



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT GARISSA**  
**CRIMINAL APPEAL NO. 12 OF 2013**

**(Appeal from original conviction and sentence of the Resident Magistrate**

**at Mwingi (I.W Gichobi) in Criminal Case Number 427 of 2012)**

**PAUL MUTIE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

**Background**

Paul Mutie (the appellant) was tried by the Resident Magistrate at Mwingi for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. He was charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the same Act. He was found guilty on the alternative charge, was convicted and sentenced to serve a jail term of ten years. He is aggrieved by the conviction and sentence and has come to High Court on appeal.

**Facts**

The facts of this case as given in evidence are that R.K.K (PW1), the complainant and a girl aged 15 years at the time of the trial, was invited by the appellant to visit him at his house following a promise to take her to Nairobi for employment. This was on 29<sup>th</sup> July 2012. On arriving at the appellant's house, the appellant told her that they would travel to Nairobi the following day. He told her that they go to bed to sleep. While in bed, the appellant removed her panties and his trousers. They had sex as a result of which the complainant suffered injuries.

In the meantime, the complainant's mother, M.N (PW2) auntie, J.M.K (PW3) and uncle M., were looking for the complainant after her mother missed her at home. They followed footprints which led them to the appellant's house. The appellant and the complainant were found inside the house. After the appellant refused to open the door, the mother, aunt, and uncle decided to wait outside until morning. They also called the Assistant Chief James Musyoki Muli (PW4) who joined them. Both the complainant and the appellant were taken to Mwingi Police Station where the appellant was placed in cells and charged while the complainant was referred to hospital for treatment.

**Petition of appeal**

The appellant has, by his amended petition of appeal, listed four grounds as follows:

- i. That the trial magistrate failed to consider that the prosecution had not proved the case beyond reasonable doubt.
- ii. That the trial magistrate failed to consider that the evidence was contradictory and inconsistent.
- iii. The trial magistrate failed to consider that there was no evidence that sexual intercourse took place.
- iv. That the trial magistrate failed to consider that the complainant failed to disclose her age and that the appellant did not know she was a minor.

The appellant has submitted in support of the grounds that the prosecution failed to prove that there was physical contact of the genital organs of the appellant and the complainant; that the evidence is contradictory and inconsistent in that the complainant said the appellant's house was dark as there was no lamp while her mother said there was light; that there is no evidence to support the allegation that there was contact of the appellant's and complainant's genitals; that medical evidence did not support the offence; that the complainant went to visit him on her own initiative and he did not know she was under age.

### **Submission by respondent**

The appeal was opposed by the State. The learned State Counsel submitted that the issue of identification does not arise since the appellant was known to the complainant; that the issue that the appellant did not know the age of the complainant did not arise since the law requires the assailant to take steps to establish the age of the complainant where the complainant claims to be above 18 years (Section 8 (6) of the Sexual Offences Act) and that there is no evidence to support allegations of a grudge between the complainant's mother and the appellant. Counsel asked the court to dismiss the appeal for lack of merit.

The learned State Counsel asked the court to find the trial magistrate in error in finding the appellant guilty on the alternative charge of committing an indecent act when there was evidence supporting a charge of defilement. Counsel asked the court to alter the findings of the lower court and find the appellant guilty of defilement.

### **Determination**

The appeal challenges the evidence that it is inadequate and therefore does not support the charges. This court has taken time to critically examine and evaluate the evidence afresh with a view to arriving at an independent conclusion. Whether the complainant was invited to visit the appellant or she took herself there is disputed but it is the word of the appellant against that of the complainant. This issue is not central to deciding whether the appellant committed or did not commit this offence. It is not disputed that the complainant was found inside the appellant's house. The appellant himself admits as much.

What is disputed is whether the appellant sexually abused the complainant. The appellant claims that he allowed the complainant to sleep at his house for safety purposes and did not have sex with her. The complainant told the court that the appellant penetrated her once and she felt pain. She claims to have been injured. She said that it was her first time to have sex. If this is true, then it would be logical to conclude that she must have been injured in her genitalia. The evidence of Dr. Nyabati Phillemon Ogetto (PW5) is that the complainant did not have injuries on her genitalia but her hymen was broken. The doctor testified that further medical examination on her was not possible since she was on her menstrual cycle. This is the reason, I believe, why the trial court found the main charge not supported by evidence.

The doctor did not explain his report in detail, especially after finding the hymen broken and finding no injuries. He did not give the history of the broken hymen. Did he mean that the hymen had been previously broken? If it was broken during the sexual contact between the appellant and the complainant,

surely there must have been fresh injuries and the doctor would have indicated so! This omission by the doctor to explain further his report leaves this court with evidence that does not support the main charge of defilement.

I have noted the inconsistencies in evidence especially in respect to what happened when the complainant's mother, auntie and uncle went to the appellant's house on the issue as to whether there was light in the appellant's house or not. However, these inconsistencies do not go to the root of this case especially since there is no dispute that the complainant was found inside the appellant's house.

Having carefully considered all the evidence and analyzed the same, I come to the same conclusion as the lower court that the offence that is proved beyond reasonable doubt is that of committing an indecent act with a child. It would not be safe, in my view, to convict the appellant on the main charge of defilement because the medical evidence does not conclusively prove penetration occurred. I find the complainant's evidence that the appellant defiled her and that it was her first time to have sex not supported by medical evidence that failed to confirm injuries on her genitalia. However, the behaviour of the appellant in refusing to open the door or disclose that the complainant was inside his house taken together with the complainant's evidence that the appellant molested her sexually proves beyond reasonable doubt that the appellant committed an indecent act with the complainant.

In conclusion therefore, it is my finding that the appeal by the appellant has no merit and must fail. It is hereby dismissed. I have considered the application by the respondent to alter the findings and convict the appellant on the charge of defilement. I find no evidence as shown in this judgement to support the main charge of defilement. I therefore uphold the lower court's findings, conviction and sentence. The appellant shall continue to serve the sentence of 10 years meted out by the lower court. It is so ordered.

**Dated, signed and delivered this 3<sup>rd</sup> day of June 2014.**

**S.N.MUTUKU**

**JUDGE**