



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 42 OF 2014**

SAMUEL MUGENDI NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(An Appeal from the Sentence and Conviction of Senior Principal Magistrate Embu in Criminal Case No. 399 of 2013 on 22nd July, 2014)***

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

The appellant was tried and convicted by Embu Senior Principal Magistrate on 22nd July 2014. He faced a charge of defilement contrary to Section 8(1) as read with 8(4) of the Sexual Offences Act. There was an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the same Act. It was not very clear in the judgment as to which offence the appellant was convicted of. He was however sentenced to serve ten (10 years imprisonment. Being dissatisfied with the judgment of the trial magistrate, the appellant lodged this appeal.

The appeal was disposed of by way of written submissions and both sides filed their depositions. The appellant in the petition of appeal and in the submissions raised the following issues:-

1. *That the charge was defective in that the child being 16 years, the charge of defilement ought to have been framed under Section 8(1) as read with 8(4) of the Act.*
2. *Corroboration of the complainant's evidence which is a requirement was lacking and especially taking into consideration the fact that the complainant was mentally retarded.*
3. *That the appellant was not positively identified as the person who defiled the complainant.*
4. *That the medical evidence was not reliable since the examination of the complainant was done about three weeks after the incident.*
5. *That the age of the pregnancy was not determined and it was therefore wrong to connect it with the alleged offense based on the human gestation period.*
6. *That the judgment was not in compliance with Section 169 of the Criminal procedure Code in that it did not state which offence the appellant was convicted of.*
7. *That although the trial magistrate identified that the prosecution's case had "hiccups" he did not address the said hiccups.*

The prosecution in their submissions answered to each and every issue raised with the ultimate submission that the prosecution proved the case against the appellant beyond reasonable doubt. It was contended that the error on the charge is curable under Section 382 of the Criminal Procedure Code. The prosecution argued that it was clear from the judgment that the appellant was convicted of the offence of defilement which called for a minimum sentence of 15 years imprisonment. The court was urged to take note of this anomaly of handing in a lesser sentence and correct it by enhancing it to 15

years.

The duty of the first appellate court was explained in the case of **JOSEPH NJUGUNA MWAURA & 2 OTHERS VS REPUBLIC [2013] eKLR** as follows:-

*“The duty of the first appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so. Provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”*

In regard to the charge sheet, the appellant was charged with defilement as the main charge. The complainant was aged 16 years. Under the Sexual Offences Act, the correct sections would have been Section 8(1) as read with Section 8(4). The prosecution indicated the sections as 8(1) as read with Section 8(3). This was an error since Section 8(3) deals with defilement of a child aged twelve (12) to fifteen (15) years.

The particulars and the statement of the charge were properly worded and there was no doubt as to which offence and its nature the appellant was facing. The particulars in fact show that the complainant was aged 16 years. The citing of the offence in Section 8(1) was correct but it was wrong as relates to the sentence section. This is a minor error which does not render the charge defective.

I am in agreement with the prosecution's argument that the error is negligible and corrigible under Section 382 to the Criminal Procedure Code.

The facts of this appeal are that PW2 the complainant aged 16 years and being mentally challenged resided at her parents home in Embu County. PW1, the mother noticed that the complainant had not had her monthly periods. She talked to her daughter and inquired whether there was any problem. The girl opened up and told PW1 that she had been defiled by one Mugendi about 3 weeks back. The mother then took her to hospital for examination after making a report at Itabua police station. Examination revealed that she had a broken hymen and that she was pregnant. The accused was arrested and investigations commenced resulting into him being charged with the offence before the Embu magistrate court.

PW1 testified to the fact that PW2 is mentally challenged and that she had dropped out of school and was at the material time staying at home. When she talked to her daughter PW1 on 14/5/2013 she told her that the appellant had a sexual activity with her on 21/4/2013. She gave the name of her assailant as Mugendi. She also told the mother that on the material day, she was coming from church when she met one Mwaniki PW3 and the appellant. PW3 greeted her and they passed each other. The appellant later followed and attacked her. He then defiled her and warned her not to tell anyone.

