**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 22 OF 2018**

**SAMUEL KIBET NG'ETICH……APPELLANT**

**VERSUS**

**REPUBLIC……..RESPONDENT**

***(Being an appeal from the original conviction and sentence in criminal case number 136 of 2016 in the Principal Magistrate's Court at Eldoret – H. O. Barasa (PM) on 13th March, 2018)***

**JUDGMENT**

1. The Appellant Samuel Kibet Ng'etich was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 12th June, 2016 at [Particulars withheld] Village in Wareng District within Uasin Gishu County intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of MA(*Name reducted*) a child aged 6 years. In the alternative, the Appellant faced charges of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that on 12th June, 2016 at [Particulars withheld] Village in Wareng District within Uasin Gishu County the Appellant intentionally caused his penis to come into contact with the vagina of the said MA.

2. The gist of the prosecution's case was that the Complainant, who was a 6 year old minor at the time, knew the Appellant who was their neighbour at the time of the incident. That on the fateful day, the appellant took the complainant to his house where he defiled her. He thereafter let the minor go and locked himself up in the house. The complainant informed PW1 her mother of the incident and she proceeded to confront the appellant in his house. She later on reported the matter to the police and the appellant was arrested. The complainant was taken to Kaplelach Hospital for treatment and later referred to Moi Teaching and referral Hospital.

3. The Appellant when placed on his defence gave an unsworn testimony in which he told the court that on 12th June 2016 he was not at home and only arrived at 10.00 pm. Further, that on 13th June, 2016 the complainant's mother came to his house to get some milk. He averred that the previous day, the complainant's mother had come to ask for milk on credit and he chased her away. He blamed his arrest on PW1 whom he alleged had framed him in retaliation for the report he made to 'nyumba kumi' (village elders) for child neglect. The appellant was arraigned in Court for the offence herein. He was tried and subsequently convicted on the main charge of defilement and was sentenced to life imprisonment.

4. Aggrieved by both the sentence and conviction, the Appellant filed the present appeal in which he contended that his conviction was based on a defective charge sheet and hearsay evidence that was not proved in court. He contended that the charges levelled against him were not proven. He filed supplementary grounds in which he averred that he was not given a fair trial and the prosecution did not prove their case beyond reasonable doubt, and that penetration was not proved. He asserted that the identification and recognition of the appellant was not sufficient and that the trial magistrate did not put into consideration the appellant's defence.

5. Learned state counsel Ms. Sakari opposed the appeal on behalf of the Respondent stating that the prosecution had proved its case to the required standard, and urged the court to dismiss the appeal and uphold both the conviction and sentence.

6. The first ground as argued by the Appellant is that the trial court failed to evaluate the evidence produced, and simply reproduced the evidence on record, upon which it made some brief observations and reached a conclusion. Further that it was discriminative to charge the appellant with an alternative charge should the evidence of defilement not be proven and further that there is no measure for indecent act. This he argued led to a miscarriage of justice.

7. On the second ground, the Appellant argued that the evidence tendered by the prosecution was insufficient and inadequate to sustain a conviction. He asserted that the evidence of PW1 could not be trusted for having inconsistencies especially on the reasons advanced why the bloody underpants' referred to were never produced in evidence and why she did not report to the police on the material day of the incident. Further, the appellant questioned why the complainant did not testify on several occasions after the *voir dire* examination had been

conducted. It was his submission that the conduct of the complainant plays a fundamental role in a defilement case. It was his case that from the conduct of the complainant, she seemed to have been forced to testify by PW1 for unknown reasons.

8. The appellant further submitted that the identification and recognition of the appellant by the complainant was obvious because they were used to each other. The trial court should therefore not have taken this into consideration in reaching a guilty verdict.

9. It was a ground of appeal that the trial court failed to consider the appellant's defence entirely. The appellant asserted in his evidence that PW1 had instigated this case in retaliation, due to a report he made to the Village Elder 'nyumba kumi' for child neglect and this was never considered by the court. In his view, this was a grave error which lead to the conclusion that he was guilty.

10. Ms. Sakari for the respondent submitted that the prosecution had conclusively presented evidence that proved the ingredients of the charges levelled against the Appellant. She stated that the Court considered the evidence on the age of the minor, evidence on whether there was penetration and evidence on the identification of the assailant. She submitted that it was the evidence of Pw1 that the complainant was born on 26th June, 2011 and was defiled on 12th June, 2016 and was aged 6 years at the time of the offence. She relied on the case of **P.O.K v Republic Appeal No. 35 of 2009,** where the court held that where documents are produced as proof of age, the trial court must also observe the child to determine the age. Further that the Children's Act defines a child as anyone below 18 years of age.

11. On the second ingredient, learned counsel submitted that complete or partial penetration had been proven. She stated that the complainant described how she went to the appellant's house who undressed her and undressed himself and did what was described as 'tabia mbaya' (bad manners). She further stated that PW3 the Doctor, examined the complainant the day after the attack and it was his opinion through his report which was produced as evidence that the minor had been penetrated.

