



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 55 OF 2015**

***(An Appeal arising out of the conviction and sentence of Hon. E.O. Juma – Ag.SPM delivered on 27<sup>th</sup> March 2015 in Kibera CMC. S.O. Case No.16 of 2014)***

**HAKI GEORGE NGUZO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Haki George Nguzo, was charged with two (2) counts of the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offences were that on 12<sup>th</sup> November 2013 at Kibera within Nairobi District in Nairobi County, the Appellant defiled M M and J N, girls aged 9 and 10 years respectively by causing his penis to penetrate their vagina. He was in the alternative charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the same **Act**. The particulars of the offence were that on the same date and in the same place, the Appellant caused his penis to come into contact with the vagina of J N, a child aged 10 years, and M M, a girl aged nine (9) years. When he was arraigned before the trial magistrate court, the Appellant pleaded not guilty to the charges. After full trial, he was convicted on one (1) count of the offence of **defilement** and sentenced to serve life imprisonment. The Applicant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for convicting him on the basis of insufficient and incredible evidence of the prosecution witnesses. He complained that a DNA test was not carried out on him to link him with the offence. The Appellant also faulted the trial magistrate for failing to comply with the provisions of **Section 169(1)** of the **Criminal Procedure Code**. In his amended grounds of appeal filed without leave of court (the court will however consider them), the Appellant was aggrieved that the trial magistrate reached the decision to convict him yet the prosecution failed to prove the case against him to the required standard of proof beyond any reasonable doubt. He complained that *voire dire* examination was not properly conducted. He claimed that his rights under **Article 50(2)(j)** of the **Constitution** had been infringed. He further complained that crucial witnesses were not called to testify. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

Prior to the hearing of the appeal, the Appellant filed his written submissions in support of his appeal. He further made oral submissions in support of his case. A response to the Appellant's submissions was made by the Learned State Counsel, Ms. Akunja. It was the Appellant's submission that the complainants, PW3 and PW5 gave conflicting accounts of the circumstances and manner in which the offences were committed. He claimed both PW3 and PW5 gave contradictory evidence on the time when the offence was said to have been committed, who among them was the first to be defiled and also what each of them wore at the time. He also claimed that the evidence of PW5 contradicted her first report made to the police in which she stated that she was in his house washing dishes when the incident happened.

The Appellant contended that the trial magistrate erred in failing to draw a negative inference from the contradictions and inconsistencies in the evidence of both PW3 and PW5. According to the Appellant, the evidence of PW5 should not have been relied upon since her *voire dire* examination was not properly conducted. He averred that the medical examination reports of PW2 in respect of PW3 and PW5 contradicted their evidence. In particular, he averred that while the evidence of both PW3 and PW5 was that they were defiled on the same day, their respective medical examination reports showed that they were defiled on separate occasions. He further averred that the said medical examination reports did not corroborate their evidence as PW2 found no injuries on them.

Regarding the medical evidence of PW7 to the effect that PW3 made a report of attempted defilement, the Appellant was of the view that his evidence contradicted her oral evidence that she was actually defiled. He contended that PW1's evidence during trial was hearsay and full of deliberate lies. He submitted that her evidence that she did not know him prior to the incident was plainly dishonest. He submitted that the trial court erred in concluding that the observations of PW2 contained in his medical report produced into evidence as exhibit to the effect that PW5's hymen was broken was conclusive evidence to establish that penetration occurred. The Appellant argued that the fact that PW5's hymen was broken did not necessarily mean it was broken through sexual intercourse. He further submitted that the trial magistrate

misdirected himself regarding his medical examination report produced into evidence by PW2 as the same did not state that he had sustained injuries in his genitals as was stated in the judgment.