The complainant said she did not report the matter to her mother because she had been threatened by the appellant. PW2 testified after a voir dire test was conducted by the magistrate. She gave sworn evidence after the court satisfied itself that she was possessed of sufficient to give evidence on oath. She testified that she attends Full Gospel Church in the neighbourhood. On her way back from church in the evening she met PW3 who greeted her and warned her to beware of the appellant who was with him for he is not a good boy. PW3 then left the appellant behind and went away.

The appellant then grabbed the complainant and took her to a nearby bush. When PW2 screamed the appellant threatened to harm her with a knife. He used the knife to cut off her tight skirt. The appellant then undressed PW2, removed his trouser and defiled her. After warning her not to tell anyone lest he kill her, the appellant escaped deep into the bush. PW2 arrived home at night but did not say anything to anyone until her mother inquired into the reason for her missing her monthly periods.

Under section 124 of the Evidence Act is the proviso which provides:-

*“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.*

The effect of the proviso is that sexual offences are distinguishable from other crimes even that of tender years does not require corroboration by another witness. In the case before me, the complainant gave sworn evidence after the court conducted the necessary test and was satisfied she understood the nature of oath. The appellant does not raise any issue on the manner of conducting the test. On perusal of the record, the magistrate interviewed the complainant before making his ruling which is the correct procedure.

Although the complainant was mentally retarded, her narration of the incident before the court was vivid and clear. It did not break the chain of events and showed reasonable understanding of what happened to her. She described how she met the appellant with his friend PW3 and gave details of the attack including the threats made by the appellant.

This was evidence of a single witness and although the magistrate did not say so, it leaves no doubt that he had in mind the mental challenge of the complainant as he dealt with the evidence. The magistrate had the chance of seeing and assessing the credibility and the intelligence of the complainant which the appeal court will not have. I have no reason to believe as argued by the appellant that he did not exercise due caution in dealing with her evidence.

Medical examination of the victim was done about three weeks after the incident. I agree with the appellant’s argument that it was not possible to get any reliable medical evidence due to the late examination. The doctor did not state in her report when the hymen had been broken. Neither did he determine the age of the pregnancy. These were important factors in helping to corroborate the evidence of PW1 on the allegations of defilement. The offence of defilement requires proof through medical evidence which was not tendered in this case.

The time of the incident and the date of penetration would have been confirmed or disapproved by evidence on age of the pregnancy notwithstanding that the laboratory tests were negative.

I take judicial notice that pregnancy results from a sexual activity. However, that sexual activity must be connected with the pregnancy. The appellant also raised the issue of the human gestation period of 9 months in relation to the time of the incident and to the time the child was born or was to be born.

When the complainant testified on 2/10/2013 the baby was yet to be born. There was no evidence from the formal witnesses who testified in the year 2014 of when the baby was born. In the absence of the evidence of the time of birth, the issue of the doubtful gestation period does not arise.

On the issue of DNA, I find that this was not necessary to prove the offence of defilement. Proof of paternity requires and in this case it was not an issue.

In the case of **JAMES MULANG'A KISUNZA VS REPUBLIC High Court Machakos Criminal Appeal No. 118 of 2010** where the court held:-

*“With regard to the requirement of DNA test on the appellant; DNA profiling would identify a suspect if investigations are carried out properly. In rural areas like Kitui region where the offense was committed, collecting DNA evidence for purpose of forensic examination is not easy as there are no experts. Even if this had been done it must be noted that DNA testing cannot be solely proof of guilt of an accused person, there is need for some other evidence to prove the case. In this case, evidence adduced proving the guilt of the appellant was cogent. There was no need of DNA test upon his person as submitted”.*

On the issue of identification, the complainant said she met one Mwaniki wa Grace (PW3) and Mugendi

