



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL NO. 188 OF 2012
PAUL MUNYAO.....APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. S.A Ogot (RM) delivered on 19/12/2012 in Mutomo Senior Resident Magistrate's Court Sexual Offence No. 20 of 2012)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Paul Munyao**, 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 night of 8th September 2012 at unknown time at *[particulars withheld]* **Ikutha District** within **Kitui County**, intentionally caused his penis to penetrate the vagina of **M M** a child aged 12 years.

2. 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 night of 8th September 2012 at unknown time at *[particulars withheld]* , **Ikutha District** within **Kitui County** committed an act of indecency with **M M** a child aged 12 years by touching her private parts namely vagina.

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 material day at about 9.00 p.m. the complainant, PW1 **M M**, a twelve (12) year old standard five (5) girl was left home with her younger siblings sleeping. The complainant's mother, PW3 **J N M** went to a neighbour's house where she stayed overnight as the neighbour's child had passed away. The complainant's father, PW4 **M M** was working away from home.

5. While the complainant was sleeping she heard somebody enter the house. The person then went to the bed where the complainant was sleeping and removed her panties and slept on top of her. The complainant felt the person penetrate her and she felt pain. The complainant asked the person who he was but he did not respond. After the person was done he started leaving. The complainant shone a torch on the said person and saw him and recognized him as a neighbour who she stated was **Munyao** the Appellant.

6. When the complainant's mother returned to the house at 6.00 a.m, the complainant who was bleeding from her private parts informed her mother what had befallen her. The mother sent for the father who came home after about one week and reported the matter to the police. The Appellant was arrested. The complainant was taken to hospital where she was examined. It was confirmed that the complainant had been defiled. After investigations the Appellant was charged with the present offence.

7. The Appellant in his defence stated that he was arrested and taken to **Mutombo Police Station**. That the complainant who was also at **Mutombo Police Station** was alleged to have been defiled and was taken to hospital. That the complainant's father told the doctor he could give him a bribe if he treated the complainant there and then. The Appellant was then told to leave the premises and return the following day. The Appellant expressed his surprise at the charge and stated that the witnesses gave false testimony.

8. The trial magistrate's finding was that the prosecution case was proved beyond reasonable doubt. The Appellant was convicted for the offence of defilement and sentenced to twenty (20) years imprisonment. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-

- **That the evidence of identification was not free from error.**
- **That the prosecution did not discharge their burden of proof.**
- **That there was no medical evidence that linked the Appellant to the offence.**
- **That the medical evidence did not conclusively establish the offence of defilement.**

9. During the hearing of the appeal, the Appellant relied on his grounds of appeal and written submissions which I have duly considered.

10. The learned counsel for the State opposed the appeal. It was submitted that the complainant's evidence is that of recognition of the Appellant as a neighbour. That the complainant shone the torch light on the Appellant from a short distance. That the medical evidence confirmed the defilement and the complainant's age. It was further submitted that the sentence was within the law.

11. 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**.

12. The complainant gave her age as 12 years. Although the trial court carried out a *voire dire*, this was superfluous. **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 gave evidence that left no doubt that she was defiled. The trial magistrate recorded the complainant's evidence on the act of defilement as follows: **“he penetrated me and I felt pain”**. Although the complainant gave no details stating which part of her body was penetrated, she clarified that she felt pain and was bleeding and that there was a white discharge from her private parts. The complainant named the Appellant as the culprit. According to the Appellant, she shone a torch at the Appellant from a distance of about two metres and recognized the Appellant who she stated was a neighbour. The complainant even gave the details of the clothes the Appellant wore. That is Khaki shorts, white shirt and a sweater. I am satisfied that the complainant's evidence is that of recognition and was free from error.

15. The complainant's evidence on what transpired is consistent with the report she made to her mother in the morning. It was the mother's evidence that the complainant mentioned the Appellant as the culprit. Although the complainant's younger brother, PW2 **T M**, a six year old boy testified that he also saw the Appellant when the complainant directed the torch light on him, PW2's evidence was not subjected to cross-examination. This was an error on the part of the trial magistrate. The evidence of PW2 is therefore worthless.

16. As stated by the Court of Appeal in the case of **Nicholas Mutula Wambua –vs- Republic in Msa Cr. A 373 of 2006** where it quoted with approval the decision of the Supreme Court of **Uganda in Sola –vs- Uganda (200) 2 EA 556:-**

“The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.”

17. The same position is expressed in **Section 208 (2)** of the **Criminal Procedure Code** provides as follows:-

“The accused person or his advocate may put questions to each witness produced against him.”

18. The evidence of PW5, **Daniel Mulwa** the Clinical Officer confirmed that the complainant had been defiled. It was the Clinical Officer's evidence that the complainant's hymen was missing and she had bruises on her vaginal wall. This corroborates the complainant's evidence that penetration had taken place. The Clinical Officer also confirmed the complainant's age as twelve (12) years. Although the Appellant stated in his submissions that the medical evidence did not link him to the offence, this is not fatal to the prosecution case. The proviso to **section 124** of the **Evidence Act** 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.”

19. The defence by the Appellant dealt with the issue of arrest and the investigations carried out. Although the Appellant stated that the prosecution witnesses gave false testimony, there are no reasons that emerge from the record why any of the witnesses would frame him up. The trial magistrate who had the benefit of seeing the witnesses testify and observed their demeanour believed the complainant hence the conviction. I have no reasons to differ with the findings of the trial magistrate.

20. Having evaluated the evidence on record afresh, I am satisfied that the conviction is based on sound evidence. The sentence is within the law. The appeal has no merits and is dismissed. I uphold the conviction and sentence.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 3rd day of July 2014.

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B. THURANIRA JADEN

JUDGE