



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 98 OF 2013

STEPHEN MUSYOKA KISULEAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against the original conviction and Sentence of the Principal Magistrate's Court at Makueni by Hon. R Yator (Ag. SRM)) in Criminal Case No. 123 of 2012 dated 16th May 2013)

JUDGMENT OF THE COURT

1. The Appellant, **Stephen Musyoka Kisue**, was charged with **Defilement** of a girl between the age of twelve and fifteen years contrary to **Section 8 (3)** of the **Sexual Offences Act of 2006**.
2. The particulars were that on diverse dates between 13th and 28th day of March 2012 at **[Particulars Withheld] Sub - Location** in **Makueni District** within **Makueni County** unlawfully caused penetration with his male genital organs to that of **N M D**, a girl aged 14 years.
3. In the alternative charge, the Appellant was charged with **Indecent Assault** of a girl contrary to **Section 11 (1)** of the **Sexual Offences Act of 2006**.
4. The particulars of the offence were that on diverse dates between 13th and 28th day of March 2012 at **[Particulars Withheld] Sub Location** of **Makueni County** unlawfully and indecently assaulted **N M D** by touching her private parts.
5. PW1 **N M D** the Complainant in her unsworn evidence testified that she was 14 years old and that she did not know her year of birth and was in class three at the time of offence. She said that on the 13th March 2012 at 6.00 a.m. she went to church at **[Particulars Withheld]** where she had gone to visit her aunt **M**. She left church at 10.00 a.m. and went to a hotel belonging to one '**Pili**' to ask for drinking water which **Pili** gave her.
6. The Complainant was standing at the counter next to the door towards the kitchen when the Appellant who was cooking *chapati* called and asked her where she came from and that she informed him that she was from **Mutulani**. The Appellant asked her to wait for him to finish cooking to show her a short route. When he completed he accompanied her and that they passed through the Appellant's home at **Kathumba** and that he entered the house while she waited outside for him to show her the route and that

there were no other people at Appellant's home and there was no other house around there.

7. The Appellant asked the Complainant to get inside the house which she did and that he then locked her inside and went away but she did not scream. The Appellant returned at 9.00 p.m. and brought her *chapati* and soda which she took before they went to bed and that night he did not do anything to her.

8. The following morning, the Appellant left tea behind and locked her inside again with a padlock and gave her a basin to use for a short call. The Appellant returned at night a time she did not know and he found her asleep. After he cooked they went to bed. He then asked her to remove her pants which she did and that he then slept on her and defiled her and she felt pain and that she bled. It was her first time to have sex. At 3.00 a.m. the Appellant woke up and defiled her again and after that he asked her to take a shower inside his house.

9. The complainant stayed at the Appellant's house for two weeks where he continued defiling her twice every night. On the 29th March 2012 the Appellant asked her to bath so as to take her to his home for marriage proposals and that they left. On the way they met two police officers and the Appellant was arrested.

10. PW2 **D N**, the mother of the victim said she was 14 years old and born in the year 1998 and that she had no Birth Certificate of the child as the same got burnt. On the 13th March 2012 her child visited her aunt **M M** at **[Particulars Withheld]** and that later on an unknown date, **M** called her saying the child was missing. She then went to report her missing child to the chief **[Particulars Withheld]** .

11. On cross-examination, the mother of the child confirmed that on the material date of 13th March 2012 the child was staying with the aunt and that she heard she was from church when she could not trace her way back.

12. PW3 **Joseph Kiptoo Biwott**, the Clinical Officer said he examined the girl on 2nd April 2012. That on vaginal examination the external genitalia was normal. However, hymen was perforated with an old opening and that there was presence of some discharge and that all other tests were negative. He remarked that there was possible sexual penetration whose duration was unclear and produced the child's P3 form as exhibit 1. On the same date of 2nd April, 2013 he examined **Stephen Musyoki** (Appellant) who had no visible injury on his private parts nor any bruises.