(appellant). From her testimony, it leaves no doubt that there the two men were people PW2 knew well and were not strangers to her. Being her neighbours in the same vilage, the complainant knew the two men by their names. During cross-examination PW2 said the home of the appellant is about 300 metres from her parents home. The appellant in cross-examination by the prosecutor said that the Full Gospel Church was about 50 metres from his house. This is where the complainant was coming from at the material time. These are very close distances where it is expected that the complainant used to see PW3 and the appellant in the neighbourhood and she knew them. There is nothing wrong with knowing a neighbour by only one name provided there is other evidence to establish the identity of the person. It does not always follow that when one knows his/her neighbour by one name, that it can be assumed that he/she does know them well. When the complainant told her mother about “Mugendi” the mother must have clarified who this Mugendi was assuming there could be another person in the close neighbourhood with a similar name. The appellant argued that “Mugendi” is a common name in Embu. PW2's evidence leaves no doubt that when the mother was reporting the matter to the police, she had established the identity of her daughter's assailant. I rely on the court of Appeal case at Nyeri of **RICHARD WAHOME CHEGE VS REPUBLIC [2014] eKLR** where it was observed:-

*“The gist of this appeal is whether the High Court was correct in upholding that the appellant was properly identified through recognition by PW1. The trial court found that it is the appellant who defiled the complainant. The High Court stated that the conviction of the appellant was safe. On our part, we are satisfied that the appellant was a person known to PW1 as they hailed in the same village. PW1 knew the name of the appellant and she disclosed the name to her mother PW2. There is nothing on record to dent the credibility and veracity of the testimony of PW1. The offense was committed in broad daylight and there is no possibility of mistaken identity. We have no doubt in our minds that the identification of the appellant by PW1 through recognition was positive and free from error or mistake.”*

I find no possibility of mistaken identity in this case and I am satisfied that identification by recognition was positive.

On the evidence of PW3, I make a few observations. He was the man who accompanied the appellant shortly before he attacked the complainant. When he greeted her that the appellant was not a good boy. This is suggestive of prior knowledge that he knew the plans of the appellant on the complainant. His denial that he did not meet with the appellant after 6.00 p.m. and that he did not see the complainant was disbelieved by the trial court which had a chance of assessing his credibility as a witness. He testified on how he spent several hours of the material day with the appellant which the appellant confirmed in his defence.

I draw a conclusion from this evidence that the two men were close friends and that PW3 did not want to put his friend in trouble by telling the truth. Given the surrounding circumstances and PW2's evidence which was clear that she knew him, I am convinced that PW3 was determined to protect his friend. PW3 may also have harboured some fear of being implicated as an aider or abettor in the offence.

The trial magistrate did not indicate whether he convicted the appellant of defilement or for the alternative charge which was wrong. Section 169 requires that judgment spells out clearly the offence an accused person is charged with. In this case the magistrate as he concluded his judgment said:

*“That out of that defilement she conceived”.*

This statement points at a conviction for the offence of defilement and not of the alternative charge. However, the sentence imposed of 10 years imprisonment was unlawful. Section 8(4) provides a minimum sentence of 15 years imprisonment.

The magistrate heavily relied on the pregnancy to convict the appellant of defilement. As I said earlier in this judgment, the age of the pregnancy was not determined. It was therefore wrong for the magistrate to rely on pregnancy to convict the appellant. The magistrate therefore erred in convicting the appellant in the absence of medical evidence which is a requirement.

The evidence of PW2 was credible and reliable on what transpired between her and the appellant. The said evidence has been evaluated at length earlier in this judgment. I reach a conclusion that the evidence on record proves the alternative charge beyond any reasonable doubt.

I therefore quash the conviction and set aside the sentence for the offence of defilement contrary to Section 8(1) as read with 8(4) of the sexual Offences Act. I substitute it with a conviction of the offence of committing an indecent act with a child contrary to Section 11(1) of the same Act.

The appellant is accordingly convicted and sentenced to serve ten (10) years imprisonment

It is hereby so ordered.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 4TH DAY OF MARCH, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Appellant**

**Mr. Ithiga for the Appellant**

**F. MUCHEMI**

**JUDGE**