



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 31 OF 2015**

**PETER MULYUNGI JAMES.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the conviction and sentence in Kyuso Principal Magistrate's Criminal Case No. 423 of 2014 –  
B.M. Mararo - PM)*

**JUDGMENT**

The appellant was charged in the Subordinate court at Mwingi with defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 7th August 2014 within Kitui County intentionally made his genital organ namely penis penetrate the genital organ of a child namely AW aged 2 years and 7 months and 3 days.

In the alternative he was charged with committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally caused contact of his male genital organ with the genital organ of AW a child aged 2 years 7 months and 3 days.

He denied the charges. After full trial, he was convicted of the alternative count and sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has appealed to this court. He filed his initial grounds of appeal on 21<sup>st</sup> April 2015. However before the appeal was heard he filed amended grounds of appeal, which he relied upon.

The grounds of appeal are as follows:

- 1. That the learned trial magistrate failed to follow the rule of law in declaring the complainant vulnerable as he made his ruling before examining the complainant's competence and demeanour.**
- 2. The trial magistrate found him guilty as charged contrary to the evidence tendered in court by the prosecutions' witnesses.**
- 3. The trial magistrate erred in law and facts to convict him without considering that none of the prosecution witnesses was an eye witness to the alleged offence.**

- 4. The trial magistrate failed to note that the prosecution witnesses evidence did not reach the threshold of proof as required by the law.**
- 5. The learned trial magistrate erred in law and facts to convict him without considering that the prosecution evidence was contradictory.**
- 6. The medical evidence failed in all ways to support the prosecution allegations.**
- 7. Trial magistrate erred in law and facts to add extraneous matters while delivering his verdict.**
- 8. The trial magistrate erred in law and fact to convict him without considering that the case emanated from existing vendetta between him and the complainant's mother.**
- 9. The trial magistrate failed to consider that there was no direct evidence to connect him with either defilement or indecent act.**

The appellant also filed written submissions which I have perused and considered. During the hearing of the appeal the appellant relied on his written submissions.

Mr. Okemwa learned counsel for the DPP submitted that the prosecution called 5 witnesses at the trial and the court found the appellant guilty of the offence of indecent act. Counsel submitted that the Sexual Offences Act under Section 2 (1) defined an indecent act. The prosecution did not tender evidence to show that the appellant touched the buttocks, the chest or genital organ of the victim.

Counsel submitted that though PW2 said that she saw traces of sperms or semen on the victim, the doctor disagreed with that evidence. The doctor found no evidence of sexual assault or traces of semen on the body of the complainant. Counsel urged the court to peruse the whole record in determining the appeal and stated that the DPP was not opposing the appeal.

This is a first appeal, and as such I am required as a first appellate court to reconsider the evidence on record and come to my own conclusions and inferences. See the case of **Okeno – Versus – Republic (1972) EA 32**.

I have perused the entire record. I have also considered the submissions of the appellant and the prosecuting counsel Mr. Okemwa. PW1 MWM the mother of the complainant, was informed by PW2 Zipporah Mutua that her daughter had been defiled by the appellant. Zipporah Mutua PW2 did not see the appellant defiling the complainant. Her evidence was that she saw the complainant walking in an unusual manner and on enquiry and removing her pant, she saw what appeared like sperms or semen coming from her private parts and buttocks.

I observe that though the complainant, a young child of less than 3 years was taken for medical examination, the doctor found neither traces of semen or any indication of sexual assault.

PW2 Zipporah Mutua also said that she called her husband David Molongo who came after a short while and interrogated the appellant who admitted committing the offence. However this very important witness was not called by the prosecution to testify in court, nor was any reason given for the failure to call this witness.

As was stated in a case of **Bukenya – Versus – Uganda (1972) EA 549**, such failure of the prosecution to call a crucial witness without explanation may under the rules of evidence, leave the court with no option but to make an adverse inference on the prosecution case.

In my view, other than the fact that the evidence of PW2 did not establish a sexual assault as the medical evidence was not supportive of her version, the failure of the prosecution to call David Mulongo the husband of PW2 to testify also added to the inability of the prosecution to discharge their burden of

proving the appellant guilty beyond any reasonable doubt.

In addition to the above, the appellant gave an unsworn testimony in his defence. He explained that he was a herdsman in the homestead and that his employers had failed to pay him his Sh. 10,000/= for having worked for 10 months, and his demand for payment must have been the reason for implicating him. His story appears to be credible.

On the judgment of the trial magistrate, in my view the learned magistrate did not weigh the evidence of the prosecution against that of the defence before convicting on the alternative charge. The magistrate rightly found that there was no evidence to support the charge of defilement. He however convicted on the alternative charge without any evidence at all. He appears to have shifted the burden of proof to the appellant with regard to the alternative count when before convicting he merely stated as follows:-

*“Although the accused alleged that he was framed up with this offence after demanding for his wages, I find that this allegation is false. The complainant's mother was away and therefore it is not possible such demand was made and the complainant's mother decided to frame him with the offence. He never cross examined PW2 about this allegation. In view of the entire evidence, I am satisfied that the offence of indecent act with a child has been proven thus I find the accused guilty and convict him accordingly under Section 215 of the Criminal Procedure Code.”*

From the above summing up of the magistrate, it is clear that because the court was of the view that what the appellant said in his defence was untrue, then he must be convicted of the alternative count without any evidence to support that indeed he committed such an indecent act. Even assuming that what the appellant was saying in his defence was untrue, the burden was always on the prosecution to establish the ingredients of the offence alleged. A person cannot be convicted because of merely the fact that what he has said is untrue. The prosecution in this case did not either prove the main charge or the alternative charge, on the evidence on record.

The ingredients of the offence charged have to be proved by the prosecution, whether or not the accused says anything.

From the evidence on record, the prosecution did not prove that the appellant did any act against the complainant which was indecent. He was thus entitled to an acquittal.

Learned Prosecuting Counsel Mr. Okemwa conceded to the appeal. In my view, he was correct in doing so.

Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Garissa this 6<sup>th</sup> May 2016**

**GEORGE DULU**

**JUDGE**