



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 146 OF 2014

PAUL MUSEMBI MUTUA.....APPELLANT

VERSUS

**REPUBLIC.....
RESPONDENT**

(An Appeal arising out of the judgment and sentence of E.M Muiru RM in Criminal [Case No. 1237 of 2013](#) delivered on 18th July 2014 at the Principal Magistrate's Court at Makindu)

JUDGMENT

The Appellant was first arraigned in the trial court on 26th September 2013 and charged with the offence of defilement of a child contrary to section 8(1) as read together with subsection 2 of the Sexual Offences Act. The particulars of the offence were that on the 22nd day of September 2013, at [Particulars Withheld] village, Makindu location within Makueni County, the Appellant intentionally and unlawfully caused his genital organs namely penis, to penetrate the female genital organ namely, vagina of N S, a child aged 8 years.

In the alternative the Appellant was charged with the offence of 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 22nd day of September 2013, at [Particulars Withheld] village, Makindu location within Makueni County, the Appellant willfully and unlawfully committed and indecent act by touching the vagina of N S, a child aged 8 years.

The Appellant pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to life imprisonment. The Appellant has preferred this appeal against the said conviction and sentence. He filed a Petition of Appeal on 11th August 2014 and availed Amended supplementary grounds of appeal and written submissions to the Court during the hearing of the appeal on 22nd October 2015.

The Appellant's main grounds of appeal are that the prosecution did not prove the case to the required standard of the law; his fundamental rights of fair trial as enshrined in Article 25 (c) of the Constitution were violated as he was denied access to prosecution witness statements in spite of his application made on 6th May 2014; that the trial magistrate did not consider the medical evidence by PW3 where he testified that the victim tested HIV positive whereas he tested negative; and that the provision of section 169(1) of the Criminal Procedure Code were not complied with in relation to the defence statement.

The Appellant in his submissions availed to the court argued that it is when the complainant was pinched on 24/9/2013 that she disclosed she had been defiled, and she was also defiled prior to 22/9/2013 as she stated that the last time it was the same person who had defiled her. Further, that more doubt was created

by the fact that the complainant was examined by the doctor after two months on 25/11/2013, and found to be HIV positive, while the Appellant was found to be HIV negative. The Appellant cited the decision in **Woolmington vs The DPP, (1935) A.C. 462** in this respect.

In opposing the appeal the learned Counsel for the State Mr. Shijenje made oral submissions in court on 22/10/2015. He argued that the Appellant was well known to the victim at the time of defilement and there was clear identification. He further stated that it was the testimony of PW2 that she had noticed that the complainant's clothes had bloodstains and the victim had told her what had happened the previous day, on 22/9/2013.

Further, that the examination by PW3 on 25/9/2013 who was a doctor, confirmed that the victim had been defiled and the age of injury was 3 days old. The medical examination had also confirmed that the hymen had been broken and there was a discharge with blood. On the issue of the fundamental rights of the Appellant being violated, the learned counsel argued that this was not raised at the lower court and it was meant to delay the trial. He noted that the Appellant had cross examined the witnesses at trial. The counsel concluded that the Appellant had been properly convicted and sentenced.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The key evidence given at the trial is as follows. The prosecution called four witnesses. After a *voire dire*, the complaint (PW 1) testified on oath that she was in standard two at [Particulars Withheld] Primary School, and on 22/9/2013 at 8p.m, her aunty had told her to take her uncle Musembi to one Ngokungu's place. Later, on their way back home, the said uncle Musembi who was the Appellant told her that he would show her something big.

PW1 stated that the Appellant then removed his clothes and told her to remove hers. He then applied saliva on her private parts and put the big thing there. She said that she felt pain and screamed but he never stopped until a passer-by came to her rescue. Afterwards she said that the Appellant took her home and told her not report what had transpired. She however told her grandmother who later took her to hospital. She said that the Appellant had promised to give her ksh. 10 but he did not.

PW2 was Z N, the grandmother of the victim, who testified that on 23/9/2013 the Appellant had called her and asked whether she had sent PW1 to borrow Kshs, 10 from him. She said that when she asked PW1 about it is when the child told her how the Appellant had defiled her the previous day. She stated that she saw blood on her clothes and that the child was pulling her legs, and that on asking her she initially kept quiet. The following day she reported the matter to the police. Afterwards she said the child was taken to hospital where a P3 form was filled. She produced the birth certificate of the child as an exhibit.

PW3 was Dr. Musyoki, a medical officer attached at Makindu sub-district hospital, and he testified that on 25/11/2013 he examined the complainant who had been defiled by someone known to her. He stated that the age of injuries was 3 days. He noted that the she was found to have a torn hymen, a lot of discharge and blood stains in her genitalia. He also stated that her urine analysis were normal, the HIV test was positive, and a syphilis test and Hepatitis B were negative. Further, that samples of the male accused were also tested and the results showed negative for HIV, hepatitis B and syphilis. He produced the medical records as exhibits in the case.

The last witness for the prosecution was PW4 Cpl. Joyce Iha, the investigating officer in the case. She testified that on 25/9/2013 the complainant and her aunt went to Makindu Police station to lodge a complaint. The complaint was that the child had been defiled by someone known to her as uncle Musembi. She stated that she accompanied the child for medical examination, and that the Appellant was subsequently apprehended and charged. It was her testimony that the Appellant had promised the complainant Kshs. 10/- if she did not report the incidence. She said that it was when that was not forthcoming that she reported the matter to her mother. She noted that the child had identified him as the

defiler.

