**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 142 OF 2010**

***(An Appeal arising out of the conviction and sentence of Hon. D. M Ochenja (Principal Magistrate)***

***delivered on 3rd December 2010 in Kitale CM CR. Case No. 1768 of 2008)***

**BOSCO BARASA WANJALA..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

The Appellant, **Bosco Barasa Wanjala** was charged with the offence of **defilement of a child** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act.** The particulars of the offence were **that on the 1st day of August 2008** at **[Particulars withheld]** in **Trans Nzoia County**, the Appellant using his genital organ caused penetration to the genital organ of **VN**, a child aged eight (8) years old. He was alternatively charged with the offence of **committing an indecent act with a child** contrary to **Section 11(1) of the Sexual Offences Act.** The particulars of the offence were that on the 1st day of August 2008 at [particulars withheld] in Kwanza District within Rift Valley province, the accused unlawfully and indecently assaulted VN by touching her vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged and sentenced to serve twenty years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. In his amended grounds of appeal, he is aggrieved that the learned trial magistrate failed to take note that the charge was premised on a defective statement of information. He took issue with the learned trial magistrate for failing to find that the important element of age was not proved. He faulted the trial magistrate for convicting him without the doctor's evidence. He was also aggrieved that his defence was rejected by the trial court without giving cogent reasons. In summary, he was aggrieved that he had been convicted on the basis of evidence that did not establish his guilt beyond any reasonable doubt.

During the hearing of the Appeal, the Appellant presented to the court written submissions in support of his appeal. He urged the court to allow the appeal.

Mr. Omooria for the State opposed the appeal. He submitted that the prosecution had established its case on the charge of **defilement** to the required standard of proof. He submitted that on the 1st August 2018 at [particulars withheld] in Kwanza the Appellant defiled a child aged eight (8) years. The prosecution brought several witnesses. The birth certificate proved the age of the child. Penetration was proved, and a P3 Form produced. The facts were well corroborated by the evidence of the complainant. She said she was pulled into a maize plantation and sexually assaulted by the accused.PW3 heard the screams from the complainant and when the Appellant saw PW3, he fled.PW4 examined the complainant and found she had been defiled.

On the issue of the Appellant's identity, it was submitted that the complainant knew the accused as Bosco. She knew where he resided. There was no issue of mistaken identity. There were no inconsistencies in evidence. The evidence was cogent. The Appellant was placed at the scene as the person who committed the offence. In summary, he submitted that the ingredients of the offence had been established. He urged the court to dismiss the appeal and uphold the conviction and sentence.

The complainant was eight (8) years at the time the offence took place on the 1st day of August 2008. At the material time, the Complainant lived in Laini Moja with her parents. She testified that she had been sent to take flour to the house of one Alex Wanyonyi in the company of her brother Japheth Nyongesa. On their way back, they saw the accused from a maize farm. He grabbed her and the brother and pulled them into the maize plantation. It was around 6.30 P.M. While in the farm, the Appellant ordered PW2 to sit down and ordered the Complainant to kneel down after which he removed her underwear. The Appellant removed his long trouser and started doing bad things (tabia mbaya) to her. She further went on to state that the Appellant removed his thing and inserted into hers. She felt a lot of pain and the Complainant and her brother screamed for help. Later, PW3 Victor Barasa came to the scene and found the accused trying to zip his trouser and the Appellant fled the scene. Her mother came to the scene and took the complainant from the ground. They went home. The following day, the mother

took her to the police station where they reported and she was taken to hospital where she was examined and treated. She identified the Appellant at the dock by pointing at him as the person who had defiled her. On cross examination, the complainant stuck to her testimony.

PW2 Japheth Nyongesa in his unsworn statement stated that he was five (5) years old. He testified that on the fateful date, the Appellant pulled him and the Complainant into a maize plantation farm where he did tabia mbaya to the complainant. The Appellant laid on top of the complainant. He screamed for help and their mother came for their rescue. Their mother pulled the complainant from the ground after which they went home. On cross examination PW2 stuck to his testimony stating that the Appellant grabbed him together with the complainant and pulled them to the maize farm where he did tabia mbaya to the Complainant.

