



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 92 OF 2013

KAMUSYI NGULU APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. Sandra Ogot (RM) delivered on 26/4/2013 in Mutomo Senior Resident Magistrate's Court Sexual Offence No. 3 of 2013)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Kamusyi Ngulu**, was charged in court as follows:-

“Count I – Defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on the 14th day of February 2013 at about 1.00 p.m, at *[particulars withheld]* village, **Mutomo Location of Mutomo District** within **Kitui County**, intentionally caused his penis to penetrate the vagina of **N M**, a child aged 11 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 No. 3 of 2006.**

The particulars of the offence were that on the 14th day of February 2013 at about 1.00 p.m. at *[particulars withheld]* village, **Mutomo Location of Mutomo District** within **Kitui County**, intentionally touched the vagina of **N M** a child aged 11 years.

2. **Count II – Assault causing actual bodily harm contrary to section 251 of the Penal Code.**

The particulars of the offence were that on the 14th day of February 2013 at about 1.00 p.m. at *[particulars withheld]* village, **Mutomo Location of Mutomo District** within **Kitui County**, unlawfully assaulted **N M** thereby occasioning her actual bodily harm.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full hearing.

4. The prosecution case was that on the 14th day of February 2013 at about 1.00 p.m., the

- complainant, PW1 N M an eleven year old standard four (4) pupil was unwell and at home sleeping. The Appellant went to their home and accused the complainant of having stolen his Kshs.350/=. The Appellant then took the complainant to his house and beat her up. The Appellant then said he would take the complainant to her grandmother's house. The Appellant then took the complainant through a bushy path then told the complainant to refund the money. The Appellant then undressed the complainant. The Appellant then removed his clothes and told the complainant to lie down on the ground then he defiled her. When the Appellant was done, he left the complainant there.
5. The complainant who was bleeding from her female genitalia put on her dress but could not find her underwear which the Appellant had torn and thrown away. The complainant went to her grandmother's house and informed her what had befallen her. The grandmother examined the complainant's private parts and saw that the complainant was bleeding and was in pain. The grandmother gave the complainant a small plastic container to collect the blood droplets. The grandmother also gave her a change of clothes and they slept for the night.
 6. The following day the grandmother reported the matter to the complainant's teacher. A report was made to the police and the complainant issued with a P3 form and examined and treated at **Mutomo Hospital Centre** where it was confirmed that the complainant had been defiled. The complainant's blood stained clothes and the small plastic container the grandmother had given the complainant to collect the blood with were handed over to the police. After investigations the Appellant was charged with the present offence.
 7. In his defence, the Appellant gave unsworn evidence. No witnesses were called. The Appellant described himself as a casual worker in a hardware store. He stated that he left home for work at **Kibwezi** on 5/1/2012. That on 23/2/2012 he worked up to 7.00p.m then went home. That a policeman went to his home and arrested him without giving him any reasons for the arrest. That he was later taken to **Mutomo Police Station** where he was informed of the offence he was being charged with and told to admit the same. The Appellant refused to admit the offence and he was brought to court for an offence he knew nothing about.
 8. The trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubts in Count I (the main count) and in Count II and sentenced to life imprisonment and to three years respectively. The sentence runs concurrently.

The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-

- **That the complainant's evidence lacked corroboration.**
 - **That the conviction was against the weight of the evidence.**
 - **That the burden of proof was shifted to the Appellant.**
9. During the hearing of the appeal, the Appellant relied on written submissions which I have duly considered. The appeal was opposed by the State. The learned counsel for the State submitted that the offence occurred in broad daylight and that the complainant's evidence was corroborated by medical evidence.
 10. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
 11. The complainant gave her age as 11 years. It was therefore superfluous for the trial court to conduct a *voire dire*.
 12. **Section 19 of the Statutory Oaths and Declarations Act Cap 15 Laws of Kenya** provides that:

“Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure

Code, shall be deemed to be a deposition within the meaning of that section.”

13. Under **Section 2** of the **Children’s Act Cap 141 Laws of Kenya**, a child of tender years is a child of ten years of age and below. (See also **Samson Oginga Ayieyo –vs- Republic – Criminal Appeal 165 of 2006**).
14. The complainant narrated to the trial court how the Appellant beat her up and defiled her after accusing her of having stolen his Kshs.350/=. The offences took place during broad daylight. The complainant knew the Appellant. There is therefore no possibility of any errors as the complainant’s evidence is that of recognition. The complainant gave evidence that left no doubt that she was beaten and defiled. For the avoidance of doubt, the complainant testified that the Appellant undressed her, then undressed himself then told her to lie down and inserted his private parts “**inside her**” leaving her with a bleeding female genitalia.
15. The complainant’s evidence about the state her female genitalia was left in was corroborated by that of her grandmother, PW2 **N M** who after listening to the complainant’s narrative checked the complainant’s private parts and noted that the complainant was bleeding and was in pain. It is the grandmother’s evidence that she gave the complainant a small plastic container to collect the dripping blood with and the blood that was collected and filled the small container. The grandmother further testified she gave the complainant a change of clothes for the night and again she gave her a change of clothes in the morning as the complainant’s clothes were blood stained. The complainant’s blood stained clothes were identified by the complainant and her grandmother.
16. The blood stained clothes were also identified by the Clinical Officer, PW4 **Daniel Mulwa** who treated the complainant at **Mutomo Hospital Centre**. The Clinical Officer gave the complainant’s age as 11 years. It was the Clinical Officer’s evidence that the complainant was sick looking. The Clinical Officer produced a P3 form which reflects the complainant’s age as 11 years and further reflects that the complainant had tender ear lobes and tender lower abdomen, had no hymen and had tears around her labia minora and around the clitoris. The Clinical Officer concluded that penetration had occurred.
17. The complainant’s School Head Teacher, PW3 **K K M** gave evidence that confirms that the report of the defilement was made at the school. The Head Teacher’s evidence also confirms that the complainant was not in school on the material date. It is the evidence of the Head Teacher that he assisted in making a report to the police and in taking the complainant to hospital. He also assisted in having the Appellant arrested. The Head Teacher also identified the complainant’s blood stained clothes. The clothes and the small plastic container were produced as exhibits by the Investigating Officer PW5 PC **Japheth Kidiavai**. An identification card which seems to have been issued by **World Vision** was also produced as an exhibit. The same reflects the complainant’s date of birth as 10/8/2002. This corroborates the age assessment by the Clinical Officer as 11 years.
18. The Appellant in his defence talked about his arrest and the allegations made against him which he denied. However, there are no reasons that emerge from the record why the complainant and her family would frame him up. Although the Appellant raised the issue of the existence of a grudge due to a land dispute, this is an afterthought as the same was only raised during the appeal process by way of grounds of appeal.
19. The trial magistrate who had the advantage of observing the witnesses believed the complainant. The trial magistrate indeed observed in his judgment that he “**found nothing in her statement or demeanour to indicate that she was lying about who her attacker was**”.
20. I have no reasons to differ with the trial magistrate. The complainant’s evidence is corroborated by the evidence of the rest of the prosecution witnesses. On the issue of lack of corroboration of the evidence on identification, the proviso to **section 124** of the **Evidence Act Cap 80 Laws of Kenya** stipulates as follows:-

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.”

21. I am satisfied that the Appellant was convicted on sound evidence. The sentence meted out in

both Count I and II is within the law. The appeal has no merits and is dismissed. The conviction and sentence are upheld.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Kitui this 12th day of June 2014.

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JUDGE