



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

Criminal Appeal 22 of 2009

KYALO KUSA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

[Being an Appeal from the original conviction and sentence in Makueni SRM's Court Criminal Case Number 370/2007 by F.M Nyakundi Ag P.M on 29.1.2009]

JUDGMENT

1. The Appeal herein arises from the conviction and sentence in Makueni SRM's Court Criminal Case Number 370/2007 where the Appellant, Kyalo Kusa had been arraigned to face the charge of defilement of a girl under the age of 11 years contrary to section 8(2) of the Sexual Offences Act, 2006. The alternative charge was that of indecent assault contrary to section 11(1) of the Sexual Offences Act, 2006. The particulars were that, on the main count, he had carnal knowledge of Musangi Kavula on 2.7.2007 and the alternative charge was that he touched her private parts on the same day and time at Kilala Location Makueni District.

2. On 29.1.2009, having been found guilty of an offence in the main charge, the Appellant was convicted and sentenced to life in prison. He then preferred this appeal which is conceded for reasons that although the hearing was conducted by two magistrates in succession, there was no compliance with section 200 of the Criminal Procedure Code and the trial was thus rendered invalid.

3. I note from the record that on 13.12.2007 S.R. Rotich, SRM took the evidence of PW1 Yvonne Musangi, PW2 Alexander Kyalo, PW3, Doris Mueni, PW4 Banventure Mungetha, PW5, Mutheu Itumo. On 22.9.2008, F.M. Nyakundi Ag. P.M took up the case and the record reads as follows:-

“Court – matter part heard by another magistrate. Section 200 Criminal Procedure Code complied with.

Accused – case should proceed from where it had reached.

Court – Hearing to proceed from where it had reached.”

4. To my mind there was clear compliance with section 200 Criminal Procedure Code and I see no need to belabour the point. The State's concession to the Appeal is made in error. Having so said, this court has the obligation to evaluate the evidence afresh and reach its own decision – see Okeno vs Republic [1972] E.A. 32.

5. The question that I must answer is whether the offence of defilement contrary to section 8(2) of the

Sexual Offences Act was committed and whether the charge was proved beyond reasonable doubt. Firstly, it is the Appellant's argument that the evidence on record was inconsistent, contradictory and fabricated. That no evidence was in any event tendered to link the Appellant to the charge and in any event that the charge sheet and the evidence on record were at variance with each other. That the learned magistrate also dismissed the Appellant's alibi and that the language used in the trial was not recorded and that the sentence passed was harsh and excessive and was not laced with a tinge of mercy.

6. Secondly, and following up on the Appellant's arguments, PW1 Yvonne Musangi recalled that sometime in July 2007, the Appellant who was her neighbour, accosted her as she returned from buying paraffin, led her into a bush and removed her pants before defiling her. She was 7 years old and he gave her Kshs. 20/= and told her not to mention the incident or he would kill her. It was the second time he had done that and she decided to inform one Katheu and the accused was then arrested.

7. PW2, Alexander Kyalo, grandfather of PW1 was informed of the incident and he also confirmed that on 2.1.2007 PW1 delayed in coming home in the evening.

8. PW3, Doris Mueni recalled that on 10.7.2007, PW1 cried at School when her name was called during roll call and when she interviewed her, she said that Kyalo, the accused had defiled her. PW4 Banventure Mungetha, head teacher at Yavonza Primary School received the report from PW3 on 10.7.2007 and so he called PW2 and after hearing PW1's story, he took her to police and then to hospital.

9. PW5, Mutheu Itumo, an aunt of the Complainant said that on 2.7.2007, the complainant was sent for paraffin and she did not come back by 7pm. PW5 tried to locate her but she arrived later that night and declined to say where she had been. According to PW5;

“One week later the headmaster came and told us of the defilement of the girl by Kyalo.”

10. PW6, Mirriam Nyaboke, a clinical officer at Makueni District Hospital saw the complainant on 11.7.2007 and she noted that the vaginal orifice was red and tender and ***“a finger could not go through because of pain.”*** She approximated the age of injury as ***“one day”*** and the genitalia was red indicating that the ***“incident was recent”***.