On the issue of proof of age of both PW3 and PW5, the Appellant contended that no direct evidence was adduced regarding the ages thus the element of age in proving the offence of defilement was not established to the required standard of proof. He supported his submission with the cases of Fappyton Mutuku Ngui -versus- Republic [2014] eKLR and Hillary Nyongesa -versus- Republic [Eldoret Criminal Appeal No. 123 of 2009]. On the issue of the trial magistrate's unsatisfactory conduct of *voire dire* examination of PW5, the Appellant was of the view that the trial magistrate ought to have expressly asked PW5 whether she understood the meaning of an oath. This, according to Appellant was a fatal omission to the prosecution's case. With respect to the alleged violation of **Article 50(2)(j)** of the **Constitution**, the Appellant submitted that his right to have adequate time and facilities to prepare a defence was infringed when he was availed to the prosecution witnesses statements a day to the hearing of the case. He cited the case of Thomas Patrick Gilbert Cholmondeley -versus- Republic [2008] eKLR to support of his submission.

The Appellant contended that PW5's mother, S being the first person PW5 disclosed the incident to ought to have testified during trial. He also contended that the lady who was said to have seen PW3 and PW5 leaving his house ought also to have been called as a witness in the case. He averred that their evidence would have lent more credence to the prosecution's case. He faulted the trial magistrate for failing to apply his discretion under **Section 150** of the **Criminal Procedure Code** to summon the said witnesses. In this regard, the Appellant relied on the case of Juma Ngondia -versus- Republic [1982-1988] EA 54 to support his submission. Ultimately, it was the Appellant's submission that the prosecution failed to prove the case against him to the required standard of proof beyond any reasonable doubt as affirmed in the case of Woolmington -versus- DPP [1935] AIIER 1.

Ms. Akunja opposed the Appellant's appeal. She made submissions to the effect that the prosecution proved its case against the Appellant to the required standard of proof beyond any reasonable doubt. It was her submission that the prosecution led evidence during trial showing that the Appellants had carnal knowledge of the complainants. She averred that the evidence was corroborated by the medical evidence which was tendered in court. On the issue of the age of the complainants, the Learned State Counsel submitted that the same was established through their respective Post Rape Care Forms and P3 Forms. As far as the identification of the Appellant is concerned, the Learned State Counsel submitted that the he was a neighbour to the complainants. The complainants knew him well. She submitted that they pin-pointed him as their assailant. She reiterated that the offence was committed on 12<sup>th</sup> November 2012 and was reported to the police on 22<sup>nd</sup> December 2012. She urged the court to disallow the Appellant's appeal.

Briefly, the facts of the case are as follows: PW3 M M and PW5 J M, the complainants were aged ten (10) years and Nine (9) years respectively when they gave evidence during trial. PW3 was a Class 7 pupil at [Particulars withheld] Primary School and PW5 a Class 4 pupil at [Particulars withheld] Care School. No documentary evidence was however adduced in court to confirm their ages. Due to the apparent tender age of the complainants, the trial magistrate conducted a *voire dire* examination before receiving their evidence. PW3 was allowed to give unsworn testimony after her *voire dire* examination in which the trial magistrate found that she did not understand the meaning and nature of oath. PW5 was however found to possess sufficient intelligence to appreciate the nature of oath and therefore proceeded to give sworn evidence. The complainants testified that the day of the incident, 12<sup>th</sup> November 2013, the Appellant found them playing outside their homes. PW3 testified that it was about 10.00 a.m while PW5 testified that it was about 11.00 a.m. The Appellant was PW5's immediate neighbour. PW3 also lived within the same neighbourhood.

The complainants testified that Appellant called both of them and requested them that he wanted them to take a key to his house. They testified that they went to his house and found the door open. They entered the house and he followed them inside and locked the door. He got hold of them and gagged their mouth with clothes. PW5 stated that he also tied their hands with a rope. This was confirmed by PW3 in her cross examination. They both testified that the Appellant then undressed them. PW1 stated that she was wearing a dress while PW5 wore a skirt. PW5 however stated that they both wore skirts. They testified that the Appellant then placed them on a bed inside his house before sexually assaulting them in turn. He first sexually assaulted PW5 before turning to PW3.

Both PW3 and PW5 testified that the Appellant inserted his penis into their vaginas and had sexual intercourse with her. They both described the experience as painful. When the Appellant finished, they dressed themselves up and he allowed them to leave his house. PW5 added that before they left the house, the Appellant pulled a knife from his pocket and threatened to harm them if they disclosed what he had done to them. She also testified that the Appellant also gave them Kshs.100 to share between them. Her brother, B saw them leaving the Appellant's house. In her cross examination, PW3 confirmed that the Appellant indeed threatened them not to disclose the incident. PW5 testified that following the incident, she felt pain passing urine and that she found it difficult to dress herself.

