



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Criminal Appeal 120 of 2011**

**MUTHUI**

**MWANGANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Mwingi Senior Resident Magistrate's Court***

***Criminal Case No.94/2009 by Hon. H.M. Nyambergi on 12/5/2011)***

**JUDGMENT**

On 9<sup>th</sup> February, 2009, the appellant was arraigned before the Senior Resident Magistrate's Court at Mwingi for an offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offence Act. The particulars were that on 7<sup>th</sup> February, 2009 at Kyuso District within Eastern Province he caused penetration of his male genital organ into the female genital organ of **KM** a child aged 4 years. The accused also faced an alternative count of indecent act with a child contrary to section 11(1) of the same act. It was alleged that on the same day and place the appellant intentionally caused contact between his genital organ and that of **KM**. The appellant denied both counts. The prosecution called 6 witnesses in a bid to prove its case against the appellant.

PW2, **KM** "the complainant" was a girl then aged 4 years old. The court in examining her found her to be a child of tender years. Consequently, the prosecution applied to have her evidence adduced by her mother as an intermediary. The application by the prosecution was allowed and she was declared a vulnerable witness and her mother's evidence was taken as hers.

PW1, **SM** is the mother of PW2. On 7<sup>th</sup> February, 2009 at about 5.30am, she had gone to fetch water leaving the complainant and her younger sibling **M** aged 2 years in the house. After 30 minutes, she came back and heard the complainant crying. On entering the house, she found the appellant defiling her. His long trouser had been lowered below his knees. She raised an alarm and her husband **FMS**, PW3 came from the house of her co-wife. He took the appellant outside and called the grandmother of the child who examined her and confirmed that the complainant had been sexually assaulted. The appellant was taken to the assistant chief, Mivukoni sub location, where police officers were called and he was taken to K Police Station. She took the complainant to Kyuso Hospital where she was treated and subsequently her P3 form filled. The appellant was her nephew and was staying with her. That her usual place of sleep was in the granary.

PW3, **FMS** is the father to the complainant whose evidence corroborated the evidence of PW1. Upon

hearing the screams of his wife (PW1) at about 5.30a.m, he came out. He found his wife standing at the door while the appellant was inside the house. The complainant was crying. He was accordingly informed by his wife that she had found the appellant sexually assaulting the complainant. When his mother examined her genitalia she confirmed that she had been sexually assaulted. As a result, he arrested the appellant and took him to the area assistant chief where police were called. The complainant was subsequently taken to Kyuso District Hospital for treatment.

PW4, **Joseph Mutua**, a clinical officer stationed at K District Hospital confirmed upon examining the complainant that she was a girl aged 4 years. Physically the complainant appeared sick. He was given a history of the complainant having been assaulted by a known person. He noticed that her hip joints were painful. There was white discharge noted from her genitalia. High vaginal swab was taken and the result thereof indicated pus cells and a few living spermatozoa. Urine test indicated red blood cells. She was put on appropriate medication. He came to the conclusion that the complainant had been penetrated.

PW5, **C.I.P James Kimwele**, the investigating officer in the case re-arrested the appellant from the assistant chief Mivukoni sub- location on allegations of having defiled the complainant. He commenced his investigations by sending the complainant to hospital and caused the recording of witness statements and finally charged the appellant.

Put on his defence, the appellant elected to give an unsworn statement and called no witnesses. He admitted that he was living in the homestead of the complainant's parents. Prior to the alleged act, the mother of the complainant had requested to have sex with him but he declined and threatened to report her advances to her husband. On the material date, the mother of the complainant enquired whether he still wanted to report her to her husband. When he confirmed, she left. After sometime she came back together with her husband and his mother. They went aside discussed the issue but her husband said he could not do such an act. At about 6.00am, the complainant was woken up and together they were taken to the area assistant chief's office at Mivukoni trading centre thence to Kyuso Police Station from where he was finally charged with the offence.

Having considered the appellant's defence *vis a vis* the prosecution evidence, the learned magistrate came to the conclusion that the prosecution evidence was overwhelming which satisfied him beyond reasonable doubt that the appellant was guilty for the offence of defilement. He accordingly convicted him and sentenced him to life imprisonment.

Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal on 2 main grounds that:-

§ The entire case of the prosecution was not proved beyond reasonable doubt as required and secondly,

§ The evidence relied on to find his conviction was hearsay which ought not to have been acted upon.

When the appeal came before me for hearing on 26<sup>th</sup> June, 2012, the appellant had prepared his written submissions in support of the appeal. I permitted him to tender them. I have carefully read and considered them alongside cited authorities.

The appeal was opposed. **Mr. Mukofu**, learned State Counsel submitted that the appellant was apprehended at the scene and medical evidence confirmed penetration. The evidence against the appellant was simply overwhelming and his conviction cannot be faulted. He therefore urged me to dismiss the appeal.

As the first appellate court, it is my duty to subject the evidence tendered before the subordinate court to afresh and exhaustive evaluation so as to reach my own conclusion as to whether the conviction of the appellant can be sustained. In doing so, I am reminded to give due allowance to the fact that I did not see the witness as they testified unlike the trial court.

