



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWERA & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 148 OF 2013

BETWEEN

FRANCIS NJAU MUROKI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nairobi (Mbogholi, J.)*

*dated 14<sup>th</sup> June, 2013*

*in*

*H.C. Cr. A. NO. 71 OF 2011)*

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**JUDGMENT OF THE COURT**

The appellant was convicted by the Principal Magistrate, Githunguri, of defilement of a child aged 4 years contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act** and sentenced to life imprisonment. His first appeal to the High Court against the conviction and sentence was dismissed.

The prosecution called seven witnesses at the trial to prove the charge – namely; **F N M** (Florence); **E W** (the child)

**A G M** (Albert); **S W** (Scholastica); **PC**

**Christine Mondli; AP Sergeant Thomas Machoka and Dr. Nzisa Liko.**

On 28<sup>th</sup> September 2009 at about 9 .00 a.m. **Florence**, the mother of the child sent the child to a nearby shop to buy rice. The child did not return immediately and Florence went out in search of her. She did not see the child along the road. She then called the child's name three times. The child responded on the third occasion. Her voice came from an uninhabited house under construction across the road. The appellant emerged from the house followed by the child. There was a bicycle by the roadside loaded with some cakes for sale. She recognized the appellant whom she used to see in the area. The child immediately sat down. Florence held and observed her. She noticed that her clothes were wet on the

lower side and her genitalia were wet. There was also a wet discharge from the genitalia. She suspected that the child had been defiled. The appellant denied doing anything to her. She screamed and members of public came and arrested the appellant and took him to Ikinu Police Post and later to Githunguri police station. The child was taken to Githunguri Health Centre and examined by **Scholastica**, a clinical officer who found, amongst other things, that the child's labia majora was swollen and the hymen freshly torn. A high vaginal swab showed the presence of spermatozoa. She concluded that the findings were suggestive of sexual assault.

On the following day, the child was examined by **Dr. Muhombe** of Nairobi Womens Hospital. Dr. Muhombe was deceased at the time of the trial and his medical report was produced by **Dr. Nzisa Liko**. Dr. Muhombe's finding was that the entrance to the vagina was swollen, that there was a fresh hymenal tear and that a high vaginal swab revealed presence of spermatozoa. The child's pant, the appellant's saliva and blood sample were also taken to Government analysts for forensic examination. **Albert**, the Government Analyst found that the child's underpants had seminal stains of group A secretor and numerous degenerated spermatozoa and that the blood sample and saliva sample of the appellant were of group A and group A secretor respectively. The Government Analyst was of the opinion that the child had taken part in a sexual activity with a group A secretor who could have been the suspect (appellant).

The appellant stated at the trial that after delivering cakes to a shop, he rode to the main road and when he heard screams he alighted from his bicycle. There was a woman screaming and people gathered. An elderly man who was cutting grass nearby told the crowd that he had not seen the appellant do anything and that both the appellant and the child should be taken to hospital for examination.

The trial magistrate after analyzing the evidence came to the conclusion that the evidence against the appellant was overwhelming and watertight. The High Court (**Mboghli Msagha, J.**) re-evaluated the evidence and concluded thus:

***“The learned trial magistrate believed the evidence of the prosecution witnesses; rejected the defence of the appellant and proceeded to convict him. The evidence of PW1, the mother of the complainant and that of the complainant (PW2) placed the appellant at the scene of the offence.***

***The appellant was known to both the complainant and her mother. It was during the day and there was no question of mistaken identity. The appellant was arrested soon thereafter and the samples of saliva and blood extracted from him were subjected to forensic examination by a Government Analyst. These samples matched the seminal and spermatozoa found on the under pant of a young girl, the complainant herein. Additionally, the complainant was examined by a doctor a day following the alleged offence and found to have been defiled. This further incriminated the appellant.***

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***The trial learned magistrate considered the defence of the appellant. The judgment says as much and in the end it was found to be merely evasive.”***

The appellant faults the judgment of the High Court on three main grounds namely; failure to evaluate the evidence of identification; failure to evaluate the medical evidence; and failure to consider the defence. He also complains that as a layman he did not adequately cross-examine the witnesses. He further submitted in the appeal that he was not well versed in Kiswahili language.

The appellant's complaint that he did not adequately cross-examine the witnesses as he is a layman or because he was not well versed in Kiswahili has no merit. Firstly, the two matters were not raised in the High Court. Secondly, the record shows that at the time of the plea he informed the court that he understood Kiswahili and Kikuyu. The record also show that the main witnesses – Florence and the child testified in Kikuyu language and that he cross-examined Florence but informed the court that he did not wish to cross-examine the child. The record further shows that the appellant cross-examined the two police witnesses and Scholastica but elected not to cross-examine the two expert witnesses - Albert and

Dr. Nzisa Liko. It is apparent that the appellant made a conscious choice which witness to cross-examine and the extent of such cross examination. It is evident that the appellant's constitutional right to fair hearing was not violated.

The appellant states in his grounds of appeal and in the written submissions that the charge was not proved beyond all reasonable doubt, that the scene being a public place there was possibility of the mistaken identity by the child; that Florence did not witness the commission of the offence; that failure to call members of public as witnesses to say how and why he was arrested left glaring doubts and that the medical evidence was not conclusive as a DNA test was not conducted on the child. The State counsel supports the conviction and sentence.

On the fact of defilement, Florence observed the child and saw tell-tale evidence of sexual assault. Further examination of the child by Scholastica and by Dr. Muhombe confirmed that the child had indeed been defiled. The trial magistrate considered the evidence and made a finding that the child had been defiled. The High Court re-evaluated the evidence and came to the conclusion that the evidence proved that the child had been defiled. It is not clear what the nature of DNA the appellant expected to be conducted on the child. The forensic evidence established that there were seminal stains and numerous degenerated spermatozoa on the under pant of the child. Further, the medical evidence proved not only that the hymen was torn, but also that there was presence of spermatozoa in her genitalia. The concurrent findings of the two courts below that the child was defiled was supported by ample medical evidence.

The evidence of the identity of the defiler was considered by the two courts below together with the defence of the appellant. There was concurrent finding of fact that it is the appellant who defiled the child. It is true that the identity of the defiler was mainly dependent on the evidence of Florence. The trial magistrate believed her entire evidence. The evidence of Florence was strong circumstantial evidence which irresistibly proved that the appellant is the one person who could have defiled the child to the exclusion of anybody else. The forensic evidence that the child's pant was stained with group A secretor and that the appellant belonged to group A secretor amply supported the circumstantial evidence. Again, the concurrent finding that the appellant defiled the child was supported by credible evidence.

Thus the concurrent findings of the two courts below, that the child was defiled and that it is the appellant who defiled the child, were based on sound evidence and cannot be faulted.

For the foregoing reasons, the appeal is hereby dismissed in its entirety.

***Dated and delivered at Nairobi this 18<sup>th</sup> day of December, 2014.***

***E. M. GITHINJI***

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***JUDGE OF APPEAL***

***J. W. MWERA***

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***JUDGE OF APPEAL***

***J. MOHAMMED***

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**