REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH COURT CRIMINAL APPEAL NO. 107 OF 2017

SIMON KAUKA STEPHEN......................APPELANT

VERSUS

REPUBLIC...RESPONDENT

(An Appeal from Conviction and sentence in Iten PMCC No.1 of 2016 delivered on 17th October, 2017 by Senior Principal Magistrate H. M. Nyaberi))

J U D G M E N T

1. The Appellant **SIMON KAUKA STEPHEN** was convicted on a charge of defilement Contrary to Section 8 (1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006 and sentenced to serve life imprisonment. The particulars of the charge states that on 12th January, 2016 at unknown time in the morning within **ELGEYO-MARAKWET** County, he intentionally and unlawfully committed an act, which caused penetration with his genital organ, namely penis into the genital organ namely vagina of **"PJK"*** a girl child aged 4 ½ years. The appellant denied the charge.

PW.1 **(JK)** was the mother of **PJK** and told the court that on 01/01/2016 at about 9.00am while inside her house with **PJK,** the latter informed her that she was experiencing pain on her genitalia. She examined the child's genitalia and noted that it appeared reddish and that some whitish discharge. The vaginal canal also appeared enlarged.

PW.1 asked the minor what had happened and the child narrated to her how **SIMON** had called her in the morning and requested her to accompany him so that he could give her a panga. When they got to his house, he closed the door, removed his and her long trousers, then he sat on a chair. He then carried the child and placed her on his thigh and inserted his penis into her vagina. She tried to block his penis but the appellant got hold of her hand, and when she began to cry, he blocked her mouth telling her to wait a little. When he finished his act, he wore his trouser and gave her strong tea.

Before the appellant called the minor, she was playing with **DJ*** who confirmed seeing the child being called to accompany the appellant to his house. PW.1 alerted the village elder **WILLIAM BETT** who advised her to take the child to hospital. However, since she did not have means, she took her to **CHEBIEMIT** hospital where the child was examined and given drugs to prevent her from venereal diseases. The next day a report was made to police. PW.1 described the accused whom she knew as a neighbour and her frequent customer. The minor PJ (PW.2) testified confirmed the version of events as narrated by her mother saying,

> "We went together and upon entering the house, he closed the door and removed my long trouser. He also removed his long trouser. He sat on the chair. He carried me and put me on his thighs. He put his penis into my vagina. I told him I was feeling pain. I cried out. After he left he gave me black tea, and told me to go home."

On Cross-Examination, PW.2 maintained that the incident took place inside the appellant's house and denied suggestion that she had been coached on what to say in Court. DJ (PW.3), the other minor aged 10 years and a sister to PJ to the trial court that were at the road near their home, she saw the appellant beckoning to PJ who was playing with other children. She saw them walk away together towards his house. PW.3 this went home and PJ arrived 20 minutes later. However DJ did not inform his mother then what she had seen PJ going with the appellant; she was present at about 7.00 pm PJ began complaining to their mother, about pain in her private parts.

DANIEL TANUI (PW.4) who examined the minor at **CHEBIEMIT** Sub-County Hospital said she was a bout 4 ½ years and upon examination found that the vulva was oedetamous (swollen) and tender. There were vaginal lacerasion and the hymen was broken. He concluded that the child had be defiled. He also examined the Appellant but made no significant findings. It is significant to note that both examination were conducted 3 days after the event. PC. **STEPHEN ODHIAMBO** (PW.3) who investigated the matter confirmed that the report about the incidence was made on 2/1/2016 in the evening by the Area Chief. The child's mother went to the Police Station the

following day. The accused was taken to the Police Station on 2/1/2016 have been re-arrested by PW.5.

PW.5. obtained the child's immunization/health records (produced as Ex.1) which indicated that she was born on 01/03/2011. The appellant's defence was that he had escorted his pregnant wife to Kapsowar Hospital on 31/12/2015 and stayed with her until the night of 01/01/2016 when she delivered. On 2/1/2016, he went home to look for money and was arrested at night the charged.

The Trial Magistrate in his Judgment noted that the minor gave a detailed account of how the Appellant called her away from her friend and what took place. Further that PW.3 corroborated the evidence to the extent of seeing the child leaving in the company of the appellant, heading towards his house. He pointed out that the appellant was well known to the witnesses as he was their neighbour. The Trial Magistrate held that the clinical findings confirmed what PW.2 stated.

The Appellant's defence was considered and rejected as an afterthought which was never raised on cross-Examination of the prosecution witness. He noted that in the submission, the appellant pointed out that there was contradiction on the prosecution case because when the mother in her statement to police recorded that the incident occurred at noon, in court, she claimed it was 9.00 am. However, the Trial Magistrate said this was a minor contradiction which did not dislodge all the other evidence presented by prosecution. The defence was thus rejected.

Being aggrieved by the decision, the appellant filed on his amended grounds that:-

(1) Trial Magistrate failed to consider that the Medical Report did not link him to the offence.

(2) No authorized documents were presented in Court to prove the charge and it was not established whether the minor was 4 ½ or 6 years old.

(3) There were contradictions in the prosecution case.

The appellant in his written submissions argued that although the P.3 Form indicated that an age assessment was done which showed that the minor was 4 ½ years old; no birth certificate or baptismal card was produced strangely enough in the submission, he then acknowledged that the minor was actually 4 ½ years; but says when the mother testified she said;

> "She is currently 6 years"

On this limb, Ms Oduor on behalf of the State submitted that the child health child was corroborated made by the clinical officer in the P.3 form and the minor's mother that at the time of the offence, the child was 4 ½ years. The child Health and Nutrition Card indicated that the minor was born on 01/03/2011. The evidence consistently repeated and confirmed that the child was 4 ½ years. Her mother PW.1 however claimed she was 6 years as at the date she was testifying – I do not think that was a fatal constraint because it still placed the child under 10 years and fell under the age bracket provided by Section 8(1) as read with 8(3) of the Sexual Offences Act.

PENETRATION:- As regards proof of the child having been defiled, the child vividly described how the appellant removed her trouser as well as his, placed her on his thigh and inserted his male genital organ into hers.

-She felt pain. This was corroborated by her mother who on a physical examination noted that the vaginal canal appeared reddish and was enlarged with apparent some suspicious whitish discharge. These findings were further confirmed by the medical evidence. Penetration which is a key ingredient was sufficiently established.

IDENTIFICATION:- It was not disputed that the appellant was well known to the minor and as Ms Oduor on behalf of **DPP** pointed out, the offence took place in broad daylight. Indeed, the other child DJ confirmed seeing PJ accompany the appellant to his house. The appellant insisted on his defence that he was framed up and had an alibi defence. Mrs. Oduor submitted, and I confirm that this was in afterthought which was never raised in Cross-Examination of the prosecution witnesses. In any event, he did not dislodge the evidence by prosecution witnesses thus defence was properly rejected by the Trial magistrate.

The upshot is that the Trial Magistrate properly considered and analysed the evidence and came to a safe conclusion for conviction. The conclusion is upheld. The sentence was as provided by law and the same is confirmed. The appeal has no merit and is dismissed.

DELIVERED and DATED this 15th day of MARCH 2019 at ELDORET

H. A. OMONDI

JUDGE