



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 14 OF 2013

MWIKYA MUNZU APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. S.K Mutai (Ag. PM) delivered on 18/2/2013 in Mutomo Senior Resident Magistrate's Court Criminal Case No. 45 of 2012)

(Before Hon. B. Thuranira Jaden J)

J U D G M E N T

1. The Appellant, **Mwikya Munzyu**, was charged with the offence of defilement contrary to **section 8 (1) (2)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that “on the 14th day of March 2012 at about 6.00 p.m. at *[particulars withheld]* village, **K Location** in **Ikutha District** within the **Kitui County** defiled **K J** a child aged 9 years by his penis penetrating into her vagina.”

2. In the alternative, the Appellant was charged with the offence of indecent assault 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 March 2012 at about 6.00 p.m, at **K Sub location, Ikutha District** within **Kitui County**, committed an act of indecency with **K J** a child aged 9 years by touching her private parts namely vagina and breasts.”

3. When the Appellant was arraigned in court, he pleaded not guilty. The case proceeded to a full trial.
4. The case for the prosecution was that on 14/3/2012, at about 6.00 p.m. PW1 **K J**, a nine year old girl was at home with her younger siblings. The mother had gone to **K market**. That the Appellant went to where the complainant was and informed her that she was being called by one **Mukendi**. The complainant did not go. That the Appellant then pulled the complainant to the bush, undressed her then defiled her. The complainant felt pain and started bleeding. The complainant screamed but nobody went to her rescue. When the complainant was done he left. The complainant went home and informed her mother what had happened.
5. The matter was reported to the police. The complainant was issued with a P3 form. The Complainant was examined at **M Mission Hospital** but was later escorted to **M Health Centre**

- for treatment. The complainant was later taken by the mother for further treatment at the **Nairobi Women's Hospital**. The medical reports from **M Health Centre** and **Nairobi Women's Hospital** confirmed that the complainant had been defiled. The accused was subsequently arrested and charged.
6. When placed on his defence, the Appellant opted to give sworn evidence. Two witnesses were called. It was the Appellant's evidence that the complainant's mother was his lover since the year 2010 but that the relationship ended in the year 2012. That when the Appellant got married in March 2012 the complainant's mother threatened to put him in a place where his wife would not get him. The Appellant further stated that on the material day the complainant's mother had called him to her house at 7.00 a.m. where he took tea.
 7. That the complainant's mother (PW3) was angry with him and it was said that the Appellant had defiled PW2's child. That he gave the complainant's mother Kshs.3,000/= and the complainant's mother asked him to go to her house in the evening which he did. That they no longer had any sexual liaisons. That on 14/3/12 the Appellant who was at his mother's hotel later went out with one **Kisamwa** and **Muthiani**. That in the evening the mother informed him about the allegations of defilement. The Appellant and his mother DW2 **Serah Peter Munzyu** then proceeded to the complainant's home where he was arrested and handed over to the police. The Appellant was then taken to hospital where he was examined and his blood samples taken. The Appellant denied the offence and stated that he was framed up.
 8. The trial magistrate was satisfied that the prosecution had proved its case against the Appellant. The Appellant was convicted and sentenced to life imprisonment. The Appellant was dissatisfied with both the conviction and sentence and appealed to this court on the following grounds:-
 - **That the evidence tendered was not sufficient to sustain the charges.**
 - **That the complainant's age was not proved.**
 - **That the defence case not adequately challenged by the prosecution.**
 - **That the trial magistrate erred in law when he failed to acquit the appellant.**
 9. During the hearing of the appeal, **Mr Kinyua Musyoki** learned counsel for the Appellant made submissions which essentially expounded the grounds of appeal. The learned counsel for the State, **Ms Kefa** opposed the appeal. It was her submissions that the complainant's evidence was corroborated and supported by the medical evidence. That the defence was a mere denial and was not convincing and that the sentence was within the law.
 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 evidence after the trial court carried out a *voire dire* and was satisfied that the complainant was “competent” to give sworn evidence. The complainant gave the time of the offence as 6.00 p.m. This was during day light. It was the complainant's evidence that she knew the Appellant as a neighbour. This was evidence of recognition and there was therefore no possibility of error. As stated in the case of **Anjononi & Ano –vs- Republic 1980 KLR :-**

“A case of recognition, not identification is more satisfactory, more assuring and more reliable than that of identification of a stranger because it depends on the personal knowledge of the assailant in one form or the other.”