11. PW7, PC David Masila investigated the case and arrested the Appellant.

12. In his defence, the Appellant stated that on 7.8.2007, he was summoned by the Assistant Chief of his home area and he reported as instructed. He was informed that the person who had caused the summons to be issued had not turned up and he was asked to go back on 9.8.2007. On that day, he was arrested and later charged and he believed that his uncle had caused the charges to be framed.

13. He denied being at the place where the incident allegedly took place on 2.7.2007 and stated that he was selling goods at a market and returned at 9.30 pm. He called DW2, Joseph Musembi Kiio who confirmed that on 2.7.2007 he was with the Appellant until 9p.m when they parted at his gate and he never saw the complainant on that day.

14. Thirdly, I should now resolve the issue of dates and timings because it was strongly argued that the Appellant could not have committed the offence on 2.7.2007 as stated in the charge sheet. From the evidence of PW2 and PW5, the complainant was sent for paraffin on 2.7.2007 and she failed to return on time prompting PW5 to go and look for her. It was only a week later that PW4 called her to school and informed them of the alleged defilement. That evidence is otherwise consistent with the charge sheet and is also consistent with that of PW7, who investigated the case. But the evidence of PW6 the clinical officer and the P3 form then creates a contradiction that must be resolved. The Officer Commanding Makueni Police Station in the ***“request to a medical officer”*** at page 1 of the P3 Form indicates that the date and time of the alleged offence was ***“11.7.2007 at 2.33 p.m”*** and the complainant was sent to hospital on ***“12.7.2007 under escort of [her] grandfather.”*** The date and time of reporting the incident is given as ***“11.7.2007 at 11.45 hrs.”*** The P3 form is dated 13.7.2007 and the approximate age of injury is given as ***“1 day”***.

15. The charge sheet clearly indicates that the offence was allegedly committed on the “**2nd day of July, 2007 at Yathonza village**” and it is my understanding that the Republic was then obligated to prove every ingredient of that charge.

16. In this case no person saw the Appellant and the complainant together and save for PW6, no person actually saw whether there was any evidence of defilement. None of the witnesses tried to check whether PW1 was indeed defiled a week prior and it was properly left to the officer to do so. I have agonized over the value of the evidence of PW6 but I am convinced as follows:-

i. All evidence points to the fact that PW1 first raised a complaint to PW3 on 10.7.2007 and PW3 informed PW4 who informed PW2 and PW5 and PW7 received the report at Makueni Police Station on 11.7.2007 and then PW6 examined her on 12.7.2007 and made her report on 13.7.2007.

ii. Save for her error in judgment that the injuries sustained by PW1 were a day old, PW6’s evidence on the results of her examination has not been challenged at all and is therefore corroborative of that of PW1 and that to whom she made her initial report. One may then ask, why did PW1 keep quiet for a week? She stated in evidence that the Appellant told her “**not to mention it to anyone**” or she would be killed. When she got the courage to speak about it, she stated that the Appellant had previously defiled her and this she repeated to PW6 who dutifully recorded it in the P3 and again said the same thing in court. I have no reason to doubt her and her conduct in the circumstances of a 7 year old child is understandable. The injuries she said she sustained after defilement were confirmed by PW6 and her conduct on the material night is telling. When PW5 asked her why she came home late, she had no answer and having just been defiled and threatened, again that is understandable.

17. I therefore accept the evidence as tendered and I am convinced that on 2.7.2007 the Appellant indeed defiled PW1.

18. On his alibi defence that he was selling goods at Kilala market the whole day, that may be so but the evidence that he defiled the complainant after 7 pm on 2.7.2007 stands and dislodges that defence. In any event, he may have been at Kilala the whole day and on his way home found PW1 who had gone to buy paraffin and for the second time could not resist his sexual urge and defiled her.

19. Lastly, I am satisfied that the sentence imposed which is the maximum allowed is proper in this case. The Appellant twice defiled the Appellant and the circumstances are aggravated enough to warrant the stiffest sentence.

20. It is clear that on all grounds, I see no merit in the Appeal and the same is dismissed in it’s entirety.

21. Orders accordingly.

Dated and delivered at **Machakos** this **6th** day of **July 2009**.

Isaac Lenaola

Judge

In the presence of; Mr Ngolya for Appellant

Mr Omirera for Republic

Isaac Lenaola

Judge