REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 77 OF 2015

SIMON NGOLE KATUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the original conviction and sentence in Kangundo Senior Principal Magistrate's Court Criminal Case No. 13 of 2015 on 31st January, 2017)

JUDGEMENT

1. The appellant herein was convicted and sentenced to life for the offence of defilement contrary to section 8 (1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the said offence is that the appellant on 18th July, 2015 at Isinga location in Kangundo District within Machakos County, unlawfully and intentionally caused his penis to penetrate the vagina of E. M. D. a child aged 10 years. He faced an alternative charge of committing an indecent act with a child contrary to section 11 (11) of the Sexual Offences Act No. 2006 particulars being that the appellant on 18th July, 2015 at Isinga location in Kangundo District within Machakos County, unlawfully and intentionally touched the vagina of E. M. D. with his penis, a child aged 10 years.

2. Brief facts are that EMD (*herein after referred to as* PW1) was on the material day alone since her grandmother and mother had gone for a pre-wedding. The appellant went to her home and inquired where her grandmother and mother were and she gave him the information of their whereabout. PW1 then got into the kitchen where the appellant followed her and asked her to lie down. He then removed her trouser and pulled her dress to the waist and had sex with her twice. She did not raise alarm since the appellant had covered her mouth using a white piece of cloth. She did not inform anyone of the occurrence since the appellant had threatened to beat her up if she did. When she went to school, a teacher who goes by the name Ann notice that she had urinated on herself and upon inquiring why she had done so, she informed her of what had occurred. She stated that she felt pain in her private parts. T M (PW2) and T M M (PW3) confirmed having been called to the school and informed of the case. PW2 and PW3 reported the matter to the police and PW2 gave the police PW1's pant which she stated had an odour. She also stated that PW1 was not walking as usual. PW3 produced an affidavit affirming that PW1's birth certificate was destroyed by fire. The affidavit was produced as P. Exhibit 4.

3. P N (PW4) was informed by PW1's teacher that PW1 was passing urine. She was allowed to sit for examination and later asked what the problem was. That is when she informed them of what had transpired and PW1's parent was called to school and advised to take her to hospital. John Mutua (PW5) a clinical officer at Kangundo Hospital examined PW1 on 23rd July, 2015 and found her external genitalia to be normal. He however found laceration when he did a 6 o'clock examination and the child showed pain on examination. She was said to have hyperemic labias, the hymen was torn and there was foul smell on discharge. HIV, Hepatitis and STD tests were negative. There was also no spermatozoa.

4. Lenny Kilonzo (PW6) the senior assistant chief of Isinga Sub-location was on 23rd July, 2015 informed by B K that PW1 had been defiled. He and the chief went to the appellant's home. They went to PW1's home but did not find anyone and proceeded to the police station.

5. Corporal Susan Kwach (PW7) of Kangundo Police station received a report from PW.2 and PW.3 who stated that PW1 kept seeking permission at school to visit the toilet but before she could go she passed urine. She was interrogated by the teacher whom she informed of the ordeal. She escorted PW1 to hospital for examination and the appellant was taken to the police station by PW6. She produced the treatment notes, p3 form and a purple striped pant as P. Exhibit 1-3.

6. The appellant was put on his defence where he stated that he was on 24th July, 2015 building a house for his son. He was approached by two people who took him to Kangundo police station where he was charged with the offence he faced. Blood and urine samples were taken from him but he was not informed for what reason. The trial court convicted him to life imprisonment.

7. Aggrieved by the conviction and sentence, the appellant filed this appeal on grounds that:

i. The learned magistrate erred in both law and fact when he convicted and passed life sentence failing to find that the age of PW1 was not established.

ii. The learned magistrate erred both in law and fact when he conducted an irregular trial in that vital exhibits were not identified by the witnesses.

iii. The learned magistrate erred in both law and fact in convicting him yet the case was poorly investigated.

iv. The learned magistrate erred in both law and fact when he dismissed his defence.

8. This court considers this appeal bearing in mind that it is duty bound to analyze and re-evaluate the evidence afresh to arrive at its own independent conclusion it being a first appellate court. in support of his case, the appellant cited **Hillary Nyongesa v. Republic Eldoret Cr. Appeal No. 123 of 2009** where the court was of the opinion that age is such a critical aspect in sexual offences that it has to be proved. It was further contended that the evidence as to PW1's age was contradictory since it was indicated as 10 years in the charge sheet yet she stated she was 8 years of age in her testimony. The appellant contended that the two key witnesses were not called upon to identify the pant (P. Exhibit 3) and the said failure was termed as an irregularity and a violation of the laid down procedure. The appellant submitted that the case was poorly investigated for the reason that the results on the tests done on semen said to be in PW1's pant were never revealed. He lamented that his evidence was not given adequate consideration and cited **Okethi Okale v. Republic [1964] 179** where the court was of the opinion that failure to consider the defence is contrary to natural justice.

9. The respondent on the other hand contended that the appellant has not disputed that he was positively identified and that there was penetration but that he only contended PW1's age. It was submitted that age can be determined by medical evidence and other cogent evidence like birth certificate and child immunization card and a hospital card. That according to examination by PW5, he assessed PW1 to be 10 years of age. That the significance of establishing the age of a complainant is to determine the sentence. The respondent in this regard cited **Hadson Ali Mwachongo v. Republic [2016] eKLR**. It was further submitted that the actual age of PW1 was not established but that the apparent age was established as 10 years which is in accordance with section 2 of the Children Act adopted by the Sexual Offences Act. It was further submitted that the production of the pant by the investigating officer was not prejudicial to the appellant since the same had earlier been marked for identification. It was finally submitted that the trial court considered the appellant's evidence and found that it could not exonerate him from offence since it was a plain denial.

10. The ingredients forming the offence of defilement are age of complainant, proof of penetration and positive identification of the assailant. Applying the test, the prosecution produced a P3 form which revealed PW1's age to be 10 years. The appellant took issue that medical evidence was not tendered to prove the same. It is noteworthy that although medical evidence is the most preferred proof for age, it has to be borne in mind that it is not the only means for proving age. I share the opinion in **Francis Omuroni v. Uganda Court of Appeal No. 2 of 2000** where it was held:

"In defilement cases, medical evidence is para-mount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in 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 observation having been made by PW5 I find that age was established to the required standard.

11. Secondly, PW1 positively identified the appellant and was very consistent in her evidence as to how the defilement took place and upon examination, it was revealed that her hymen had been torn. It is worth noting that PW5's evidence was that no spermatozoa was found on PW1 rather that her hymen was torn which is an indication of penetration. On the other hand, the appellant did not give evidence exonerating himself from the scene but as correctly submitted by the respondent his evidence was mere denial and did not therefore cast doubt on the prosecution case.

12. In the circumstances, I find no reason to interfere with the trial magistrate's findings. A person who commits the offence of defilement with a child of less than 11 years shall upon conviction be sentenced to imprisonment for life as provided in section 8(2) of the Sexual Offences Act. The minimum sentence here is life imprisonment and I accordingly uphold and affirm the conviction and sentence by the trial court. The appeal is therefore found to have no merit and is dismissed.

Orders accordingly.

Dated and delivered at Machakos this **19th** day of **April, 2018.**

D.K.KEMEI

JUDGE

In the presence of:

Simon Ngole Katunga - the Appellant

Machogu - for the Respondent

Kituva - Court Assistant