12. The complainant's evidence is that the Appellant removed her clothes and defiled her. Although the complainant stated that she felt pain and bled, no details were elicited from the complainant on exactly what she meant by defilement. That gap was however filled in by the complainant's mother. The mother's evidence is that when she did not find the complainant at home then heard her screaming, she rushed to the scene where she found somebody running away and found the complainant holding her pant. That the complainant told her that the Appellant had defiled her. The mother then checked the complainant's private parts and noted that the complainant was bleeding. The matter was then reported to the Assistant Chief and to the police. During cross-examination, the complainant's mother explained that she took the complainant for treatment at **M Mission Hospital** first where the doctor told her that the complainant had started having her

- menstruation but the police advised that the complainant be taken to **M Health Centre** where the complainant was examined and the P3 form filled in.
13. PW4 the Medical Officer who examined and treated the complainant testified and produced a P3 form which reflects the complainant's age as 9 years. The Clinical Officer's evidence is that the complainant's hymen was missing and there was presence of spermatozoa. He confirmed that the complainant had been defiled.
14. PW3 **Dr Daniel Nguku**, a Medical Officer from the **Nairobi Women's Hospital** produced a medical report also testified that the complainant was examined on 16/3/12 and had a torn and hyperemic vaginal wall and a whitish discharge which confirmed that the complainant had been defiled.
15. The defence counsel in his submissions stated that the Clinical Officer (PW4) filled in the P3 form after the doctor at **M Mission Hospital** allegedly refused to fill in the same. There are allegations and counter allegations on what transpired at **M Mission Hospital**. However, there is no evidence from **M Mission Hospital**. The Clinical Officer (PW4) was recalled and produced the original P3 form. The Clinical Officer (PW4) was competent to produce the P3 form. As stated by the Court of Appeal in the case of **Kavoi Kiilu –vs- Republic (2010) e KLR the Court of Appeal**;

“Under section 2 of the Clinical Offences 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.”

16. There is nothing wrong concerning the mother's choice to take the complainant to the **Nairobi Women's Hospital** for further treatment. Although the defence counsel in his submissions stated that the maker of the medical report from the **Nairobi Women's Hospital** was not called to testify, it was not necessary to have the 2nd medical report produced as an exhibit.
17. The trial magistrate who had the advantage of seeing the witnesses testify believed the complainant. I have no reason to differ with the trial magistrate. 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 evidence of PW5 **Patrick Ngala Mutisya** confirms that the report of defilement was made to him the same evening and he arrested the Appellant and handed him over to the police. The evidence of PW7 PC **Japheth Kidiavai** confirmed that the report of defilement was made at **Mutomo Police Station** and investigations carried out. According to the Investigating Officer, the doctor at **Mutomo Hospital** refused to fill in the P3 form because he had been compromised.
19. The Appellant blames this case on a love relationship with the complainant's mother that had gone sour. The complainant's mother denied having had a love affair with the Appellant. However, according to the Appellant they were lovers before the Appellant got married and ended the relationship. The Appellant's mother, DW2 **Serah Peter Munzyu** also testified that the

complainant and the Appellant were lovers. However, the defilement was real and confirmed by the medical evidence.

DW3 **Kisamwa Katwa** testified that he was with the Appellant on the material day up to 6.00 p.m. The offence herein is said to have taken place at about 6.00 p.m. DW3 did not know if the Appellant defiled the girl. The evidence of DW3 is therefore of no probative value.

20. I have also considered the authority cited by the Appellant's counsel, **Alphonse Maundu Mwangela –vs- Republic - Mks HCCR. A 102/10**. Although the said decision is not binding to this court, it is observed that the facts therein were contradictory and inconsistent. As to whether the provisions of the law relied on are correctly stated in the charge sheet, the same is curable under section 382 of the Criminal Procedure Code as no failure of justice has been occasioned.

21. The trial magistrate ought to have chosen whether to base the conviction on the main count or in the alternative count. The evidence on record supports the main count. I however correct the record to reflect that the Appellant is convicted in the main count of defilement. The sentence is within the law. Consequently, 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