



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 179 OF 2012**

**MWEA FRANCIS ..... APPELLANT**

**VERSUS**

**REPUBLIC**

***(Being an appeal from the conviction and sentence of Hon. B.M. Kimemia (PM) delivered on 28/01/2012 in Kitui Principal Magistrate's Court Sexual Offence Case No. 11 of 2011)***

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***(Before Hon. B. Thurairaja Jaden J)***

**J U D G M E N T**

1. The Appellant, **Mwea Francis**, was charged with the offence of “defilement in violation of **section 8 (1)** as read with **section 8 (2)** of **Sexual Offence Act No. 3 of 2006.**”

The particulars of the offence were that “on the 24<sup>th</sup> day of March 2011 between 2.00 p.m. and 5.00 p.m. in **Kitui County**, intentionally and unlawfully caused his penis to penetrate to the vagina of **RM** a child aged 2 years and 8 months.”

2. In the alternative the Appellant was charged with the offence of “indecent act with a child contrary to **section (1) (1)** of the **Sexual Offence Act No. 3 of 2006.**”

The particulars of the offence were that “on the 24<sup>th</sup> day of March 2011 between 2.00 p.m. and 5.00 p.m. in **Kitui County**, intentionally touched the vagina of **RM** a child aged 2 years and 8 months with his penis.”

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full hearing.

4. The prosecution case was that on the material date at about 2.00 p.m., the complainant, **RM** a two (2) year, eight (8) year old girl and her seven (7) year old brother were left at home by their mother under the care of the Appellant who was their domestic employee. The mother went to the market. When the mother returned home at about 5.00 p.m., she found the children at the gate. While giving the children a bath the complainant informed the mother of pain in her private parts. The mother checked the complainant and saw a raw wound there. That the complainant said the Appellant who she called ‘uncle’ had gone up and down on her “tup tup” while she was at the chair in the sitting room. The mother called the child’s

grandmother who went to see what had happened. Thereafter the matter was reported at **Kitui Police Station**. The complainant was escorted to the hospital where it was confirmed that she had been defiled. The accused was arrested and charged.

5. The Appellant in his defence denied the offence. He stated that the complainant's mother was her employer and had failed to pay him and he quit the job. That when he went to the complainant's home the complainant's mother sent him to the Posho mill and when he returned he was arrested.

6. The trial magistrate was satisfied that the prosecution had proved their case and convicted the Appellant in the main count of defilement. The Appellant was sentenced to life imprisonment.

7. The Appellant was dissatisfied with both the conviction and the sentence and appealed to this court on the following grounds that can be summarized as follows:-

- **That the prosecution was conducted by an unqualified police prosecutor contrary to section 85 of the Criminal Procedure Code as read with section 88 of the Criminal Procedure Code.**

- **That the prosecution case was not proved beyond reasonable doubts.**

8. During the hearing of the appeal, the Appellant opted to rely on his written submissions which I have duly considered. The learned counsel for the State submitted on the sufficiency of the evidence and further submitted that the sentence was within the law.

9. This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.

10. The complainant was 2 years and eight months old at the material time. The complainant was not able to testify but the mother, PW1 **FNM** gave evidence. The mother's evidence is that she had left the children with the Appellant who was their domestic employee.

11. The mother (PW1) testified that the child reported to her that it was the Appellant who she described as uncle who had done "up and down on her *tup tup*". The mother's evidence on the identification of the Appellant by the complainant as the culprit is corroborated by that of the complainant's grandmother, PW2 **FN**. The grandmother specifically testified that the complainant referred to the Appellant as "uncle **Mwea**" as the one who had defiled her. The grandmother's evidence further corroborated the mother's (PW1) evidence that the Appellant was the domestic employee who had been left with the children when the children's mother went to the market. According to the Investigating Officer, PW4 **PC Margaret Kwamboka**, the complainant identified the accused as the 'uncle' who had defiled her. During cross-examination the Investigating Officer stated that the complainant pointed out the Appellant. The evidence of these three witnesses (PW1, PW2 and PW4) shows that the complainant was able to specifically identify the Appellant to them as the culprit soon after the defilement.

12. Although the complainant was not able to testify in court, the complainant was a child of tender age and was a vulnerable witness as provided for under **section 31** of the **Sexual Offences Act**.

13. The evidence of the doctor, PW3 **Dr Patrick Mutuku** confirmed that the complainant was defiled. According to the doctor there was penetration as the child had "bruises on the labia majora and the hymen was absent". The doctor assessed the complainant's age as 2 years 8 months. Another age assessment carried out on the complainant about three months

late gave the complainant's age as three years. I am satisfied the complainant was 2 years 8 months on the material day.

14. In addition to the direct evidence as narrated to the court by the complainant's mother, grandmother and the Investigating Officer, the circumstantial evidence points at the Appellant as the culprit. According to the complainant's mother, she had left the Appellant with the children when she went to the market. The mother further testified that the Appellant used to do farm work and also assisted in taking care of the children. During cross-examination the mother denied any suggestions by the Appellant that there was any other man working in her compound that day. The complainant's evidence as told through the mother is that the defilement took place in the sitting room. This is corroborated by the mother's evidence that she had left the complainant sleeping in the sitting room.

15. Was the complainant's brother a crucial witness who ought to have testified? The record does not reflect whether the said brother had any material evidence to offer. Although the brother could have given circumstantial evidence, that evidence was adduced by the mother and the grandmother.

16. The defence given by the Appellant alluded to a frame up due to quitting his job for nonpayment. However, the defilement was real as confirmed by the doctor. The complainant's mother in her evidence denied suggestions by the Appellant that she had a grudge against him. The complainant's grandmother also denied the suggestions of any grudge having existed between her and the Appellant. The Investigating Officer (PW4) according to her evidence did not know the Appellant before. The trial magistrate who had the benefit of seeing the witnesses testify and observed their demeanour believed the prosecution case. I have found no reasons to differ with the findings of the trial court. The offence occurred in broad daylight. It was evidence of recognition and therefore free of any possibility of error especially when taken into account with the circumstantial evidence on record.

17. On the ground of appeal that the prosecution was conducted by unqualified prosecutor **Section 82 (5) of the Criminal Procedure Code**, the said provision was amended by **Legal Notice No. 7 of 2007**. There is no longer any requirement that a case must be prosecuted by a police officer who is not below the rank of an Assistant Inspector of Police. **Section 88 of the Criminal Procedure Code** is not applicable in the circumstances of this case as it was prosecuted by a public prosecutor.

18. Having re-evaluated the evidence on record, I find no merits in the appeal and dismiss the same. I uphold the conviction and sentence.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Kitui this 13<sup>th</sup> day of November 2014.**

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**B. THURANIRA JADEN**

**JUDGE**