13. PW4 **APC John Mutua**, said that on the 29th March 2012 at 2.00 p.m. while at the post a man, father to one **R K** went to report her daughter **R** who was missing and that he had a hint that she was at the Appellant's home in **[Particulars Withheld]**. Together with his colleague who knew the Appellant, they went to his home and on the way they met a girl carrying clothes in a paper bag and on interrogating her, it turned out she was the said **R** who had been missing for five days.

14. **R** then informed them that he had left the Appellant at his home and that he had locked up the victim while defiling her. That the said **R** then showed them a route that the Appellant would use while from **Mutulani** and then they took her to the post where the father was. When they returned to look for the Appellant, they met him heading to **Mutulani Market** while with the Complainant and that he claimed the Complainant was his wife and that he then escorted them to the post.

15. PW5 **Cpl. Paul Kipkore**, the Investigating Officer said A.P. Officers from **[Particulars Withheld]**. took the Complainant and the Appellant to the station on 30th February 2012 at 2.30 p.m. on allegations of defilement and after being arrested on 29th March 2012. The report was that the girl had gone missing from 13th March 2012 and that he recorded witness statements and issued them with P3 forms and that he escorted them to **Makueni District Hospital** for examination and P3 forms duly filled.

16. DW1 **Stephen Musyoki Kisule**, the Appellant herein in his defence said that he was arrested on 28th March 2013 by AP's from **[Particulars Withheld]** of an offence he had no knowledge of. He questioned

the prosecution witness's evidence saying that the Complainant did not know him and that she lied she was from church on the 13th March 2012 yet it was a Tuesday and that no witness was called to testify that indeed the Complainant had been locked in.

17. The Appellant said that mother of the Complainant had said that she did not know him and that she had not known her child was missing. He further said that the Clinical Officer said that the Complainant was locked in from 18th to 28th yet the Complainant said it was on 13th to 28th.

18. The trial magistrate after considering the case, convicted him to serve twenty (20) imprisonment.

19. Being dissatisfied with the conviction and sentence the Appellant filed his Petition of Appeal on 24th May 2013 and raised four (4) grounds of appeal. These are the grounds:-

i. That, the learned trial magistrate grossly erred in both law and fact when he entered a conviction and sentence while knowing that the charge was defective.

ii. That, the learned trial magistrate erred in both law and fact when he relied on unproved evidence which contravened the provisions of Section 150 of the Criminal Procedure Code.

iii. That, the learned trial magistrate erred in law and fact by not re-evaluating his trial recordings to learn that the case was a frame-up case before convicting me.

iv. That, the learned trial magistrate erred in both law and fact when he convicted me without considering and calculating the weight of medical report.

20. The Appellant filed submissions in which he expounded the above grounds.

21. On ground one, the Appellant submitted that the learned trial magistrate convicted him on a defective charge.

22. On ground two, the Appellant stated that certain crucial witnesses were not called, and that such failure led to his conviction illegally.

23. On ground three, the Appellant stated that the case was fabricated by PW4, PW5 and PW2. The Appellant stated that PW4 and the father to **R** would have been called as witnesses.

24. The prosecution opposed the appeal and filed submissions herein on 3rd May 2016.

25. In response to the said grounds of appeal the prosecution's case is that the charge was not defective despite the fact that only **Section 8 (3)** of the **Sexual Offences Act** was stated in the charge sheet and not **Section 8 (1)** which prescribes the offence and punishment. The State cited **Section 383** of the **Criminal Procedure Code** which forbids the appellate court from reversing or altering the findings, sentence or order passed by a court of competent jurisdiction on account of an error.

26. On ground two that the prosecution failed to call more witnesses, the prosecution case is that it is not bound to call a plurality of witnesses and that the defence could also have called also witnesses they wished to call. The prosecution cited the case of **Bukenya & Others –vs Uganda (1972) EA 549**.

27. In answer to the grounds 3 and 4 the prosecution dismissed the same and stated that there was sufficient medical evidence to prove the offence and that the prosecution had proved its case beyond reasonable doubt.