12. On the third ingredient of identification, leaned counsel submitted that the complainant knew the appellant who was their neighbour and correctly identified him. She further stated that this was confirmed by the appellant that he and the complainant were known to each other. She asserted that the complainant pointed to her genital area when she described what the appellant had done to her.

13. On the ground that the charge sheet was defective and not properly before court, learned counsel for the respondent submitted that the charges against the appellant were properly framed to show that he was charged under **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. He stated that the charges were read to the appellant in the language that he understood. It was her submission that the evidence against the appellant was overwhelming and prayed that the appeal be dismissed entirely.

**14.** In determining this appeal, this court being the first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32,** where the Court of Appeal stated that:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."**

**15.** In line with the foregoing, this Court in determining this appeal has to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved as required by law beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the oral submissions.

**16.** The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them singly.

**17.** The age of the complainant was settled by the health clinic booklet and birth notification presented by the complainant's mother PW1 indicating that the complainant was born on 26th June, 2011. That being so the complainant was shy of her 6th birthday when the incident took place. I note that her age was not disputed by the appellant. The complainant was hence a child of tender years within the meaning of the law.

**18.** On the issue of penetration, **Section 2** of the Sexual Offences Act defines penetration as:

> **'the partial or complete insertion of the genital organs of a person into the genital organ of another person.'**

This position was fortified in the case of **Mark Oiruri Mose vs R [2013] eKLR** when the Court of Appeal stated thus:

> **'…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ….'**

Later the Court of Appeal, then differently constituted, in the case **of Erick Onyango Ondeng v. Republic [2014] eKLR** held as follows on the aspect of penetration:

> **"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."**

19. The record before me shows that when the complainant testified she told the court that the appellant herein who was known to her removed her clothes and also removed his own clothes and performed an act which she called 'tabia mbaya'(bad manners) on her. She indicated the area upon which the act had taken place by touching her vaginal area. The minor repeated this evidence on cross-examination. Dr Eunice Temet (PW3) of Moi Teaching and Referral Hospital produced a P3 report on behalf of Dr Yatich who had examined the complainant on 1st June, 2016. His finding lent credence to the evidence of the Complainant that she had been defiled. It was his finding that the complainant had fresh posterior porched tear suggestive of penetration. From the foregoing evidence, I am satisfied that penetration was proved.

20. On identification, PW1 told the court that she had returned home at 7pm on the fateful day to find her daughter crying. Upon inquiring, the minor told her that she had been defiled by Samuel 'Macho nne' who was their neighbour. I am persuaded that the word 'defile' being technical, was her own translation of what the minor told her. The important thing is that the minor stated straight away that it was Samuel 'Macho nne' who did "bad manners'' to her. In her evidence in Court, the minor said, "**I know who Macho nne is. He is over there (points at the accused) I know what he did to me. He did bad manners**"

21. The record therefore indicates that the Complainant stated that the Appellant was a person known to her and the appellant admitted in his evidence that they were known to each other. It was therefore a matter of recognition as opposed to identification. In the case of **R -vs- Turnbull & Others [1976] 3 All ER 549** the learned Judges stated on page 552 as follows:

> ***"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

22. Though young, the court found that the complainant was intelligent enough and appreciated the need to speak the truth. The complainant recognized the appellant as 'macho nne' and stated that he was well known to her. It is therefore not in doubt that the Appellant was positively identified.

23. The upshot of the foregoing is that all the three ingredients needed to sustain a conviction in a charge of defilement were conclusively proved by the prosecution before the trial court.

24. The Appellant argued that the charge sheet was defective for including an alternative charge of indecent act with a child. I have perused the charge sheet presented at the trial and I find that the charges against the appellant were properly framed. The prosecution is at liberty to make the decision whether to charge or not to charge an individual and the number of charges to be made in accordance with the provisions of the law applicable.

25. The Appellant complained that his defence was not considered and the evidence presented by the prosecution was not sufficient to sustain a conviction. The record shows that the appellant gave unsworn testimony which the trial court analysed and made a finding that his defence that he was framed by PW1 did not shake the prosecution's case against him. The trial court went further to state that the evidence against the appellant that he was the perpetrator of the offence against the complainant was not shaken by the defence raised.

26. The appellant averred that failure by the complainant to testify on several occasions even after the *voir dire* examination had been conducted was sufficient proof that she had been coached and was not telling the truth. The court in its determination, made a general observation that evidence tendered by children must be regarded with utmost care. From the record, indeed the trial failed to begin on several occasions due to the refusal by the complainant to testify. However, when she testified, her evidence was not shaken in any way even during cross –examination. It must be remembered that the Complainant was a child of tender years, but was courageous and forthright in her evidence. The argument by the appellant therefore fails.

27. Consequently, I find that the trial court, directing itself to the evidence before it and the law applicable, reached the correct conclusion. The conviction entered against the Appellant was well founded. This appeal is therefore found to be unmeritorious and consequently dismissed.

**PREPARED, DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2020.**

**L. A. ACHODE**

**HIGH COURT JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF OCTOBER, 2020.**

**OLGA SEWE**

**HIGH COURT JUDGE**