PW3's mother, PW1 A M got to know of the incident on 18<sup>th</sup> December 2013. She testified that she was called by a certain lady who was her neighbour. When she got there, she found PW3 narrating how she and her friend were defiled by the Appellant. She stated that PW3 told them that the Appellant called them to his house where he defiled them. She testified that PW3 said that he threatened to harm them with a knife if they disclosed what he did to them. He gave them Kshs.50/- each as inducement. PW3's evidence was that she did not know the Appellant at the time. PW4 E M, who is PW5's mother, testified that she found out about the incident on 23<sup>rd</sup> December 2013 when she overheard PW3 discussing it with another lady. She testified that she went up to them and inquired from PW3 what had transpired. PW4 testified that PW3 disclosed that the Appellant defiled both herself and PW5 in his house. She testified that she later confronted PW5. She confirmed what PW3 had told her. She testified that PW5 explained that she did not disclose the incident earlier because the Appellant threatened them with dire consequences.

PW3 was taken to MSF Beigum Olympic Center for medical attention. At the hospital, she was seen by Irene Onyango, a nursing officer on 11<sup>th</sup> February 2013. PW6 Pacific Awuor Orialo, a nursing officer at the hospital produced a Post Rape Care Form (PRC) prepared by the said Irene Onyango in respect of PW3 as **prosecution's exhibit no. 1**. The report showed that PW3 presented herself at the hospital with a history of having been sexually assaulted by a person known to her. An examination of her genitalia revealed that she had a whitish discharge on her vaginal wall and her hymen was broken. PW5 was medically examined at Kenyatta National hospital on 3<sup>rd</sup> February 2014 by PW7 Dr. David Thuo. PW7 testified that she presented herself with a history of having been sexually assaulted by a person known to her. On examining her genitals, he found that she had an old hymen tear. Although PW7 testified that PW5 also had a white discharge coming from

her genitals, this was not recorded in the Post Rape Care Form which he produced into evidence as **prosecution's exhibit no. 5**.

Both PW3 and PW5 were also examined by PW2 Dr. Joseph Maundu based at the Police surgery. He examined PW3 on 5<sup>th</sup> February 2014. He testified that he examined her genitalia and also found that her hymen was broken. He filled his findings in a P3 form which he produced into evidence as **prosecution's exhibit no. 2**. PW2 examined PW5 on 24<sup>th</sup> February 2014. He testified that he examined her genitalia found that she had a torn hymen. She also had a whitish discharge. He filled his findings in a P3 form which he produced into evidence as **prosecution's exhibit no.4**. PW2 also examined the Appellant on 5<sup>th</sup> February 2014. In his report, PW2 noted that he found nothing remarkable on him. He filled his observations in a P3 form which he produced into evidence as **prosecution exhibits no. 3**.

PW7 PC Jane Chepchumba was assigned to investigate the case. After concluding her investigations, she formed the view that indeed a case had been established for the Appellant to be charged with the present offences. When the Appellant was put on his defence, he essentially denied committing the offence. Other than explaining the circumstances of his arrest, the Appellant did not at all touch on the evidence that was adduced against him by the prosecution witnesses.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to a fresh evaluation with the 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 heard nor saw 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 the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the evidence adduced before the trial court. It has also considered the grounds of appeal presented by the Appellant and the submissions made by both the Appellant and the State.

In the instant case, the Appellant argued that there was no credible evidence that he committed the offences and that the trial magistrate relied on the evidence of the complainants which was full of contradictions. He argued that *voire dire* examination was not properly conducted on PW5. A *voire dire* examination of a witness is required to ascertain whether they understand the nature of the oath and the value of telling the truth in order to determine their competence or otherwise to testify during trial. PW3 and PW5 testified that they were aged ten (10) and nine (9) years respectively during trial. A *voire dire* examination was conducted for both PW3 and PW5 before they gave evidence. After the *voire dire* examination, the trial magistrate noted that although PW3 was intelligent enough to understand and respond to questions posed to her, she did not understand the meaning and nature of an oath. The trial magistrate therefore allowed her to give unsworn evidence. PW5 was found to possess sufficient intelligence to understand the meaning and nature of the oath and therefore allowed to give sworn evidence.