28. I have carefully considered the appeal and submissions of the parties. I raise the same issues raised in the Appellant's ground of appeal, for determination herein. I will determine all those four issues together. I have noted that the Honourable trial magistrate had carefully considered the charge sheet in

her judgment. At page 7 of the judgment, the Honourable trial magistrate stated that it had considered both the prosecution and defence evidence and the exhibits produced. In looking at the charge sheet, the Appellant was charged under **Section 8 (3)** of the **Sexual Offences Act** which is the penalty section and had not been charged under **Section 8 (1)** which defines the offence. As the law requires the Appellant should have been charged under **Section 8 (1)** as read with **Section 8 (3)** of the **Act**.

29. The trial court found that the defect in the charge sheet was accrued by the particulars of the offence which read *“that on diverse dates between 13th and 28th day of March 2012 at [Particulars Withheld] Sub –Location in Makueni District within Makueni County unlawfully caused penetration with his male genital organs to that of N M D a girl aged 14 years”*.

30. The said particulars clearly stated the offence of penetration and which were read out to the Appellant sufficiently and which meant that the Appellant understood the charges facing him. The Appellant during trial fully participated and followed proceedings and asked questions in line with his defence. As such the trial court found that no miscarriage of justice was occasioned by the technical defect in the charge sheet. In proving the charges of defilement Section 2 of the Act defines penetration as *“the partial or complete insertion of the genital organs of a person into the genital organs of another person”*.

31. The prosecution proved that there was actual penetration and the Appellant was responsible, and also established the age of the victim. In relation to the age of the child an age assessment report was produced by the Clinical Officer assessing age of the child as 14 years. The girl said she did not know her year of birth but that she was 14 years old. The mother on the other hand, said she was born in the year 1998 and that she had no Birth Certificate for the child as the same got burnt. From that evidence, it is not in dispute that the child was 14 years old at time of offence.

32. On whether there was any penetration, the girl confidently testified that the Appellant took her to his house on the 13th March 2012 where he locked her inside and that on that night they just slept without him doing anything, that it was the following night that the Appellant defiled her twice in the night and she felt pain and bled.

33. It was the Complainant’s evidence that after the second night, the Appellant continued defiling her twice every night, and for close to the two weeks he locked her at his house. The Complainant’s evidence on penetration was corroborated by that of the Clinical Officer PW3, who as per the P3 Form, remarked that there was possible sexual penetration after he examined the child on the 2nd April 2013 where he found her external genitalia normal but the hymen had been perforated and which opening was old and that she as well had some discharge. The mother of the child said that when she interrogated her, the Complainant said that she had been defiled by the Appellant for the two weeks he had locked her.

34. On whether the Appellant was responsible in defiling the child, the child did explain how she went to ask for drinking water from the hotel that the Appellant was working. The Appellant later took her to his house and locked her in for two weeks and that from the second day he continued defiling her twice every night while locked in the Appellant’s house and given a basin to urinate in and to take shower inside the house.

35. It is not denied that the child had gone missing from the 13th March 2012. The mother said she received a call from **M** whom the child had gone to visit on the 14th March 2012 informing her that she had gone missing the previous day on 13th March 2012. That she then went to report to the chief and waited for any information in case she was traced.

36. The girl said she was locked in the house on 13th March 2012 and that on the 29th March 2012 the Appellant asked her to prepare so that they could go to her home for marriage proposals. It is indeed clear that the period of 13th March 2012 to 29th March 2012 was at least two weeks.

37. One thing is evident that at the time of arresting the Appellant, he was together with the child. This is a very sad case, which, however, the prosecution has proved, occurred.

38. I am therefore convinced that indeed the Appellant had been with the child and considering that he had locked her in for close to two weeks the child must have positively identified the Appellant as the two weeks period was enough for her to identify him.

39. Pursuant to the foregoing paragraphs of this judgment, I am satisfied that the Honourable trial magistrate did not err in convicting and sentencing the Appellant. I find the appeal herein not merited and the same is herewith dismissed.

40. On the sentence this court observes that the 20 years given was not excessive. The conviction and sentences are upheld and the appeal dismissed.

THAT is the judgment of the court.

DATED AND DELIVERED AT MACHAKOS THIS 2ND DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

Mr. Machogu for State

Appellant present in person

Court Assistant – Mr. Munyao