REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal No. 76 Of 2013

MORRIS MUTIE THOMAS …..…..….. APPELLANT

VERSUS

REPUBLIC …….....…RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 106 of 2013 of the Senior Resident Magistrate's Court at Taveta – Hon. Ondieki - **PM**)

JUDGMENT

The Appellant was Convicted and Sentenced to life imprisonment for the offence of defilement contrary to section 8(1) (2) of the Sexual offences Act No. 3 of 2006.

The particulars being that on the 14th day of February, 2013 at [Particulars Withheld] Village Taita – Taveta County, intentionally caused his penis to penetrate the vagina of S.J. A child aged seven (7) years.

This case went to full hearing. The main grounds for appeal are

1. That the trial magistrate relied on the uncorroborated evidence of a minor and that Voire Dire evidence was unlawfully conducted.
2. That the conditions obtaining at the time of the alleged defilement were not conducive to proper identification.
3. That the trial Court did not consider the Alibi defence put forward by the defence and which was not challenged by the prosecution.

The brief facts of this case as can be gleaned from the record of proceedings is that on the 14th day of February, 2013 the Complainants father and mother returned home late at night and stated fighting.

A neighbour Jacquiline John (PW 5) intervened and took the Complainant and two of her siblings for sanctuary that night. The following day the children went to school.

Unbeknown to her a serious incident had taken place before she took the children for shelter from her quarreling parents. Neither did the parents bother to ascertain the well being of their children before engaging in a fight.

Aware of the situation at home, the Complainant decided to report of what had transpired between her and the Accused on the night of 14th February, 2013 to her teacher.

In her evidence, she testified of how the Accused who was known to her before as a neighbour proceeded to their one roomed house which was well-lit with electricity lighting and undressed her. In the process her pants were torn. He removed all her clothes and his trouser and proceeded to have sexual intercourse with her penetrating her vagina and anus. When he heard her mothers arrival he disappeared from the scene. She reported the matter to her teacher the following day who in turn reported to police and the Accused was arrested and later charged with this offence.

The clinical officer (PW 4) who examined the Complainant found that her underpant was soiled and torn. The labia walls were bruised, swollen and tender. The hymen was absent. There was a whitish discharge. Further examination revealed that there was infection on her genitalia.

A perusal of the Judgment by the learned trial magistrate shows that he was alive to the issue of identification and the principles and guidelines ensuing therefrom.

He relies on the authority of the case of **MWENDA – VS- REPUBLIC – COURT OF APPEAL AT NAKURU 1989 – CRIMINAL APPEAL NO. 51 OF 1988.**

At page 5 of his Judgment . He did observe that,

> **" the offence is alleged to have taken place at night. The Complainant said that they were asleep in a single room which was well lit by electric light. Immediately the Accused gained entry into the room, the Complainant saw him well as he put off the lights, undressed her, tore her pants, penetrated her vagina as well as her anus. The ordeal took place between 7:30 pm and 11:00 pm and the Court was further told that the Accused was a neighbour and had in the past defiled her and so was well known to her. To my mind the Accused was a well known person to the Complainant and had in her past committed the same act. There was enough light in the beginning besides having enough time together before the Accused was disrupted by the arrival by the Complainants parents".**

He concluded that there was positive identification. Upon evaluation of the evidence on record, I do arrive at the same conclusion that the Accused was well known to the Complainant and was positively recognized that night as there was enough light and ample time to see him.

The age of the Complainant does not appear to be contested here. She was assessed by Doctor Mutinda and was found to be aged approximately seven (7) years. The age assessments form was produced as an exhibit in court exhibit No. 3.

The Accused did not question its authenticity or its findings. The mother also did testify that her daughter was aged seven (7) years. During cross- examination the issue of age did not arise nor is it one of the grounds of appeal. Indeed in his submissions the appellant concedes that the issue of age was proved but he questions the issue of whether a proper Voire dire examination of the Complainant was made. I have perused the record of proceedings found at page 2 line 20, whereby after a brief examination the trial magistrate noted,

" The witness has sufficient intelligence and gives sworn testimony".

Prior to that the Complainant had been asked several questions (though it is in question and answer form). That in itself does not make it fatal to the prosecution case. The evidence of the Complainant appears cogent and was not contradicted during cross-examination.

Penetration – In his submissions the appellant argues that in her evidence the Complainant did not state that she bled during the sexual act nor did she make a report to her parents or the good Samaritan who took her to her house after her parents started fighting. Secondly that when the Complainant was examined by a clinical officer no spermatozoa was found. Thirdly, the P 3 form is defective in that part B was not filled by the Doctor as required.

The learned trial magistrate relied on the evidence of the clinical officer who found the Complainants labia minora and majora were bruised and swollen and the hymen was absent. It is noted that no bleeding was alleged by the Complainant nor is sit shown in the P3 form. The Complainant did testify to the effect that prior to this incident the Appellant had sexual intercourse with her. This therefore could explain the absence of bleeding.

The questions to why the complainant did not report the matter to her parents or the good Samaritan who gave them shelter that night is self- explanatory. Her parents arrived home drunk and started fighting, she had to be whisked away together with her siblings by a good neighbour.

Her only figure of trust was her teacher to whom she reported the matter the following day. By the time she was taken to a Doctor for examination no presence of sperms could be found.

Alibi defence. The Appellant submits that his alibi did create doubts in the prosecution case.

In his Judgment the learned trial magistrate did visit the issue of the alibi defence and noted that at no time during cross- examination of the prosecution witnesses did he raise it or allude to it in any manner and it was therefore an after thought.

After perusing the record of proceedings I do come to the same conclusion that the defence of alibi was not such as one that could have created doubt on the mind of the trial magistrate.

This appeal has no merit and is disallowed.

Judgment delivered dated and signed this **14th** day of **February, 2014.**

….....

M. MUYA

JUDGE

14TH FEBRUARY, 2014

In the presence of:-

The State Counsel

The Appellant present

Court clerk Musundi