The trial magistrate's notes of her *voire dire* examination are as follows:-

*“J M*

*I am a pupil at [Particulars withheld] School in Kibera*

*I am in class 4*

*I stay in Kibera. I stay with my father called M and my mother E (PW3) in court identified and my brother is J in class 7 at [Particulars withheld] my follower she is 5 years old. She attends a school which is next to ours, she attends school with my other sister L aged 4 years.*

*I do attend church at [Particulars withheld] Gospel Church, at Line Saba Kibera. We go to church on Sunday. J, B, L and I go for Sunday school. My mother PW3 came to church later. My dad does not go to church, he goes to*

*I know that it is good to tell the truth always. I know that it is wrong to tell lies. Those who tell the truth will be blessed by God and those who tell lies will go to hell. I wish to go to heaven hence I tell the court the truth.*

*Court: The minor is intelligent enough to answer questions put to her as is above to give evidence. She also understands the consequences of oath. Let her be sworn.”*

From the notes of the trial magistrate it is clear that the trial magistrate sufficiently interrogated PW5'S understanding of the nature of the oath and was satisfied that she appreciated the duty to tell the truth before receiving her evidence. Her *voire dire* examination was thus properly conducted. PW3 and PW5 were also cross examined by the Appellant.

As to the question of whether the prosecution proved the case against the Appellant to the required standard of proof, the prosecution was required to establish that there was penetration, that the victim of the sexual assault 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 respect of the first ingredient, the prosecution relied on the evidence of the complainants, PW3 and PW5. The evidence adduced in court was that the Appellant lured the complainants to his house by pretending to send them to deliver a key to the house. He had kept the door open and once the complainants got in, he followed them inside. He then accosted the complainants and gagged their mouths with clothes. PW5 testified that he also tied up their hands with a rope. He then undressed them and placed them on a bed before he had sexual intercourse in turn with both of them. He first sexually assaulted PW5 and thereafter PW3. When he finished, he pulled a knife from pocket and threatened them not to disclose what he had done to them before allowing them to leave the house. PW5 also testified that the Appellant gave them Kshs.100/- to share among themselves. The complainants were cross examined by the prosecution and their evidence was not shaken.

The prosecution relied on medical evidence of PW2, PW6 and PW7 to corroborate the complainant's evidence. PW3 was examined by PW2 on 5<sup>th</sup> February 2014. He found that her hymen was broken. He filled his findings in a P3 form which he produced into evidence as **prosecution's exhibit no. 2**. The Post Care Rape Form produced into evidence as **prosecution's exhibit no. 1** showed that PW3 was also examined at MSF Beigum Oympic Center on 11<sup>th</sup> February 2014 and was also found to have a broken hymen. She also had a whitish discharge on her vaginal wall. On her part, PW5 was medically examined at Kenyatta National hospital on 3<sup>rd</sup> February 2014 by PW7 Dr. David Thuo. PW7 testified that he found that she had an old hymen tear. Although PW7 testified that PW5 also had a white discharge coming from her genitals, this was not recorded in the Post Rape Care Form which he produced into evidence as **prosecution's exhibit no.5**. PW2 examined PW5 on 24<sup>th</sup> February 2014. He testified that he examined her genitalia found that she had a torn hymen. She also had a whitish discharge. He filled his findings in a P3 form which he produced into evidence as **prosecution's exhibit no.4**.

PW2 also examined the Appellant on 5<sup>th</sup> February 2014. In his report, PW2 noted that he found nothing remarkable on him. He filled his observations in a P3 form which he produced into evidence as **prosecution exhibits no.3**. From the evidence adduced during trial, the prosecution therefore established to the required standard of proof that indeed the complainants were penetrated. PW3 and PW5 were clear on who was defiled first. The Appellant argued that there were discrepancies in the evidence of both PW3 and PW5. The discrepancies in the evidence of PW3 and PW5 as to whether the offence took place at 10.00 a.m or 11.00 a.m or what they wore at the time is immaterial at this point because being young children, they are bound to forget such details. This court therefore finds that the prosecution proved the first ingredient of penetration to the required standard of proof beyond any reasonable doubt.