PW3 Victor Baraza stated that on the fateful date, PW1 and PW2 had been sent by their mother to take flour to the house of Alex at around 6.00 p.m. Later, he heard PW1 and PW2 screaming for help. The screams were coming from the maize plantation. He rushed to the farm where he found the accused laying on top of the complainant. Upon seeing PW3 the Appellant zipped his long trouser and ran away. PW3 noted that the Appellant had sexually assaulted the complainant. PW3 identified the Appellant. He knew him by his names. He used to sell ground nuts.

PW4 AN the Plaintiff's mother testified that she had sent the Complainant and PW2 to take flour to their brother's house. She later heard PW2 screaming for help. PW2 shouted her name and he was saying that the Complainant was been killed in the maize plantation. She sent her son Victor to find out what had happened. She heard Victor saying that Bosco was harming the complainant. She rushed to the scene and found the complainant who informed her that the Appellant had defiled her. She examined the complainant and found that she had been defiled. She reported the matter to the police and escorted the complainant to Endebess Hospital where she was treated and discharged. PW1 was later issued with a P3 form which was duly completed and returned to the police station.

On cross examination by the accused, she testified that she had sent her children to take flour to their elder brother Alex. She later heard screams and send her son Victor PW3 to find out what was happening. she also rushed to the scene. She found the complainant lying down. She had been defiled. She had some whitish discharge on the left thigh and on her pants. She picked the complainant and rushed her home. She reported the incident to the village elders who examined the complainant. She had send her son to find out what was happening because she thought the children were playing. The Appellant was identified by her children. She also stated that the complainant was 7 years at the time of the incident but she was 8 years at the time of the trial.

PW5 P.C Esther Bitok, was the Investigating officer attached to Endebess Police station Gender Office. A certain woman came with a child VM who was aged 8 years. The mother told her that the child had been defiled by the Appellant. At the time of the incident, the mother has sent the complainant somewhere on the way where she was caught up by the Appellant who pulled her into the maize plantation and defiled her. The complainant's clothes were soiled in the course of the incident and she was given the soiled blouse and skirt. She produced the skirt and blouse as MFI-2 and MF1-3 respectively. On cross examination, by the accused person, she confirmed that the Complainant was brought to the station on 2nd August 2008.She was given the Complainant's blouse and skirt. She was also given the complainant's panties. She did her investigations and established that the Appellant indeed committed the offence. She stated that the Appellant was brought to the Police station on the 2nd August 2008. The children who were with the complainant at the time of the incident also came to the station. She further stated that the children who were with the complainant at the time of the incident implicated him.

When the Appellant was put on his defence, he testified that he was a farmer from Japata in Chepchoina area. He stated that the Complainant's mother had clashed with his mother. He also stated that on the 2nd August, 2008, he was at home. At around 2.00 p.m., he was arrested after been identified by the complainant's mother. He was then escorted to Chepchoina police post for one day. The following day, he was escorted to Endebess Police station Kshs. 2500 stolen from him. He was never told what offence he had committed. The money was later given to the complainant's mother. He was later charged with the present offence. He denied committing the offence.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to fresh evaluation with the ultimate objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither saw nor heard the witnesses as they testified and must therefore give due regard in that respect (See **Okeno vs Republic (1972) EA 32).** The issue for determination by this court is whether prosecution did indeed establish the guilt of the Appellant to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial court in light of the submission made by the parties to this appeal. It was clear to this court that the prosecution did indeed establish the guilt of the Appellant to the required standard of proof beyond any reasonable doubt. In a case of defilement, the prosecution is required to establish that there was penetration, that the victim of the sexual offence was a child and finally the identity of the perpetrator.

**Section 2(1)** of the **Sexual Offences Act** defines penetration as ***''the partial or complete insertion of the genital organ of a person into the genital organs of another person.''***

In the present appeal, proof of penetration was established by the testimony of the Complainant.

