



**No. 124/2013**

**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 180 OF 2012**

**PETER KIMANZI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal case No. 344 of 2011 by Hon M.W. Murage, CM on 7/12/2012)*

**JUDGMENT**

1. The appellant was charged with defilement of a girl contrary to Section 8(1) as read with Section 3 of the Sexual Offences Act 2006. Particulars thereof being that on 21<sup>st</sup> February, 2011 at **[particulars withheld]** Primary School in daystar within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of **N M** a girl aged 10 years.
2. In the alternative, he was charged with the offence of committing an indecent act with a girl child contrary to Section 11(1) of the Sexual Offences Act 2006. The particulars being that on the material day he indecently and unlawfully touched the vagina of **N M** a child aged 6 years with his penis.
3. The appellant was tried convicted and sentenced to life imprisonment.
4. Being aggrieved with the conviction and sentence, he appealed. In his Amended Supplementary grounds of appeal, he states that:-

The charge sheet was defective, the prosecution did not prove their case beyond reasonable doubt and that the learned trial magistrate acted on wrong principles when he held that if there were other teachers in the staffroom they would have testified failing to observe that it was upon the prosecution to have summoned them.

5. This is a case where the prosecution called four (4) witnesses.
6. PW1, the complainant, a child aged 10 years in standard 4 told the court that the accused, her mathematics teacher called her to the staffroom at lunch hour. He enquired from her why she was not writing names of noise makers and she told him that there were none. He then threw her down, removed her panties, opened his zip and put something hard inside her, where she urinates from. She felt something like water. A girl by the name **W** went in to ask for permission to go to the toilet and he left hurriedly. She further stated that the appellant used to touch their breasts. On cross-examination, she stated that she fell down and he fell on top of her. She was taken to hospital the following day.

7. PW2, **Dr. John Mutunga** produced the medical examination report on behalf of **Dr. Omolo** who examined the complainant. She was found with bruises on the labia majora and minora. Her hymen was broken. There was no discharge or bleeding. The degree of injury sustained was assessed as grievous harm.
8. PW3, **M K**, the complainant's father stated that after referring the matter to the police; he took the complainant to Athi River Medical Centre for treatment. He was then referred to Machakos Hospital.
9. In his defence, the appellant testified that on the material day as the Deputy Head teacher at the school, he was on duty as the discipline master. On the 21<sup>st</sup> February, 2011 he disciplined the complainant and her siblings for reporting to school late. At 8.30 pm their mother rang him and sought to know what he had done to her children then switched off her phone. It was his evidence that he was not alone at the staffroom. He was with other teachers who had since been transferred from the school. He denied having committed the offence.
10. This being the first appeal, it is the duty of the court to re –evaluate the evidence adduced during trial in the lower court in order to reach its own independent conclusion, bearing in mind the fact that I did not have an opportunity of hearing and seeing witnesses who testified (see **Okeno versus Republic [1972] E.A. 32**).
11. With regard to the 1<sup>st</sup> ground of appeal, it is stated that the charge sheet was defective. The appellant is charged contrary to section 8 (1) as read with Section 3 of the Sexual Offences Act, 2006 that provides thus:-

***“(1) A person who commits an act which Causes penetration with a child is guilty of an offence termed defilement.***

***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years”.***

12. To establish a charge of defilement, it is a prerequisite condition that the age of the complainant be established. In this case, looking at the main charge and its alternative, it would appear the investigation did not know the age of the child. In the main charge it is stated the complainant was 10 years old while in the alternative count it is stated she was 6 years old.
13. In her evidence the complainant said she was aged 10 years old. PW2 produced in evidence a child health card (immunization Card) which indicates the child was born on 16/6/2000. The only issue with the card is, it is in the name of **E**. The surname is altered and a name **N** written thereon. There is no proof that it was issued to the complainant herein. PW3, the father to the complainant was silent on the age of the child. The P3 (medical examination report) however, indicates that the child's age is estimated as 10 years old.
14. As to whether the charge sheet was defective in the case of **Isaac Omambia versus Republic 995] eKLR-**

***“In this regard, it is pertinent to draw attention to the following provisions of section 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge. Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offences or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as the nature of the offence.”***

15. The issue to be determined is therefore whether the aforesaid defect in the charge caused any prejudice to the appellant as to occasion a miscarriage of justice or a violation of a fundamental right to a fair trial
16. In this case the appellant pleaded to the charge with a clear statement of the offence being defilement. Particulars of the offence were detailed enough. Details of the charge forming ingredients thereof were stated. The date, place and manner in which the offence was alleged to have been committed were stated.
17. Section 137 of the Criminal Procedure Code provides that no objection shall be taken to a charge

- in respect of its form or content as long as it is framed in accordance with the rules enumerated under that section.
- 18.The appellant having pleaded to the charge and participated in the trial towards the end was not prejudiced; therefore he cannot be acquitted just because there was a substantive defect.
- 19.I will therefore proceed to determine whether the case was proved beyond reasonable doubt.
- 20.In order to prove the offence of defilement there must be penetration. In her evidence the complainant said the appellant threw her down and removed her panties and put something hard inside her. She felt something like water.
- 21.PW2 said the Doctor who examined the child found her labia majora and minora bruised. Her hymen was broken. There was however no tears, discharge or bleeding. The child is alleged to have been defiled on 21/2/2011 and was treated on 22/2/2011. No evidence was adduced to suggest when the hymen was broken. Without evidence of discharge or bleeding it cannot be said with certainty that the hymen was broken on the 21<sup>st</sup> February, 2011. Therefore there is no evidence of the act of penetration.
- 22.The proviso to section 124 of the evidence Act provides;-

***“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

***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.” Emphasis mine.***

- 23.This is a case where the learned trial magistrate who took evidence of the child did not record any reasons in proceedings stating whether or not she was satisfied that the child told the truth. Similarly, in the judgment of the learned magistrate this is not alluded to.
- 24.In the circumstances, I find that the trial court failed to analyse all the evidence on record prior to reaching its findings. There was no proof of penetration of the child. I therefore allow the appeal, quash the conviction and set aside the sentence. The appellant shall be released forthwith unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at MACHAKOS this 11<sup>TH</sup> day of NOVEMBER, 2013**

**L.N. MUTENDE**

**JUDGE**