



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

**HCRA. No. 96 OF 2014**

**AUGUSTINE MBURU.....APPELLANT**

**=VERSUS=**

**REPUBLIC .....RESPONDENT**

**(An Appeal from the conviction and a sentence of life imprisonment in CR. CASE No. 125 of 2013  
by Hon. I. RUGURU (SRM) at MOMBASA LAW COURTS on 14<sup>th</sup> day of March 2014)**

**JUDGMENT**

1. The Appellant herein was sentenced to life imprisonment for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the sexual offences Act No. 3 of 2006.
2. The particulars of the charge were that on unknown date during the month of December, 2012 at Changamwe area in Mombasa District within the Coast Province, the Appellant willfully and unlawfully caused his penis to penetrate the vagina of xxx a girl aged 8 years.
3. The Appellant is facing an alternative charge of indecent act with a child contrary to section 11 (1) of the sexual offences Act No. 3 of 2006 in that in the same material particulars as in count 1 above, the Appellant willfully and unlawfully caused his penis to rub the vagina of xxx a girl aged 8 years.
4. The prosecution evidence in summary is that the complainant went to the Appellant's kiosk on an unknown date in December 2012 to buy tomatoes. The complainant said they used to refer to the Appellant as Soko Soko. She found the Appellant alone. He grabbed her hand, dragged her behind a storey building into a banana plantation where he removed her under wear and he also removed his trouser and put his thing in her vagina and anus. The complainant screamed and a woman went to her rescue. The complainant ran straight home leaving the woman at the scene.
5. PW3 took the complainant to St. Valeria Hospital where she was referred to Coast General Hospital. The matter was also reported to the police and the Appellant was arrested.
6. PW4 (Dr. Ngone) said Dr. Wahome examined the complainant and filled the P3 form. The Doctor confirmed that the complainant's hymen was broken and found to have a tender and lacerated anal region which is evidence of defilement and sodomy.
7. The Appellant said in his defence that he was arrested on 11/01/2013 at his place of business where he sells vegetables. He said the complainant's mother owned him money and she therefore held a grudge against him. He said he knows nothing about the offence.

8. The trial Magistrate convicted the Appellant and sentenced him to life imprisonment. The Appellant has now appealed to this court on the following grounds:-

**(i) THAT the learned trial Magistrate erred in law and fact in convicting the Appellant without considering that the charge sheet which was relied upon to convict me was fatally defective contrary to section 89 (5) 137 (a) (i) (ii) f 214 (1) 275 (1) (2) and 276 (2) of the C.P.C.**

**(ii) THAT the learned trial Magistrate erred in law and fact in convicting the Appellant without considering that the burden of proof in the present case was not established beyond any reasonable doubt contrary to section 107 and 109 of the C.P.C and section 36 of the sexual offence Act.**

**(iii) THAT the learned trial Magistrate erred in law and fact in convicting the Appellant without considering that the evidence in chief that was adduced and put in the committal proceedings were never exhibited in court to warrant the conviction of the appellant contrary to section 63 (3) of the Evidence Act.**

**(iv) THAT the learned trial Magistrate erred in law and fact in convicting the Appellant without noticing that there was massive contradictions and in variances in the prosecution evidence that did not reconcile with each other contrary to section 153 as read with section 154 of the C.P.C.**

**(v) THAT the learned trial Magistrate erred in law and fact in convicting the Appellant without noticing that the KEY witness who was subsequently mentioned in the committal proceedings was never compelled to appear in court in order to clear the doubt upon the prosecution evidence contrary to section 114 as read with section 150 of the C.P.C.**

**(vi) THAT the learned trial Magistrate erred in law and fact in convicting the Appellant without considering that the present matter was fabricated due to the grudge that existed between the Appellant and the complainant's mother over the debt.**

9. The Appellant submitted in writing as follows:-

(i) That the charge sheet was defective in that it does not outline the full information on the nature of the offence the Appellant was charged with and that the charge sheet does not say whether the defilement was done to a boy or girl.

