



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 123 OF 2013

PETER MUTUNGA MUSYOKA APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. S.K. Mutai Senior Ag. Principal Magistrate delivered on 22/5/2013 in Mutomo Senior Resident Magistrate Court Sexual Offence No. 6 of 2013)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Peter Mutunga Musyoka** was charged with the offence of defilement contrary to **section 8 (1)** as read with **section 8 (4)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the diverse dates between 8th and 10th day of March 2013 at unknown time, at *[particulars withheld]* village, **Kalivu Location** of **Ikutha District** within **Kitui County**, intentionally caused his penis to penetrate the vagina of **N K M** a girl aged 16 years.

2. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full hearing.
3. The prosecution case was that on the 8th March 2013 at about 9.00 p.m, the complainant, a 16 year old standard 7 pupil was on her way home from church. She met the Appellant on the way who held her hand and pulled her to his house up to the bed. The Appellant then undressed the complainant and defiled her and they stayed together for three days. When the complainant went home her father **PW2 L K M** questioned her and beat her up. The complainant revealed to the father what had transpired. The matter was reported to the area Assistant Chief and to the police. The complainant was issued with a P3 form and treated at **Mutomo Health Centre** by a Clinical Officer, **PW4 Daniel Mulwa**. It was confirmed by the Clinical Officer that the complainant had been defiled. After investigations the Appellant was charged with the offence herein.
4. In his defence, the Appellant described himself as a farmer. That on the 12th March 2013 he had taken his animals to graze when he was arrested by a police officer. That the complainant's father complained about his daughter having disappeared from home. That the complainant's father said

- he had taken his daughter to hospital and wanted the Appellant to reimburse the hospital expenses. The Appellant denied having anything to do with the expenses. The Appellant was then charged and arraigned in court where he denied the charge. The Appellant further stated that on the 11th April 2012, the complainant's father had contracted him to construct a house for him but only paid half of the price that they had agreed on then gave him a telephone set to guarantee the balance. That the complainant's father threatened to fix him then framed up this case on him.
5. The trial magistrate found the prosecution case proved beyond reasonable doubt. The Appellant was convicted and sentenced to 15 years imprisonment. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:

- **That there was no eye witness.**
 - **That there was no conclusive medical evidence.**
 - **That the prosecution evidence was hearsay and contradictory.**
 - **That the area chief to whom the first report was made was not called to testify.**
 - **That the prosecution case was a fabrication by the complainant's father.**
 - **That the prosecution case was not proved to the required standard.**
6. During the hearing of the appeal, the Appellant relied on written submissions. The said submissions essentially expounded the grounds of appeal.
7. The appeal was opposed by the State. The learned counsel for the State submitted that there was sufficient evidence in support of the conviction and that the defence case was not convincing.
8. 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**.
9. The complainant gave her age as 16 years. It was therefore superfluous for the trial magistrate to conduct a *voire dire*. A 16 year old is not a child of tender years.
10. **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.”

11. 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**).
12. The complainant's evidence is that the Appellant pulled her to his house where he defiled her and where they stayed for three days. The complainant and the Appellant knew each other. There was therefore no issue of mistaken identity.
13. The complainant's evidence is corroborated by that of her father (PW2) who testified on the complainant's disappearance from home and how the complainant after a beating revealed her liaison with the Appellant.
14. The Clinical Officer (PW4) also gave evidence that confirmed that the complainant had been defiled. According to the evidence of the Clinical Officer, the hymen was missing and the complainant had a foul smelling vaginal discharge. The Clinical Officer produced a P3 form which reflected the complainant's age as 16 years.
15. The evidence of PW3 **APC Martin Kirimi** confirmed that a report of defilement was made at their **AP Post** and he arrested the Appellant and escorted him to **Mutomo Police Station**. PW5 **PC Grace Gichohi** the Investigating Officer also gave evidence that generally confirms the complainant's report and the investigations carried out.
16. The defence by the Appellant boils down to that of a frame up by the complainant's father due to

a debt due to lack of full payment for the construction work which the Appellant alleged that he had carried out for the complainant's father. However, there is no reason why the complainant would give false evidence against him. The defence is not convincing. The defilement was real and confirmed by the evidence adduced by the Clinical Officer. The trial magistrate who had the advantage of seeing the witnesses testify and observing their demeanor believed the complainant, hence the conviction. I have no reasons to doubt the complainant's evidence.

17. Having evaluated the evidence afresh, I am satisfied that the conviction was based on sound evidence. The sentence is within the law. The appeal has no merits and is dismissed. The conviction and sentence are hereby 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