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006**
2. The appeal was not opposed.
3. This is the first appellant court my duties as such have been stated severally in other cases which to subject the evidence as a whole to fresh and exhaustive examination, to weigh conflicting evidence, to draw my own conclusion and to come to my own decision on the evidence. See Criminal Appeal No. 84 of 2014 **ERIC ODHIAMBO OKUMU –V-REPUBLIC** court of APPEAL MOMBASA.
4. P W 1 the minor (**who I shall herein after refer to as J M N**) stated she was a standard 5 pupil. On 17.7.2014 at 4pm while in the

company of P W 3 another minor (**hereinafter refer to as EN**) went to collect her shoe she had left for repair from the cobbler, the appellant herein, based at [Particulars Withheld] shopping center. J W N said appellant told them that the shoe was in his house. JMN and EN accompanied appellant to his house. JWN in examination in chief stated:

*“Accused (appellant) gave me 10/= when we got to his house but I returned it to him. I went out and accused went to the house allegedly to collect my shoe. He then dragged me into his house.”*

JMN then stated that appellant proceeded to defile her while holding her mouth to stop her from screaming. JMN said that EN pushed the door and appellant dressed up. JMN then put her under pants in her pocket and she and EN ran home. JMN said that she did not report the matter because appellant had threatened to kill her. However that it was EN who reported the matter to a boy called J and J informed

his mother and his mother informed JMN's father. She was later examined by a doctor and a P was filled.

5. On being cross examined by the appellant JMN stated:

*"You put me in the house and you closed the door. EN pushed the door open and rescued me."*

6. EN a standard 6 pupil gave unsworn testimony. She confirmed that on 17<sup>th</sup> July 2014 she escorted JMN to collect her shoes and not shoe, from appellant. Appellant informed them that the shoes were in his house. She proceeded to say:

*"Accused entered his house and JMN and I remained outside. Accused then called JMN into his house and I remained outside. JMN then told Muturi that she'd collect her shoes the following day because it had not been repaired. Accused then came out of the house and asked that we go home so that her father would not find us there. We then ran home."*

7. Following that testimony EN stated how he informed his class mate, J that she and JMN had gone to the accused house and JMN had gone into the house and accused had locked the she pushed it open. To that she added:

*"JMN told me to tell police that I saw accused tie his belt."*

8. P W 4 C K mother of the boy called J said her son told her he had eaten cake given by JMN. He further told her that JMN and EN used to get money from appellant, the cobbler. As a result that they used to eat cake every Saturday. It P W 4 who reported that information JMN'S father.

9. **P W 5 D N** step father of JMN is relating what P W 4 told him and contrary to what P W 4 said in her testimony stated that P W 4 had told him that JMN had been defiled by the appellant.

10. **P W 2, RONALD MUTAI**, the clinical officer gave evidence on the examination carried out by his colleague and stated that JMN's hymen was broken and that the examination had shown there was attempted force penetration.

11. Although having exhaustively considered the trial court's evidence I conclude as submitted by both counsels that the evidence adduced by the prosecution did not meet the criminal standard of proof and therefore appellant's conviction was not safe, I will first consider other grounds of the appellant's appeal which I find cannot succeed.

12. Firstly appellant submitted that attempted forced penetration cannot cause a hymen to break. It is important to note that the P3 form actually stated:

"absent hymen." In response to that ground of appeal I would state the fact the hymen was absent does not always mean there was no attempted forced penetration. The authorities that are there show otherwise than what was submitted by the appellant. In the case HC CRIM CASE No. 434 OF 2010 **REPUBLIC-V-ERICK ONYANGO ONDENG** Justice Achode had this say:

*"The fact of the hymen not being breached does not negate the complainant's assertion that the appellant inserted his penis into her vagina. Section 2 of the Sexual Offences Act, No.2 of 2006 interprets the act of penetration as follows:*

*"Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

Also in the case **TWEHANGANE ALFRED – VS – UGANDA CRIM. APP. 139 OF 2001[2003] UGCA 6 the court state:**

*"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is*

*sufficient to constitute the offence. It is not necessary that the hymen be ruptured.*

13.I wholly support those findings.

14.Secondly appellant submitted there were inconsistencies on the age JMN.

15.JMN stated she was a class 5 pupil and her age was 13 years. P W 5, her stepfather said she was 14 years old. The birth certificate showed that JMN was born on 29<sup>th</sup> April, 2000. By the time JMN was testifying September 2014 she was 14 days old.

16. In my view that inconsistency in stating her age is minor and can be overlooked. Particularly because JMN's birth certificate was produced which showed her exact date of birth. Where the court is confronted by minor contradictions such contradictions can be ignored. A case in point is **TWEHANGANE ALFRED – VS- UGANDA(supra)** where the court stated:

*“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.*

17. In regard to my earlier statement that the conviction of appellant was not safe I wholly support both Learned Counsels assessment of the prosecution's evidence. The reproduction of that evidence that I have made above in this judgment will show that there were inconsistencies that were crucial in the determination of the appellant's case by the trial court. Those inconsistencies, in my view, pointed to the credibility of JMN the complainant.

18. JMN said appellant dragged her into his house EN who was present did not so state. Although she said that appellant called JMN into the house, she painted a picture of normalcy with appellant telling them to go home EN's evidence brought to question the credibility of JMN, when she said JMN told her to lie.

19. The evidence of EN runs parallel to the sworn testimony of the appellant given in his defence. Appellant in his defence stated that JMN had left her shoes with him for repair for over three years. Incredibly as it may be because she would then have been 11 years old and one wonders if those shoes would have fitted her at age 14 years. He went with both JMN and EN to his store and JMN identified her shoes which had not been repaired. They agree JMN collect the shoes the following day after repair. Four days later, he said he was arrested.

20. There is also the inconsistencies between P W 4, J's mother and P W 5 JMN's stepfather. P W 4 did not tell P W 5 that appellant had defiled JMN yet P W 5 in evidence said that that was what she told him.

21. It is important to consider that P W 4 was told by J that JMN and EN always bought cake on Saturdays with money given by appellant. Is it then possible that the fabrication of the evidence against appellant was based on failure on his part to give JMN more money or what. This in my view was an important issue that the prosecution ought to have explored but did not.

22. On the whole I find that the inconsistencies of prosecution's evidence point to this appeal succeeding. Accordingly the appellant's appeal succeeds and the conviction against appellant is quashed and the sentence is hereby set aside.

**I order the appellant to be set free from custody unless otherwise lawfully held.**

***Dated and Delivered at Nanyuki this 4<sup>th</sup> February, 2016***

**MARY KASANGO**

**JUDGE**

**Coram**

Before Justice Mary Kasango

Court Assistant – Kirunja

For state .....

For Appellant .....

**COURT**

Judgment delivered in open court

**MARY KASANGO**

**JUDGE**