(ii) That the complainant said she was defiled by someone called Mzee Soko soko and the charge sheet is at variance with the evidence adduced in this case. The name of the Appellant in the charge sheet is not Mzee Soko soko but AUGUSTINE MBURU.

(iii) That the medical evidence is insufficient as no DNA was conducted on the Appellant in accordance with section 36 (1) of the sexual offence Act.

(iv) That there was irregularity in the evidence adduced in that the particulars which the trial Magistrate relied on was containing different information from the evidence which talks about Mzee Soko soko while the particulars of the charge talk about AUGUSTINE MBURU.

(v) The Appellant further submitted that some vital witnesses were not called such as the woman who rescued the complainant. Such a witness was crucial and also the clinical officer who examined the complainant at VALERIA Hospital.

(vi) Finally the Appellant submitted that his defence that the Appellant had a grudge with the mother of the complainant was not taken into account.

10. The Respondent opposed the Appeal and submitted as follows:-

(i) On the first ground that the charge sheet is defective, the Respondent submitted that the charge states the offence and the penal provision and it is therefore not defective. Further that no objection was raised on the issue of the name of the Appellant.

(ii) On the second ground the charge was not proved, the Appellant had the opportunity to cross-examine the witnesses who said he is also known as Mzee Soko soko.

(iii) On the ground that crucial witnesses were not called, the Respondent said the woman who rescued the complainant was a passer-by and she could not be traced and that the testimony of the complainant was corroborated by that of the complainant's mother.

(iv) On the issue that the defence was not considered, the Appellant any questions on the alleged grudge.

11. This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that the court did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & Another Vs Republic** the court citing **Okeno v. R** held:-

***“An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. ”***

12. I have carefully re-evaluated the evidence adduced at the trial court bearing in mind that the trial court had the opportunity to see the witnesses. My findings are as follows:-

(i) To establish a case of defilement, the prosecution was required to prove three elements in order to secure the conviction of the Appellant on the charge of defilement. The first element is penetration. Penetration is defined under **Section 2(1) (d)** of the **Sexual Offences Act** as

***“The partial or complete insertion of the genital organs of one person into the genital organs of another person”***.

(i) I find that the Complainant’s testimony was corroborated by medical evidence that she had injuries on both the anal region and her hymen was missing.

(ii) The second element that the prosecution was required to establish is the identity of the perpetrator. The complainant testified that she knew the Appellant prior to the incident. The Complainant said she knew the Appellant as Soko Soko. Although the name on the charge sheet is different, there is evidence that the Appellant was known by the name Soko Soko.

(iii) The third element that the prosecution is required to prove is the age of the complainant. Under **Section 2(1)** of the **Sexual Offences Act**, the definition of a child is the one assigned thereto in the **Children Act**. This means any human being of less than eighteen (18) years. In the present appeal, the age of the complainant was established by the age assessment form which confirmed that the Complainant was eight years old.

(iv) I find that it is not true that the charge sheet is defective simply because the name Soko Soko is not used to refer to the Appellant. He did not raise this issue before the trial court and he had the opportunity to ask the witnesses questions.

(v) On the issue that vital witnesses were not called, the Prosecution gave an explanation that the woman who rescued the Complainant was a passerby who could not be found. I find that the testimony of the Complainant alone is sufficient to convict the Appellant under section 124 of the evidence Act and in this case the trial court gave reasons why the evidence of the minor was reliable. The court said she knew the Appellant very well.

(vi) From the foregoing, the prosecution proved its case against

(vii) The Appellant on the charge of **defilement** contrary to **Section 8 (1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. The Appellant's appeal on conviction lacks merit and is hereby dismissed.

(viii) The conviction is safe and I accordingly uphold it and confirm the sentence

**Dated and signed at Mombasa this 15<sup>th</sup> November 2016.**

**ASENATH ONGERI**

**JUDGE.**