IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 338 OF 2013

MUTIE MUSAULI ..…….. APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. S.K. Mutai (SRM) delivered on 12/6/2012 in Mutomo Senior Resident Magistrate's Court Criminal Case No. 67 of 2012)

****

(Before Hon. B. Thuranira Jaden J)

J U D G M E N T

1. The Appellant, **Mutie Musauli**, was charged with the offence of defilement contrary to **section 8 (1) (3)** of the **Sexual Offences Act No. 3 of 2006**.

   The particulars of the offence were that "on the 9th day of April 2012 at about 5.00 p.m. at ***[particulars withheld]*** **village**, **Ikutha Location** in **Mutomo District** within the **Kitui County** defiled **K M** a child aged 13 years penetrating is penis into her vagina."

2. In the alternative the Appellant was charged with 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 9th day of April 2012 at about 5.00 p.m. at ***[particulars withheld]*** **village**, **Ikutha Location** in **Ikutha District** within the **Kitui County** committed an act of indecency with **K M** a child aged 13 years by touching her private parts namely vagina and breasts."

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.
4. The prosecution case was that on the 9/4/2012 at about 5.00 p.m. the complainant, PW1 **K M** a 13 year old standard 6 pupil was on her way home from the barbers. She came across the Appellant who held her hand and pulled her to the bush. The Appellant then removed her clothes and defiled her. The complainant screamed for help and her mother, PW2 **M M** went to her rescue. That the Appellant on seeing the mother ran way. The matter was reported to the village elder then to the area Assistant Chief and to the police. The complainant was issued with a P3 form and treated at **Mutomo Health Centre**. The Appellant was arrested and subsequently charged with the offence herein.

5. When called upon to give his defence, the Appellant gave unsworn evidence. No witnesses were called. The Appellant stated that he was a herdsman. He stated that this case was a frame up. He denied the offence and stated that the people who arrested him assaulted him on his private parts.
6. At the conclusion of the trial, the trial magistrate found the case proved beyond reasonable doubts and the Appellant was convicted and sentenced to 20 years imprisonment.
7. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-
    - **That the prosecution case was not proved beyond reasonable doubts.**
    - **That the Appellant was not subjected to a medical examination.**
    - **That the evidence adduced was at variance with the charge sheet.**
    - **That the complainant's clothes were not produced as exhibits.**
    - **That there was no proper medical examination carried out on the complainant.**
    - **That the Appellants fundamental rights were violated due to overstay in police custody.**
    - **That some crucial witnesses were not called.**
    - **That the Appellant was ignorant of the law and did not effectively defend himself.**

8. During the hearing of the appeal, the Appellant relied on written submissions. The written submissions essentially expounded the prosecution case and added that the defence case was not given adequate consideration.
9. The appeal was opposed by the State. The learned counsel for the State submitted that the complainant's evidence was corroborated by the mother's evidence and the evidence of the Clinical Officer. It was further submitted that the defence case was not convincing and was a mere denial.
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 13 years. It was therefore not necessary to carry out 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's evidence shows that the offence took place in broad daylight at about 5.00 p.m. The complainant identified the Appellant in court and stated that it was the Appellant who removed her clothes and defiled her. Although the identification of the Appellant in court amounts to dock identification without any evidence to show if the complainant knew the Appellant before, the evidence of PW2 **M M** the complainant's mother filled in the missing links. The mother's evidence corroborated that of the complainant in regard to going to the barbers for a haircut and also that the complainant screamed. It was the mother's evidence that she caught the Appellant red handed defiling the complainant and that the Appellant ran away when he saw her. The complainant's mother denied having any grudge or any differences with the Appellant.
15. The Clinical Officer, PW4 **Teresia Mbula** gave the complainant's age as 13 years. The Clinical Officer's evidence confirmed that the complainant had been defiled. It was the Clinical Officer's evidence that the hymen was missing and the vagina was loose with a "whitish" smelly discharge and that penetration had taken place. The P3 form and the treatment notes produced as exhibits

gave the complainant's age as 13 years.

16. The Clinical Officer was a competent witness to testify on the complainant's medical condition. In the case of **Kavoi Kiilu –vs- Republic (2010) e KLR** the **Court of Appeal** state as follows:-

> **"Under** section 2 **of the** Clinical Officers Act **(**Training, Registration and Licensing Act Cap 260 (LOK) **a clinical officer means:-**
>
> > ***"a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act……..."***
>
> Section 7(4) **of the Act States:-**
>
> ***"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette."***
>
> **The** Act **goes further to provide that such officers may engage in private practice *"in the practice of medicine, dentistry or health work for a fee."* It follows that the clinical officer did testify in this case on his area of competence."**

17. Although no medical examination was carried out on the Appellant, 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."**

18. The trial magistrate who had the advantage of seeing the witnesses testify and observed their demeanour believed the complainant, hence the conviction. I have no reason to differ with the trial magistrate.
19. The evidence of PW3 **R M M** corroborates the complainant's mother's evidence that a report of the defilement was made and youths organized to arrest the Appellant. With the evidence of the arrest on record, the area Assistant Chief was not in my view a crucial witness. The Appellant was arrested and escorted to **Mutomo Police Station**. The Investigating Officer, PW5 **PC Benjamin Maundu** gave evidence that confirms that investigations were carried out then the Appellant charged.
20. The accused in his defence case stated that he was framed up. There are however no reasons that emerge from the record why the complainant and her mother would frame up the Appellant. The defilement was real as attested by the medical evidence.
21. On the issue that the Appellant's rights were violated due to overstay in police custody, the Appellant's remedy lies in a civil action (*See* for example **Julius Kamau Mbugua –vs- Republic - Criminal Appeal Nrb. 50 of 2008**.
22. Nothing turns on the complainant of ignorance of the law as ignorance of the law is no defence. I have also not seen any variance between the charge sheet and the evidence. However, once the Appellant was convicted in the main count, there can be no conviction on the alternative count. The conviction could only be on either the main count or the alternative count. There is sufficient evidence in support of the conviction in the main count of defilement contrary to **section 8 (1)** and **8 (3)** of the **Sexual Offence Act**. I therefore make a correction to reflect a conviction in the main court of defilement. The sentence is within the law.
23. For the reasons stated above, I find no merits in the appeal and dismiss the same.

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B. THURANIRA JADEN

JUDGE

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

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B. THURANIRA JADEN

JUDGE