



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 125 OF 2013

PETER SINGI APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. S.A Ogot (RM) delivered on 17/05/2013 in Mutomo Senior Resident Magistrate's Court Criminal Case No. 244 of 2010)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Peter Singi**, was charged with the offence of “defilement contrary to **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 12th day of December 2010 at unknown time in **Mutomo District** within the **Kitui County** intentionally caused his penis to penetrate the vagina of **LT** a girl aged 3½ 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 12th day of December 2010 at unknown time in **Mutomo District** within the **Kitui County** intentionally touched the vagina of **LT** a child aged 3½ years.”

3. When the Appellant was arraigned in court on 15/12/10, he pleaded guilty. He was convicted and sentenced to life imprisonment. The Appellant thereafter appealed and on 4/12/2012 the conviction was quashed, the sentence set aside and orders made for a retrial.
4. When the Appellant subsequently appeared in court on 5/1/13, he pleaded not guilty. The case proceeded to a full trial.
5. The prosecution case was that on 12/12/10 at about 10.00 a.m., PW4 **FT** who was about 9 years old and her sibling **AT** arrived home from **[Particular Withheld] Church** where they had gone for Sunday school. They found all the doors locked but one window was open. PW4 peeped through the open window. She saw her cousin the Appellant seated on the bed with her 3½ year

- old sister **L** (complainant) and one **S**. The Appellant was feeding the two girls with porridge and the Appellant was at the same time rolling some tobacco. The Appellant opened the door for them. PW4 asked **L** what they were doing. That **L** said that the Appellant had put his penis inside her private parts and she had felt pain. That the Appellant promised to buy them sweets if the matter was not brought to the attention of the children's mother. When the Appellant failed to buy the sweets, the children informed their mother what had transpired.
6. The mother inspected **L** and saw some red and white discharge on her female genitalia. **L** was taken to hospital and the matter reported to the police. The Clinical Officer who examined **L** and treated her confirmed that she had been defiled. The Appellant was arrested and charged.
 7. In his defence, the Appellant gave unsworn evidence. No witnesses were called. The Appellant said he sold radios at the market. The Appellant stated that on 'that Sunday' he had parted ways with **NT** (the mother to **L**) at 6.00 a.m. That the Appellant went to **Mutomo** then went to his business premises at **Kasaala market**. He worked until 6.00 p.m. That he could not get a motor vehicle back to **Mutomo** and he slept in a hotel. In the morning he went to his rented room in **Mutomo**. He was summoned home but he did not go and said he would go later.
 8. The trial magistrate was satisfied that the prosecution case was proved beyond any reasonable doubts. The Appellant was convicted for the offence of defilement and sentenced to life imprisonment. The Appellant was aggrieved by both the conviction and the sentence and he appealed to this court on the following grounds:-
 - That the medical evidence did not support the charge.
 - That the complainant's age was not ascertained.
 - That the Clinical Officer was not a Medical Officer and was not competent to give evidence.
 - That the prosecution case was not proved beyond reasonable doubts.
 - That one Salome who was a crucial witness was not called to testify.
 - That the Appellant was not subjected to a DNA test.
 - That there was no eye witness and the evidence on record was cooked up.
 9. During the hearing of the appeal, the Appellant relied on his grounds of appeal. The appeal was opposed by the State. The learned counsel for the State argued that the circumstantial evidence was reliable and that the evidence of defilement was corroborated by the medical evidence.
 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 **LT** was 3½ years old at the material time. By the time the case proceeded to hearing about three years later, the complainant had no re-collection of the matters in question. The trial magistrate after carrying out a *voire dire* found the complainant incapable of giving evidence.
 12. PW4 **FT** is the one who the complainant informed of the matters in question on the material day. PW4 was 12 years old by the time she testified and therefore about 9 years old at the material time. The evidence of PW4 however fails to give crucial details e.g. when the offence occurred, at which place and how the victim identified the perpetrator and any other surrounding circumstances. This would have given re-assurance to the court whether the evidence of identification or recognition was free from error.
 13. One **AT** who was with PW4 at the material time did not testify. One **S** who was also said to have been with the victim at the material time did not testify. It is not clear from PW4's evidence what the age of one **S** was. If the said **AT** and **S** were capable of giving evidence, they were crucial witnesses who could have shed more light on the matter.
 14. Although the trial magistrate carried out a *voire dire* on PW4 she was 12 years old. **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.”

15. 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**).
16. The victim’s mother, PW1 **Nyiva Thomas** only repeated what she was told by F (PW4). Although the evidence of the mother is that she inspected the victim’s private parts and the Clinical Officer PW3 **Daniel Mulwa** confirmed that the victim had been defiled, the evidence on who was the perpetrator of the offence is scanty and unreliable.
17. The Appellant denied the offence. With the weak prosecution case, the Appellant ought to have been given the benefit of doubt. The evidence by the prosecution witnesses that the Appellant admitted the offence is not supported by any regularly obtained evidence of a confession. The evidence of confession therefore ought not to have been received.
18. Before concluding this judgment, I must point out that a Clinical Officer is competent to give medical evidence. In the Court of Appeal’s dictum in the case of **Kavoi Kiilu –vs- Republic (2010) e KLR the Court of Appeal** it was stated as follows:-

“Under section 2 of the Clinical Officers 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.”

19. Obtaining DNA tests would be welcome but not mandatory. The proviso to **section 124 of the Evidence Act Cap 80 Laws of Kenya** provides 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.”

20. With the foregoing, the appeal has merits and is successful. Consequently, I quash the conviction and set aside the sentence. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Kitui this 13th day of November 2014.

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B. THURANIRA JADEN

JUDGE