



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 332 OF 2013

DAVID NYARURI BOSANDO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant herein **DAVID NYARURI BOSANDU** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at the Molo Law Courts. The appellant was arraigned in court on 30/4/2012 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The particulars of the charge were given as follows:-

“On the 27th day of April 2012 at Turi Location in Molo District Nakuru County intentionally did cause his genital organ namely penis to penetrate the genital organ namely vagina of M W aged 4½ years old”

The appellant faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT 2006**. The Appellant entered a plea of ‘**Not Guilty**’ to both charges and his trial commenced on 9/5/2012. The prosecution led by **CHIEF INSPECTOR MUTETI** called a total of five (5) witnesses in support of their case.

PW1 M W was the complainant, a child aged 4 years. **PW2 W K** was the complainant’s brother aged 7 years. The two children state that on 27/4/2012 at 2.00pm they were at home alone caring for their baby sister ‘**G**’. The accused whom they knew as ‘**pastor**’ came and called the complainant to go and see the mirror in his house. The complainant left with accused. After a while she returned crying. She had 10/= which she used to buy mandazi. The complainant informed her brother that accused had done ‘**Tabia Mbaya**’ ie sexually molested her.

PW3 B W was the children’s mother she told the court that on the material day she had gone out to the farm leaving her children at home. She returned to her home and noted that her daughter M did not appear normal. **PW2** told her that ‘**Pastor**’ had molested his sister. **PW3** reported to the village elder then summoned a neighbor called ‘**Cecilia**’ to help her examine the child.

Upon checking the complainant’s private parts she saw blood and a tear on the private parts. **PW3** immediately rushed the child to Elburgon hospital for treatment. The matter was reported to police. The appellant was later arrested and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he totally denied having seen or molested the complainant. The appellant called one witness in support of his defence.

On 18/12/2013 the learned trial magistrate delivered his judgment in open court. He convicted the appellant of the main charge of Defilement and there after sentenced him to life imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

MR. MOTANYA Advocate argued the appeal on behalf of the appellant. **MS NGOVI** learned State Counsel opposed the appeal.

Being a court of first appeal, I am obliged to re-evaluate the evidence adduced before the trial court and to draw my own conclusions on the same.

The Appellant had been damaged under Section 8(1) as read with Section 8(2) of the Sexual Offences Act. In cases of defilement the age of the victim is both a relevant as well as a crucial factor. It has been held severally by the Court of Appeal that proof must be tendered of the exact age of the victim in order to establish this offence. This is because the sentence to be imposed upon conviction will depend on the age of the victim. In this case the complainant was stated in the particulars of the charge sheet to have been aged 4½ years at the time of the incident. No proof at all by way of a Birth Certificate, Health card, School admission letter or Baptism card was availed to confirm the child's age. No Age Assessment was done by a doctor to confirm her age. The complainant herself in her testimony stated that she did not know her age. **PW3** the complainant's mother told the court that her daughter was born in September 2007. However **PW3** did not produce any documentary evidence to prove the date of birth of the child. As such a central element of this charge remains unproven. Without concrete proof of age a conviction under Section 8 cannot stand.

The two children **PW1** and **PW2** told the court that the appellant called the child to his house on the material day. However, **DW2 STEPHEN OMWARO** told the court that on that day he and the appellant spent the whole day together preparing the appellant's land for farming. **DW2** insists that "**No child came to the house that day**". Even under cross examination by the prosecutor. **DW1** insists that

"I worked for accused on 27th not 24th April. We were about to put mud on the hut. I did not see the complainant near the scene"

At the very least this defence places a doubt on the prosecution case. The defence casts sufficient doubt on the prosecution case. For the above reasons being lack of documentary evidence to prove age of the complainant and doubt raised by the appellant's defence, I find that his conviction was unsafe. As such I do allow this appeal. The appellant's conviction is quashed and his sentence is hereby set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Nakuru this 12th day of October, 2015.

Read in open court.

Mr. Obutu holding brief for Mr Motanya

Appellant in person

Mr Chirchir for State.

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Maureen A. Odera

Judge