Having carefully combed through the evidence on record, it is common ground that the complainant was

defiled. There is the evidence of the clinical officer, **Joseph Mutua** to the effect. He examined the complainant on 7<sup>th</sup> February, 2009 at about noon. This was about 7 hours after the incident. As per his own testimony upon examining the complainant-

***“The high vaginal swab showed many pus cells and a few living spermatozoa noted. The urine showed red blood cells. An HIV test was conducted and the result was negative. There was also whitish discharge from her vagina. She was treated with antibiotics...I assessed the degree of injury as harm. I came to the conclusion that there was actual penetration and the nature of the offence was defilement. The hymen was broken...”***

With this evidence which was not seriously challenged, the question as to whether or not the complainant was defiled was settled. The crucial question then became and which demanded for an answer was who then defiled the complainant? According to the learned magistrate, it was the appellant. The appellant vehemently denies that conclusion on the grounds that the presence of spermatozoa in the complainant's private parts cannot be linked to him since he was not taken for medical examination upon arrest, the evidence linking him to the offence was hearsay as the complainant did not testify and lastly that there existed a grudge between him and the complainant's mother.

Dealing with the aspect of medical examination of the appellant, it is not a legal and or mandatory requirement that in cases of this nature, the perpetrator be subjected to medical examination as prove that he committed the crime. What is required is evidence that places the appellant in the mix. That evidence may be oral or documentary. Medical examination may be part of such evidence, but it is not mandatory requirement. In other words failure to have the appellant subjected to medical examination in this case was not fatal to the prosecution case. When the question was put, PW5, he had a perfect answer;-

***“It was not necessary to have sent you to hospital for examination. Since you had been caught by people the child knew you...”***

The appellant had been caught in the act. In the premises, it was unnecessary to subject him to medical examination. The evidence of PW1 was to the effect that she chanced on the appellant as he defiled her daughter, the complainant. The complainant was crying. The appellant's trousers were lowered to the knees. The complainant's private parts were examined and injuries noted. Later in the day she was examined by the clinical officer who confirmed defilement. Between the time the appellant was found in the act and when the complainant was examined as aforesaid she was throughout in the presence of her mother, father and the police officers. In the circumstances, nobody else could have committed the defilement on her.

With regard to the appellant's submission that he was convicted on hearsay evidence since the complainant herself did not testify, this is hogwash. The trial court conducted a *vore dire* examination of the complainant to determine as required, whether she could testify given her age. The court found that she was unfit to testify and her mother PW1 was allowed to testify as her intermediary pursuant to section 31 of the Sexual Offences Act. Under this section a court is allowed to declare a witness other than the accused, who is to give evidence, a vulnerable witness if such witness is the alleged victim in the proceedings pending before the said court; a child; or a person with mental disabilities. In this case, the complainant was the victim as well as a child aged about 4 years. Upon declaration of a witness a vulnerable witness, the court can direct that such witness gives evidence through an intermediary. This is what happened in this case. The court deemed the complainant's mother as an intermediary and her evidence was regarded and or treated as that of the complainant. However, the only rider to the evidence of the intermediary is that;-

***“A court shall not convict an accused person charged with offence under this Act solely on the uncorroborated evidence of an intermediary”***

Was there corroboration of the evidence of the intermediary? Of course there was. There is the evidence of the complainant's father who being attracted by the screams of the intermediary who had found the appellant defiling their daughter, came out of the house, of his 2<sup>nd</sup> wife and found the appellant inside the

house, whereas PW1 was standing at the door and the complainant was crying. He called his mother who examined the complainant's private parts and confirmed that she had been injured. Then there was the evidence of the clinical officer. Based on all the foregoing, the appellant cannot be heard to say that the evidence which convicted him was hearsay and uncorroborated.

With regard to the alleged grudge between the appellant and the complainant's mother, I do not think, just like the learned magistrate, that such grudge existed. It was a mere figment of the appellant's fertile imagination. He never raised the issue with PW1 and or her husband when he cross-examined them. He only raised the issue in his statement of defence. If indeed there was such grudge which hinged on his resistance to PW1's sexual advances, it would have been very easy for him to raise it with PW1 and PW2. He did not. The learned magistrate therefore rightly rejected the defence.

The appellant was found in the act. He was caught red handed. PW1 found the appellant in bed with the complainant with his trousers lowered to the knee. The complainant was screaming. PW1 screamed and attracted the attention of her husband who was sleeping in the house of the co-wife. The husband (PW3) rushed to the scene and found the appellant in the house. The victim was still crying. The appellant was thereafter arrested at the scene. Medical evident confirmed that that there was actual penetration. This evidence as correctly submitted by the learned State Counsel was simply overwhelming against the appellant. The conviction was thus safe.

The appeal lacks merit. It is dismissed in its entirety.

**DATED ,SIGNED, and DELIVERED at MACHAKOS this 5THday of OCTOBER 2012.**

**ASIKE –MAKHANDIA  
JUDGE**