The second element that the prosecution was required to prove is the age of the complainants. Under **Section 2(1) of the Sexual Offences Act**, the definition of a child is the one assigned thereto in the **Children Act**. This means any human being of less than eighteen (18) years. PW3 was said to be aged 10 years while PW5 was said to be aged 9 years during trial. However, no documentary evidence was produced in court to ascertain their ages. In determining the age of the complainant, it is imperative that the prosecution establishes the age of the complainant with the best possible evidence which is a birth certificate, birth notification, an immunization card or in some instances a baptismal card issued shortly after the birth of the child. However, where this best evidence is not available, the prosecution can rely on other documentary evidence such as the medical report and the P3 form. The prosecution can also rely on the testimony of the parents of the complainant and also by the court visually satisfying itself as to the apparent age of the complainant. This position was upheld by **the Court of Appeal in Nyeri C.A Criminal Appeal No. 61 of 2014, Richard Wahome Chege –versus- Republic** (unreported) and **Nyeri C.A Criminal Appeal No. 100 of 2013 J.W.A -versus- Republic** (unreported).

In the present appeal, PW2 testified that PW3 was aged 10 years during trial. Also the P3 form produced into evidence as **prosecution's exhibit no.2** by PW2 noted that the complainant was aged ten (10) years when he examined her on 5<sup>th</sup> February 2014. Her age was further confirmed by **prosecution's exhibit no.1** produced into evidence by PW6. As regards the age of PW5, her mother, PW4 testified during trial that she was aged 9 years. Also the P3 form produced into evidence as **prosecution's exhibits no.4 and 5** by PW2 and PW7 respectively confirmed the same. This court is therefore satisfied that the prosecution established that the complainant was a child at the time of the sexual assault.

The third element that the prosecution was required to establish is the identity of the perpetrator. The complainants identified the Appellant as the person who sexually assaulted them. PW5 testified that she the Appellant was their immediate neighbor and that she had been to the Appellant's house severally. Accordingly, this court finds that the prosecution established that the Appellant was positively identified as the perpetrator of the offence to the required standard of proof beyond any reasonable doubt satisfying the final ingredient of the offence.

However, an examination of the judgment of the trial magistrate, this court observes that the trial magistrate acquitted the Appellant with regard to the main offence of defilement and the alternative charge of committing an indecent act on a child against PW3 (*who was inadvertently referred to as PW2 throughout the judgment*) for reason that prosecution adduced contradicting evidence regarding her age which in his view could not be ascertained. The trial magistrate stated as follows;

***“In the past the prosecution has always led the witness description to include the age of the witness however in the receipt I have noted the case in Makau description of the witness in that scenery information is given a witness before proceeding to the evidence. If the age of PW2 was provided, it would have guided the court to rely on such record. However, never then for the court had the benefit to see the witness and on conclusion state categorically that PW2 was aged 10 years and not 35 as alleged in Pexh. 1. The onus of proof lies on the prosecution.*”**

.....

***However faced with the fact that the two ages in respect of PW2 were availed during prosecution's case by the person to avail any is that the Appellant's appeal on documentary evidence to show the exact age of PW2. This court cannot assume her age.***

***The accused is rather to the benefit of the court in respect of count and u/s alternative charge. He is accordingly found not guilty in respect of count 1 and its alternative”***

This court has seen the said Prosecution's **exhibit No.1** which is a Post Rape Care Form produced into evidence by PW6 in respect of the complainant. The document indicates the date of birth of the complainant as 30<sup>th</sup> May 2003. The age of the alleged perpetrator of the offence is what is stated to be approximately thirty five (35) years. From the above, it is clear that the trial court erred in that regard. Nonetheless, the trial magistrate conducted a *voire dire* examination of the complainant on the basis that she was a child of tender years. The fact that PW3 is a child therefore is not in doubt. However, since the prosecution did not appeal against that decision, this court will let the matter rest.

The upshot of the above conviction lacks merit and is hereby dismissed. The conviction and sentence is upheld. It is so ordered.

**DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MARCH 2018**

**L. KIMARU**

**JUDGE**