



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 44 OF 2015**

*(An appeal from the Judgment of the Senior Resident Magistrate, Embu in CMCR. Case No. 678 of 2014 dated 18/5/2015)*

**BENARD MUCHANGI..... APPELLANT**

**VERSUS**

**PROSECUTION.....RESPONDENT**

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

1. This is an appeal against the judgment of Senior Resident Magistrate Embu delivered on 18/5/2015. The appellant was convicted of attempted defilement and sentenced to serve ten (10) years imprisonment. He was dissatisfied with the judgment and lodged this appeal.
2. The main grounds of appeal are that no exhibits and medical report were produced in court to prove the prosecution's case. Further that vital witnesses were not summoned to testify and that the magistrate dismissed his defence on weak reasons. The appeal was canvassed through written submission.
3. The appellant in his submissions stated that the magistrate failed to find that there was a grudge between him and the victims mother. He further argued that Article 50 of the Constitution was violated as he was not allowed to cross examine the complainant.
4. The state counsel submitted that PW1's evidence was corroborated by that of PW2, PW3 and PW4. Under section 143 of the Evidence Act the prosecution is at liberty to call the number of witnesses it chooses in support of case. It was further argued that the appellant did not call any witnesses to support his evidence and did not have an alibi.
5. The duty of the 1<sup>st</sup> appellate court was explained in the case of *NJOROGE VS REPUBLIC [1987] KLR 19* that:-

*“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see *Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570*)*

6. The complainant's evidence was that on the material day she met the appellant at [particulars withheld] in Embu town where she stays with her family. The appellant got hold of her and took her to his house in the same plot here her family resides. He undressed her and also removed his trousers before lying on top

of her. He then inserted something in her birth carnal causing her a lot of pain and which made her scream. She reported the incident to her mother when she returned home in the evening.

7. The complainant said she did not know the accused before the incident though he lived in the neighbourhood. She was able to identify him in court without any difficulty. He was arrested by the chief of the area. PW1's evidence was corroborated by that of Dr. Njuki who found that she had bruises on the middle aspect of both thighs and around the vagina opening. He opined that there was partial penetration.

8. The appellant in his defence stated that he was arrested on 30/4/2014 and taken to court on allegation of defiling his neighbours child. He was framed as they had differed with PW3 the mother of the complainant who was her lover. He alleged that PW4 was his business competitor and that they had differed which led her to lie to the court.

9. The applicable law in this appeal is Section 2 of the Sexual Offences Act.

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

*8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

*(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

10. In a case of this nature, the prosecution is required to prove the age of the victim. PW3 her mother testified that the complainant was aged nine years. The P3 form and the post rape report indicated the age of the complainant as 9 years.

11. The evidence of PW2 was that there was no full penetration but it was partial. This was proof of sexual contact between the appellant and the complainant and is supported by case law based on the definition contained in the Act.

12. Under Section 2 of the Sexual Offences Act, penetration need not be full or it can be partial.

13. In the case of **MARK OIRURI MOSE VS REPUBLIC [2013] eKLR** the court held:-

*So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.*

14. In view of the definition under Section 2 of the Sexual Offences Act and the decision in the case of **MARK OIRURU (supra)**, I am of the opinion that penetration was proved.

15. The appellant alleges that there was no exhibit produced in court to prove his case. The record shows that the only exhibit produced during the trial was only the P3 form. The appellant did not explain what kind of exhibits he was referring to.

16. In the case of **PETER KIHIA MWANIKI VS REPUBLIC [2010] eKLR** the court held:-

*'It would have been proper to avail those exhibits for the court's observation. However, a failure to produce the same was not fatal to the prosecution case. There were other exhibits which were more incriminating which the prosecution produced. We do not think there was a failure of justice arising from the omission to tender those exhibits in court.'*

17. In view of the above, it was not mandatory for the prosecution to produce exhibits. The court requires evidence to prove the case beyond any reasonable doubt whether there may be exhibits or not.

18. The appellant argued that there was no medical report produced in court to prove that the offence took place. This is not correct since PW2 Dr. Godfrey Njuki produced the P3 form, the post rape care report and the laboratory results of the victim.

19. PW4 testified that the complainant left a trail of blood stains in the toilet which followed an explanation from her that somebody had defiled her. She pointed out to PW4 the appellant as the person who had sexually assaulted her. On checking her private parts, PW4 found that it was swollen.

20. The doctor testified that there was partial penetration but the hymen was not perforated. Penetration may be full or partial and this is sufficient to prove the offence of defilement. It is not necessary that spermatozoa be present for a conviction of the offence of defilement to stand.

The magistrate convicted the appellant for the offence of attempted defilement for the reason that penetration was partial. Section 2 of the Act is clear on what is regarded as penetration. The prosecution had proved the offence of defilement. It was a misdirection on part of the trial magistrate to convict the appellant on a lesser offence.

The appellant complained that his defence was dismissed without good reasons. His defence shows that he only told the court how he was arrested and how he was not in good terms with PW3 and PW4. PW4 denied knowing the appellant before the incident. The allegations against the two witnesses did not feature during cross-examination.

It was only the issue of framing up which featured and was denied by PW3. She said that she was ready to face the consequences if she was found to be lying to the court. Her boldness may be construed to mean that she was telling the truth.

In particular, it is noted that the appellant did not cross-examine PW3 on the issue raised in his defence of broken intimate relationship. The allegation must have been an afterthought for it came up after the prosecution had closed its case.

However, it is the complainant who told her mother that the appellant had defiled her. It is not the mother who brought up the matter. If PW1 the 9 year old girl was lying, the magistrate who had the opportunity to assess her demeanor would have detected it. The magistrate found the evidence of PW1 and PW3 credible.

The appellant's defence was considered and rejected for having no substance. The magistrate referred to it as a mere denial. I find the observation of the magistrate sound for it was based on the evidence on record.

The appellant alleged that vital witnesses were not called to testify. Section 143 of the Evidence Act provides that;

*"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."*

28. This provision was explained in the case of **DAVID MUTUNE NZONGO VS REPUBLIC [2014] eKLR**.

29. In the case of **MARTIN NYONGESA WANYONYI VS REPUBLIC [2015] eKLR** the court cited **Criminal Appeal No. 504 of 2010 KAINGU ELIAS KASOMO VS REPUBLIC** where it was stated as follows,

*"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".*

30. The appellant complainant that his rights were violated because he was not allowed to cross-examine the complainant. The record is clear that PW1 who was only 9 years old gave an unsworn statement after a *voire dire* test was conducted. The appellant had no right to cross-examine the minor in the circumstances.

31. It is my finding that all the ingredients of the offence of defilement were proved as opposed to attempted defilement.

32. I therefore set aside the conviction on attempted defilement and substitute it with one of defilement contrary to Section 8(1) of the Sexual Offences Act.

33. The sentence of ten (10) years imprisonment is substituted with that of life imprisonment under Section 8(2) of the Act.

34. The appeal is accordingly dismissed.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF APRIL, 2016.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Onjoro for respondent**

**Appellant present in person**