



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

**CRIMINAL APPEAL NO. 84 OF 2015**

**ROBERT MUTIA..... APPELLANT**

**VERSUS**

**REPUBLIC ..... .RESPONDENT**

*(Being an appeal from the original conviction and sentence in Kitui Senior Principal Magistrate's Court Criminal Case (S.O.) No. 28A of 2012 by Hon. G. Kibiru, Ag. C M on 15/05/14)*

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

1. **Robert Mutia**, the appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Sub-section (3)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **31<sup>st</sup>** day of **August, 2012** at around **8.00 p.m.** at *[particulars withheld]* **Sub-location, Katutu Location** in **Kitui County**, unlawfully and intentionally did an act of penetration to **M M** a child aged 9 years by inserting his penis into her genital organ namely vagina.
2. In the alternative, he was charged with the offence of **Committing an Indecent Act** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on the **31<sup>st</sup>** day of **August, 2012** at around **8.00 p.m.** at *[particulars withheld]* **Sub-location, Katutu Location** in **Kitui County**, committed an act of indecency with **M M** a child aged 9 years by touching her private parts namely vagina, breasts and buttocks by using his hands.
3. He was tried, found guilty, convicted and sentenced to **life imprisonment**.
4. Being aggrieved by the conviction and sentence thereof he appealed on the grounds that:
  - There was no proof of penetration.
  - Facts presented were contradictory.
  - Selective bits of evidence was applied and exonerating evidence disregarded.
  - The age of the Complainant was not ascertained hence rendering the charge defective.
  - The grudge between the Appellant and family of the Complainant was casually dismissed, an omission that prevented the learned magistrate from ascertaining that the Appellant was framed up.
5. The case as presented by the Prosecution was that PW2 **M M** a minor was asked by the Appellant, to take a radio to his house. He closed the door, made her lie on the bed and undressed her. He had carnal knowledge of her and urged her not to reveal the information to anybody. However, she informed PW1 **N K M**, her aunt who checked her private parts and observed some blood spots on her pant and thighs. She confronted the Appellant immediately but he denied having committed the offence.

6. The Complainant was taken to hospital the following day. On examination the hymen was found missing. The Appellant was arrested and charged.
7. In his defence the Appellant denied the charges. He stated that he paid the Complainant's Grandmother money for lease of land. She went for a burial and when she returned he was arrested for allegedly defiling the Complainant. He argued that the charges were trumped up due to the sum of money that the minor's grandmother owed him.
8. The Learned Trial Magistrate analyzed evidence adduced and for reasons given found the Prosecution's case overwhelming. Hence the conviction on the main count.
9. This being a first appeal, I am duty bound to reconsider evidence adduced at trial, re-evaluate it and draw my own conclusion in deciding whether the conviction and sentence should be upheld; bearing in mind that I neither saw nor heard witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**
10. The appeal was canvassed by way of written submissions that I have considered.
11. The Appellant has faulted the trial magistrate for believing that there was penetration yet evidence adduced to that effect was not backed by medical notes. Medical evidence was adduced by PW5 **Dr. Juliet Akoth Ooko** who examined the Complainant. She testified that at the time of examination of the minor the inner part of the vagina was reddish and the hymen was absent. Laboratory examination showed pus cells though spermatozoa was not noted.
12. A post rape care form was filled in respect of the minor. She was interviewed following the event by a health worker during examination. She confided in the officer who captured the data that was later reflected on the P3 form. There was no deviation from what she adduced as evidence in court.
13. Penetration is defined as:

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

14. The minor stated that the Appellant made her lie on the bed and he told her that he wanted to sleep with her. She lay facing upward as the Appellant lay on her. Both of them were undressed. He then defiled her as she screamed. Immediately thereafter she went and informed her aunt (PW1) who examined her and found some blood spots on the pant and thighs. The minor said she was sexually violated at about 9.00 p.m. She reported to PW1 at about 11.00 p.m. who confronted the Appellant immediately. This child, per the post rape care form, was washed prior to being taken to hospital the following morning.
15. On examination, the external part of the vagina was reddish and the hymen was absent. The membrane forming the hymen may break following the insertion of a male genital organ into the female one. The fact that there were no spermatozoa could not be deemed to be no evidence of penetration. Medical evidence adduced established the fact of penetration which resulted into the hymen of the minor being torn.
16. The age of the Complainant has been questioned. In the course of *voire dire* examination the child stated that she was **9 years old**. PW5, the Doctor testified that her age was assessed. Exhibit 5 was the age assessment report produced in evidence. It was certified that the child **M M** was examined and found to be **nine (9) years old**.
17. Proof of age of the Complainant in this case constitutes an essential element of proof of guilt in the case. In the case of **Raphure vs. The State 2009 2 BLR 97 CA** it was stated that proof of age may be established by birth certificate or evidence of the mother or someone else who was present at birth.

The Complainant lived with her grandmother per the evidence adduced. PW3, **A K W** her grandmother was silent on her age.

18. In another case, **Francis Omuroni vs. Uganda – C A No. 2/200**. It was held thus:

***“In defilement case, medical evidence is paramount in determining the age of the victim and the Doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be***

***proved by birth certificate, the victim's parents or guardian and by observation and common sense."***

19. The child herein was subjected to age assessment. The doctor certified her age to be **nine (9) years**. Her age was established to be nine years. The P3 form indicates her age as **ten (10) years**. This brings in the question whether the contradiction is fatal to the prosecution's case. The part indicated was filled by a police officer. The estimated age was also given as **10 years**, but the age assessment certificate confirmed that she was **9 years old**. What then is the significance of indicating the age of the Complainant? Looking at the **Penal Section**, the age of the Complainant in **Sexual Offences** guides the court in forming an opinion as to what sentence to impose. **Section 8(2)** of the **Sexual Offences Act** provides for a sentence of **life imprisonment** for a person who defiles a child aged **eleven (11) years or less**. Therefore the discrepancy alluded to is inconsequential to the charge and indeed not prejudicial to the appellant.
20. Contradictions stated refer to the evidence adduced by PW1 that at the time of seeing the child on the material night she had blood spots on the thigh and pants while the child said her pants were dirty and why the pants were not preserved. It was stated by the Doctor that out of ignorance the child's guardian and grandmother washed the 'dirt' hence not preserving the evidence to be produced in court. The child was not interrogated as to what she meant by dirt. Dirt can be a combination of many things soiling a specific item. Therefore blood spots on the pant cannot be dismissed to have not been dirt in the opinion of a child. The contradiction was not material.
21. The Appellant alleges that the Complainant was coached to lie against him following a land transaction between him and PW3 that never materialized which the magistrate never considered. The incident occurred while PW3 was away at a funeral. It is admitted that PW1 woke up the Appellant on the material night and confronted him over the issue. The trial magistrate considered and analyzed the evidence which he dismissed and disregarded as the Prosecution's case was watertight.
22. This was a case of defilement which could be proved based on the evidence of the child as long as it was sufficiently cogent. **(See Fred Wanjala vs. Republic CA No. 61 of 1984)**.
23. Direct evidence adduced as to what transpired was that of the child and the trial magistrate in compliance with the proviso to **Section 124** of the **Evidence Act** gave reasons that made him believe the child thus:

***"This court had the opportunity to hear PW2 a nine year old girl. She was consistent and firm in her evidence. She narrated ..... same story to PW1, PW3, PW4 and PW6 as to what accused had done to her. That would not have been possible if PW2 had been coached."***

There is no proof of fixation on the part of the Prosecution. The act of PW4 assaulting the Appellant after his arrest should have been pursued against him.

24. From the foregoing it is apparent that the charge against the Appellant was proved to the required standard. In the premises I have no reason to interfere with the conviction and sentence. Accordingly, the appeal which is devoid of merit fails and is dismissed.
25. It is so ordered.

**Dated, Signed and Delivered at Kitui this 1<sup>st</sup> day of December, 2015.**

**L. N. MUTENDE**

**JUDGE**