REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.123 OF 2017

(Appeal Originating from Nyahururu CM's Court SOA No.1/2015 by: Hon. A.W. Mukenga – R.M.)

BENSON KARIUKI MACHARIA.....APPLICANT

V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, **Benson Kariuki Macharia**, was convicted for the offence of ***defilement of a girl contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act***.

The particulars of the charge are that on 21/8/2015 at [particular withheld] Area in Subukia, intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of **RWM**, a child aged 6 years.

In the alternative, the appellant faced a charge of ***committing an indecent act contrary to section 11(1) of the Sexual Offences Act*** in that on 21/8/2015, at [particular withheld], intentionally and unlawfully caused his penis to come into contact with the vagina of **RWM**, a child aged 6 years.

Upon conviction on the main charge, he was sentenced to serve life imprisonment.

Being dissatisfied by both the conviction and sentence, the appellant filed this appeal through the firm of Wabandi Advocate.

The grounds of appeal filed on 2/9/2016 are as follows:

1) That the court relied on contradictory evidence in convicting the appellant;

2) That the prosecution failed to call crucial witnesses;

3) That the appellant was convicted based on a defective charge;

4) That the court based the conviction on insufficient evidence.

The appellant prays that the appeal be allowed, conviction quashed and sentence set aside. Mr. Gacheru, counsel also filed submissions in support of the grounds.

This being the first appeal, it behoves this court to examine all the evidence tendered in the trial court, evaluate and analyze it and thereafter make its own conclusions and determinations. See ***Okeno v Republic (1972) EA 32***.

The prosecution called a total of 5 witnesses. **PW1 RWM** was the minor, who after undergoing *voire dire* examination, was found not to understand the meaning of the oath but was intelligent enough to give unsworn evidence. PW1 identified the appellant as Ben and that she fears the appellant because he did '*tabia'* to her; that he promised to give her sugarcane, called her to his shamba when she was grazing cattle, did '*tabia'* to her while she lay down on her back; that he used the thing between his legs; that her grandmother called her and she went and informed her grandmother and her uncle M what had happened to her. She was taken to hospital and treated.

PW2 S N recalled the 21/8/2015, he called the niece, the complainant; that PW1 emerged from the maize plantation. He noticed that there was dust on her clothes and arms and he told the grandmother to examine her; that the grandmother informed him what the child had said, that Ben did '*tabia*' to her; that the child was taken to hospital and appellant was arrested after 2 days.

PW3 M W is PW1's grandmother. She told the court that on 21/8/2015, she took PW1 to the neighbour to graze cattle with N and went back home to prepare to go to a funeral. On her way to the funeral, she found the appellant talking to PW1 and that the appellant said the child wanted sweet potatoes; PW3 told PW2 to call the child and when she asked PW1 where she had come from, she said she had been doing *'tabia'* with Ben. PW3 went to the funeral wondering what 'tabia' meant and later took PW1 to [particular withheld] where they were referred to Subukia where she was treated and the doctor referred them to the police station. The appellant could not be found for 2 days but was arrested.

PW4 Milka Cherot, a Clinical Officer from Subukia Sub County Hospital attended to PW1 on 24/8/2015. She found PW1 to have a discharge in her private parts; the hymen was broken but no injuries on the private parts and there was a smelly discharge from the private parts; that the laboratory test revealed she had bacteria and she was put on treatment. PW4 formed the view that the girl was defiled.

PW5 Cpl Joseph Maketo of Subukia Police Station was at the police station on 24/8/2015 when PW1's grandmother, accompanied by PW1, reported that PW1 had been defiled. A report had earlier been made at Rock Police Post. She was referred to Subukia hospital for treatment.

When called upon to defend himself, the appellant testified on oath and denied the offence; that police officers found him at his home, tied him up, he was taken to Subukia Police Station and later to hospital.

In an offence of defilement, the prosecution has to prove:

1) Penetration;

2) Age of the complainant;

3) Who is the perpetrator.

Penetration is defined under section 2 of Sexual Offences Act "***penetration" means the partial or complete insertion of the genital organs of a person into the genital organ of another person***".