She testified that; "**the accused removed his long trouser and started doing bad things (tabia mbaya) to me. He removed his thing and inserted into mine. I felt a lot of pain…."**

The Court of Appeal in **Kivuva Vs Republic** [2015] eKLR held as follows as regards specificity required in the proof of penetration:

> **"Evidence of sensory details such as what a victim heard, saw, felt, and even smelled is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic strengthens the credibility of any witness' testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this**

**appeal."**

The complainant was defiled in the presence of PW2 who was her brother and the trial court observed that there was no evidence of bad blood established between the Appellant and the two prosecution witnesses. There was also no evidence that the two had been coached by their mother to give false testimonies against the accused.

**Section 124 of the Evidence Act Cap 80, Laws of Kenya provides;**

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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."***

From a plain reading of the above section, it is clear that corroboration is not a requirement. All that is required is for the Court is to record the reasons for believing the victim where the only evidence is that of the alleged victim.

The Appellant was aggrieved that the trial magistrate convicted him without the doctor's evidence. In **George Muchika Lumbasi V Republic [2016] eKLR** the court addressed itself thus;

> **"Despite the existence of Section 36 it is now settled law that sexual assault is proved by evidence and not by medical examination. Evidence by the victim or even circumstantial evidence is enough to prove rape or defilement as the case may be. In the case of Flappyton Mutuku Ngui V. Republic [2014] eKLR while considering a similar issue of medical re-examination in a defilement case, the court of Appeal found that there was sufficient medical evidence in support of PW2'S testimony which was trustworthy as to the person who had defiled her**."

In the present appeal, it was clear that penetration was established by the testimony of the complainant.

The second issue that the prosecution was supposed to establish is the age of the complainant. From the charge sheet, the complainant was said to be eight (8) years old at the time of the sexual assault.PW4 the Complainant's mother testified that her child was seven years at the time of the incident and was eight (8) years at the time of trial. The trial court conducted *voir dire* examination on the complainant and she claimed to be 10 years old. The trial court applied the provisions of **Section 124 of the Evidence Act** and concluded that the complainant was a female child of tender years. She was aged eight (8) years old and therefore gave a sworn statement.

In the Ugandan Court of Appeal case of ***Francis Omuroni –vs- Uganda, Criminal Appeal No. 2 of 2000***; it was held that: -

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."***

The **Court of Appeal** of Kenya has also expressed itself on the issue of age assessment. In ***Criminal Appeal No. 61 of 2014; Richard Wahome Chege -Vs- R,*** the Court of Appeal sitting in Nyeri *(Visram, Koome & Otieno-Odek JJ.A)* found the evidence of the complainant's mother to be sufficient proof of age. The learned Judges expressed themselves as follows;

> ***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant and the complainant herself."***

This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of **Section 2(1)** of the **Children Act.**

As regard the identity of the perpetrator, this was not in dispute. He was a well-known person to the witnesses who easily recognized him. It is a well settled principle in criminal law that recognition is better than identification. There was no doubt that the complainant properly identified the Appellant as the perpetrator of the sexual assault. The Appellant was known to the complainant prior to the sexual assault. She knew where he lived and they were neigbours at home. He even visited their home once and was known to sell groundnuts.

This court is of the view that the provisions of **Section 124** of the **Evidence Act** apply in this case. The complainant was telling the truth. The evidence of the complainant was credible. The evidence was consistent.

This court, having re-evaluated the evidence adduced before the trial court and the submission made on this appeal, cannot see any reason to disagree with the finding of the trial court. This court holds that the prosecution proved the charge of defilement to the required standard of proof beyond any reasonable doubt. The defence of the Appellant did not dent the otherwise strong evidence adduced by the prosecution witnesses.

Having carefully considered the evidence on record, re-evaluated it, considered the authorities and applied the law, this court arrives at the conclusion that this appeal lacks merit and is hereby dismissed. The conviction and the sentence of the trial court is hereby upheld. The sentence was legal since the same is provided by statute. It is so ordered.

**DATED** at **KITALE** this 23rd day of **June, 2021.**

**L. KIMARU**

**JUDGE**