The trial court found that the Appellant had a case to answer and complied with section 211 of the Criminal Procedure Code in that respect. The Appellant gave unsworn evidence and did not call any witness. He testified that on 28/9/2013 he had left Mombasa together with his wife to go visit her parents. He said that after a staying for 3 days, his mother-in-law (PW2) called him for a meeting where he was told to live with them since he had married their daughter. He stated that he refused to abide and that was when the case was instituted against him. He denied the charges against him.

Upon consideration of the grounds of appeal, submissions made and evidence in the trial Court, I find that the issues raised in this appeal are firstly, whether the Appellant's right to a fair trial was violated. Secondly, whether the Appellant's conviction for the offence of defilement was based on sufficient evidence, and lastly, whether the judgment of the trial court conformed to section 169 of the Criminal Procedure Code.

On the first issue, the Appellant claimed that his right to a fair trial as enshrined in Article 25 (c) of the Constitution were violated, as he was not availed the witness statements upon application on 6th May 2014. I have perused the record of the trial court, and note that the Appellant requested for the witness statements on 3/12/2013, 16/12/2013 and 7/1/2014. On all those occasions the Court ordered that the Appellant be supplied with the witness statements. When the matter next came for hearing on 22/1/2014, the Appellant stated that he was ready to proceed and did not raise the issue of provision of witness statements. On 6th May 2014 he made an application not for the witness statements, but for the case to start afresh on the ground that he had received the witness statements late after PW1 and PW2 testified, which application was denied by the trial magistrate.

Article 25 (c) of the Constitution that was relied upon by the Appellant in this regard provides that the right to a fair trial may not be limited. Article 50(2)(j) of the Constitution further provides that the right to a fair trial includes the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. This right was explained in **Dennis Edmond Apaa and Others v Ethics and Anti-Corruption Commission, Nairobi Petition No. 317 of 2012 [2012] eKLR** as follows:

“The words of Article 50(2)(j) that guarantee the right “to be informed in advance” cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c) guarantees the accused the right, “to have adequate facilities to prepare a defence.

This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence The obligation to disclose was a continuing one and was to be updated when additional information was received.”

In the present appeal, it is evident that the Appellant requested for witness statements and that at some point they were availed to him. The contention is the time that the same were availed, and if indeed they were availed before the commencement of the trial. I note that the Appellant had been consistent and persistent in requesting for the witness statements before the trial commenced, and at the start of the trial on 22/1/2014 he did not raise this issue, and indicated that he was ready to proceed. I therefore agree with the trial magistrate that raising the issue of a fresh trial on account of late provision of witness statements was an afterthought, as he had the opportunity to raise this issue before the trial commenced and did not do so, and as he also expressly stated that he had received the witness statements.

On the second issue as to whether the Appellant was convicted on the basis of satisfactory and sufficient evidence, this Court is mindful of the ingredients of defilement which were highlighted in **Charles**

Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013 as follows:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

The complainant knew the Appellant who she referred to in her testimony as Uncle Musembi, and the alleged defilement took place during the day. She also told PW2 that the person who committed the defilement was the Appellant. The age of the complainant was indicated in the P3 form as 9 years. It is in this regard provided under section 8(2) of the Sexual Offences Act that a person who commits an offence of defilement with a child of eleven years or less is liable upon conviction to imprisonment for life.

As regards the requirement of penetration, section 8 (1) of the Sexual Offences Act states that:-

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.

“Penetration” under section 2 of the Act is defined to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.” The evidence of the complainant in this regard was that the Appellant inserted his big thing into her private parts and that she felt pain and screamed. Her testimony was clear, consistent and remained unshaken on cross-examination.

The medical officer, PW3, also testified that the hymen of the complainant was broken and there was discharge and blood stains on her genitalia. Contrary to the Appellant’s assertions, the P3 form produced as an exhibit by PW3 was dated 25/9/2013 and not 25/11/2013, and indicated that the injuries suffered by the complainant were 3 days old, and was evidence that the defilement occurred on 22/9/2013. I therefore find that the prosecution proved beyond reasonable doubt that there was penetration of the complainant by the Appellant.

On the third issue raised, it was argued by the Appellant that section 169 of the Criminal Procedure Code was not complied with because his defence was not given due regard. The said section 169 provides as follows:

“(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.”

I have examined the judgment by the learned trial magistrate, and I find that the Appellant’s claim is not supported. The trial magistrate set out the evidence given by the defence in the said judgment, which evidence he expressly stated he had considered. He however found that there was overwhelming evidence tendered by the prosecution. I am also of the same view and I see no fault on the part of the magistrate.

The prosecution therefore proved all the elements of the offence of defilement and I find that the Appellant’s conviction was safe and on the basis of sufficient evidence.

I accordingly uphold and affirm the conviction of the Appellant for the charge of defilement contrary to section 8(1)and (2) of the Sexual Offences Act, Act No. 3 of 2006, and the sentence for this conviction is

legal and is also affirmed.

It is so ordered.

DATED AT MACHAKOS THIS 11TH DAY OF NOVEMBER 2015.

P. NYAMWEYA

JUDGE