In this case the complainant was a child of tender age. After a *voire dire* examination, the court was of the view that she did not know the importance of oath but was intelligent enough to know the importance of telling the truth and the court directed that she would give unsworn evidence. However, when she testified, it indicates that she was sworn and was subjected to cross examination.

From the outset, PW1 told the court that she feared the appellant because he did '*tabia*' to her. She explained that the appellant called her to his shamba in the pretext that he was going to give her sugarcane but that he did '*tabia*' to her private part with this thing which is between his legs, as she lay on her back. PW1 said that her grandmother called her and she went. PW2 and 3 said that when PW1 emerged from the maize plantation where the appellant was, she was covered in dust and that made them suspicious and that is when PW1 told PW3 that appellant did '*tabia*' to her. PW1 was examined on 24/8/2015. Though no injuries were found to her private parts, she was found to have a smelly discharge, her hymen was missing and she had an infection of STI for which she was treated. Though the prosecution did not follow up on this evidence, in cross examination of PW4 by appellant, she confirmed that the appellant was examined and found to have a sexually transmitted disease.

In cross examination, PW5 confirmed that when taken to hospital, the appellant was found to have a disease. From the findings of PW4 coupled with the testimony of PW1, 2 and 3. I have no doubt and I do agree with the trial court that PW1 was defiled by the appellant.

PW1, 2 and 3 identified the appellant as a close neighbour. The appellant did admit to that fact and that he used to get milk from the PW1's home. There is no doubt that PW1 knew the appellant. The incident occurred in broad daylight. The appellant also admitted that there was no grudge or dispute between the appellant and PW1's family. In cross examination, PW1 denied that her grandmother told her what to tell the court and implicate the appellant.

I am satisfied beyond any doubt that PW1 positively identified the appellant as the perpetrator, a person who was very well known to her.

PW1 was the only witness to the offence. Section 143 of the Evidence Act provides that a fact may be proved by the evidence of one witness, unless a statute specifically provides to the contrary.

PW1 is a minor and by the amendment to Section 124 of the Evidence Act, corroboration is not a prerequisite to relying on evidence of a minor.

The Section provides:

"Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings. Court is satisfied that the witness is telling the truth".

The trial court believed the testimony of the complainant who knew the appellant before and described in detail what the appellant did to her.

The appellant also complained that some crucial witnesses, i.e. N and M were not called. PW1 told the court that she had been grazing goats with N when the appellant called her and then defiled her in the maize plantation. PW1 also told the court that after the incident, she

informed her uncle M. Though PW2 is PW1's uncle, the court cannot tell if he was the M referred to. However, the said M did not witness the offence. If he had been called as a witness, he could only tell court what he was told. Similarly, PW1 did not tell court that N witnessed what happened to her because she was called to where the appellant was, in his farm. It is the prosecution which determines which witnesses to be called in support of their case. The prosecution's failure to call a particular witness can only be faulted if they failed to call witnesses because the evidence may have been adverse to their case.

In ***Mwangi v Republic (1984) KLR 595***, the Court of Appeal held:

> ***"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive".*** See also ***Bukenya v Republic (1973) EA 549***.

M did not witness the offence and all he would have told the court would be hearsay. Similarly, N did not witness the incident and failure to call the two witnesses is not fatal to the prosecution case.

I find that there is overwhelming evidence on record that it is the appellant who defiled the complainant and the conviction was sound and this court has no reason to interfere.

PW3 told the court that PW1 was born on 2/9/2009 and her health card was produced in evidence (***Ex.No.1***) which confirms the state of birth to be 2/8/2009. The age was estimated to be 6 years as per P3 form. The complainant was therefore 6 years at the time she was defiled, PW1's age was proved. Under Section 8(2) of Sexual Offences Act, a person found guilty of defiling a child under 11 years of age is liable to a sentence of life imprisonment. The sentence is mandatory. The trial court arrived at the proper finding and this court cannot interfere.

The appeal lacks merit. It is hereby dismissed in its entirety.

Dated, Signed and Delivered at *NYAHURURU* this *26th* day of *January*, 2018.

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R.P.V. Wendoh

JUDGE

Present:

Ms. Rugut – for prosecution

Mr. Chege - for the appellant

Mr. Soi - court assistant

Present – appellant