



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO.123 OF 2012**

**ALEXANDER MUKUNGA NZAVYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(APPEAL FROM THE CONVICTION AND SENTENCE OF THE ACTING*

*SENIOR RESIDENT MAGISTRATE (V. A. OTIENO)  
IN MWINGI CRIMINAL CASE NO.205 OF 2012)*

**JUDGEMENT**

The Appellant was charged, tried and convicted in the Senior Resident Magistrate's Court at Mwingi for the offence of defilement contrary to Section 8(1)(4) of the Sexual Offences Act No. 3 of 2006. He was thereafter sentenced to 15 years imprisonment. The Appellant was aggrieved by the conviction and sentence and has appealed to this Court.

The Appellant in his memorandum of appeal raised six grounds of appeal which can be consolidated into three grounds namely that the trial magistrate convicted him on inconsistent and uncorroborated evidence; that the prosecution failed to call crucial witnesses; and that his defence was not considered.

Mr. Mulama for the state opposed the appeal and contended that this being a sexual offence sometimes there is no independent witness other than the victim. He asserted that there was sufficient evidence on record to show that after the incident the complainant went and reported the incident to her mother and later identified the Appellant. On the Appellant's claim that he ought to have been taken for examination in order to establish if he had indeed committed the offence, Mr. Mulama submitted that the Appellant was arrested long after the incident and a medical examination would not have yielded any results.

I have, as required of me, submitted the evidence to fresh analysis. PW1 M U is the mother of the complainant. She told the Court that on 1<sup>st</sup> April, 2012 at about 6.00p.m. she sent her daughter to [particulars withheld] shopping centre. The complainant came back at about 8.00p.m. and on being asked why she had delayed, she reported that she had met a man on the way who took her to a thicket and defiled her. She told her mother that the man was based at the shopping centre. She led her mother and the assistant chief to the shopping centre and pointed out the Appellant who was in a group of other men. The Appellant was then arrested by the assistant chief.

The complainant who testified as PW2 told the Court that she was approaching their gate on her way home from the shops when the Appellant accosted her and took her to a thicket and defiled her.

PW3 Dr. Nyambati Ogeto examined the complainant and noted injuries in her vagina. He noticed dry

blood and bruises. The Court record does not indicate what PW3's conclusions were. The P3 form which was produced as an exhibit does not show the opinion of the doctor. He, however, noted that the complainant was mentally handicapped.

PW4 Police Constable Gregory Maingi was the investigating officer. He told the Court that age assessment was carried out on the complainant and it revealed that she was 16 years old. He produced the age assessment report as an exhibit.

In his defence the Appellant denied committing the offence. He told the Court that he had been framed because of a dispute he had with the complainant's mother over grazing grounds.

The way this case was prosecuted is quite disturbing. I do not understand why the doctor (PW3) never offered any opinion after examining the complainant. Penetration is best proved by medical evidence. The doctor did not tell the Court that there was penetration. There is no mention of spermatozoa being seen upon examination. The medical evidence placed before the Court did not prove that there was sexual activity. Presence of injuries is not by itself evidence of sexual activity. There was evidence from PW1 and PW3 that the complainant was mentally handicapped. Her evidence therefore needed corroboration and the medical evidence could have been of much use.

This is also one case in which the evidence of a crucial witness was left out. The evidence of the assistant chief who allegedly arrested the Appellant would have confirmed if indeed the complainant had identified the Appellant. The evidence would have also assisted the Court in understanding the circumstances surrounding the arrest of the Appellant.

There is an issue that was never raised by any of the parties but which I believe went to the root of the trial. What was the age of the Appellant? The complainant did not mention her age. Her mother testified that she was born in November, 1995 and she was 17 years old. The most perturbing thing is that the prosecution decided to ascertain the age of the complainant when the hearing of the case was at an advanced stage. On 17<sup>th</sup> September, 2012 the prosecutor applied for the assessment of the age of the complainant and the Court allowed the application. The age assessment document produced by PW4 is dated 26<sup>th</sup> September, 2012 meaning it was a product of the order of 17<sup>th</sup> September, 2012. Age is an important ingredient in a case of defilement and the investigating officer must establish the age of a complainant before even contemplating taking a suspect to court.

The trial against the Appellant was riddled with a lot of anomalies and it would not be safe to sustain the conviction and sentence. This appeal succeeds and the Appellant is set free unless otherwise lawfully held.

Orders will issue accordingly.

Prepared, Dated and signed this 27<sup>th</sup> November, 2013

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

Dated and delivered this 3rd day of December, 2013

**S.N.MUTUKU**

**JUDGE OF THE HIGH COURT**