REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 80 OF 2016

DAVID MBAU NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence in Criminal Case No. 644 of 2014 in the Senior Principal Magistrates' Court at Kigumo by D. Orimba, Senior Principal Magistrate, dated 23rd June 2015]

JUDGMENT

1. The appellant was adjudged guilty of *defilement* contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to *twenty years* imprisonment.

2. The particulars were that on 22nd March 2014 at [particulars withheld] village within Murang'a County, he intentionally caused his penis to penetrate the anus of J. M. G. *[particulars withheld]* a boy aged 13 years.

3. The appellant has preferred an appeal. The *original* petition was filed on 24th October 2016. On 8th May 2018, the appellant sought and was granted leave to *amend* the grounds of appeal. The new grounds are contained in the home-made pleading filed on even date.

4. There are *two* grounds of appeal. First, that the learned trial magistrate erred by relying on contradicting or inconsistent evidence; and, secondly, that the investigations into the offence were half-baked or unreliable. In a synopsis, the appellant contends that the prosecution did *not* prove the charge beyond reasonable doubt.

5. At the hearing of this appeal on 8th May 2018, the appellant relied on his handwritten submissions filed in court. He took up cudgels on the inconsistencies between the Occurrence Book reports [particulars withheld] 2014 and OB4/23/3/2014. The two reports were not produced in the lower court. He also pointed out some discrepancies: while the treatment notes (exhibit 1) indicate the complainant was treated at Maragua, the P3 form (exhibit 2) refers to Murang'a. He submitted that the witness statements were incomplete. For instance, the full mobile telephone numbers were not provided.

6. The appeal is contested by the State. Learned State Counsel, *Ms. Gichuru*, submitted that on the totality of all the evidence, the ingredients of the offence were proved beyond reasonable doubt. The sentence handed down was the minimum sentence provided by section 8 (3) of the Act. I was beseeched to dismiss the appeal.

7. I have considered the grounds of appeal, the written submissions, the records of the lower court, the evidence and the rival submissions.

8. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I neither saw nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190, *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR.

9. PW1 gave his age as *13 years.* He was in class 7. After a brief *voire dire* examination, the learned trial magistrate formed the opinion that he could tell the truth. The questions posed by the court to the minor and his answers are recorded. The witness was *affirmed*. I am satisfied that the court complied *fully* with the procedure of taking the evidence of a minor. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445.

10. On the material date, the complainant had been sent to the shops by his father (PW2) to charge a battery. On his way back, he was waylaid by the appellant. He knew him. The appellant had a knife. He led the appellant into a nearby thicket and removed his trousers. He asked the complainant to bend, applied some Vaseline to his anus and sodomized him. He then produced a bottle of water and cleaned the complainant's anus.

11. On the way back, the appellant started beating the complainant. It was outside a local bar styled *Gaza*. The bar was run by PW3. PW3 witnessed the assault outside the bar. He went into the bar and called a police officer (PW4). When confronted by the police, the appellant jumped over the fence and vanished into the night. PW3 informed the boy's father. PW4 and the Assistant Chief advised PW2 to take the complainant to hospital.

12. The appellant was arrested by the public the following morning. They gave him a thorough beating. He was saved from further lynching by the police. That account was confirmed by the investigating officer, Mohamed Godana (PW5).

13. PW6 was Charles Kamotho. He was a clinical officer at Maragua Hospital. The examination was done on 23rd March 2014. There was a whitish discharge from the anus. The anus was tender. HIV was negative. The witness produced the treatment notes and P3 form that I referred to earlier. He testified that penetration had occurred. The anal swab did not show spermatozoa. He prescribed drugs including antibiotics and Post Exposure Prophylaxis.

14. When the appellant was placed on his defence, he gave sworn testimony. He confirmed that he was arrested on 23rd March 2014. He was frog marched to the road and beaten senseless. He broke his leg and arm. He also lost two teeth. He was first taken to Maragua Hospital and later to Murang'a Hospital. He testified that there were no witnesses to the alleged offence.

15. A number of issues arise from that evidence. I will deal first with the *identification* of the appellant. The complainant and appellant were *not* strangers; they were *neighbours*. PW1, PW2, PW3 and PW4 all *knew* the appellant. The incident took place after 6:30 p.m. But granted the circumstances, the identification of the appellant was not in doubt. That to me is evidence of *recognition*; stronger evidence than mere identification. See *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549, *Obwana & Others v Uganda* [2009] 2 EA 333. I have reached the inescapable conclusion that the appellant was positively identified by PW1, PW3 and PW4.

16. The next key question is whether the appellant *penetrated* the complainant. *Penetration* is defined in section 2 of the Sexual Offences Act as follows-

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

17. The complainant was emphatic that the appellant removed his trousers, applied some Vaseline and inserted his penis into his *anus*. That evidence was *corroborated* by the clinical officer, PW6. I have also carefully studied the treatment notes and P3 form. The totality of all that evidence proves *penetration*.

18. The age of the complainants is *material* in offences of this nature. See *John Wagner v Republic* [2010] eKLR, *Macharia Kangi v Republic* Nyeri, Court of Appeal, Criminal Appeal 346 of 2006 (unreported), *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported), *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR. Section 8 of the Sexual Offences Act provides for graduated *minimum* sentences. The *age* of the complainant may mean the difference between a life sentence and a few years in jail.

19. From the unchallenged testimony of PW1 and PW2; the treatment notes and P3 forms (exhibits 1 and 2), it is evident that the minor was aged 13 at the time of the offence. The mere absence of a birth certificate does *not* mean the age was not proved. I am fortified in that conclusion from the recent decision of the Court of Appeal in *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Criminal Appeal 661 of 2010 [2015] eKLR. The learned judges delivered themselves as follows-

> *"From the evidence, besides the evidence of PC Paul Mwangi, who we consider was incompetent to ascertain the child's age, all other evidence indicated that ZN was either 12, 13 or 15 years. When this is considered against the backdrop of the charge sheet which specified the complainant's age as 12 years, it is evident that the ages indicated, all fell within the age bracket specified under Section 8 (1) and (3) of the Act, and concerned the defilement of a child within the particular age bracket. As such, we find that, the charge and the sentence preferred were sound, and no prejudice could be held to have been suffered by the appellant. At any rate, we consider that the discrepancies are not material and curable under Section 382 of the Criminal Procedure Code."*

20. Lastly, I have weighed the testimony by the appellant against the evidence of PW1, PW2, PW3, PW4, PW5 and PW6. When juxtaposed against that evidence, the appellant's defence is bogus. He dealt at length about his arrest by members of the public. The relevant part of his testimony was that there were no eye witnesses to the offence. But he was placed squarely at the *locus in quo*; and, he was positively *identified* as the person who *penetrated* the complainant.

21. The appellant's submissions in this appeal regarding poor investigations; or, discrepancies in two Occurrence Book entries are a red herring. Like I said, those two reports were *not* part of the evidence in the lower court. I have also compared the treatment notes and P3 forms (exhibits 1 and 2). I see no material inconsistency. I thus concur with the learned trial magistrate's finding of guilt.

22. In the end I have reached the conclusion that the prosecution proved *all* the elements of the offence beyond *reasonable doubt*. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332. It must follow as a corollary that the conviction was *safe*.

23. Under section 8 (3) of the Sexual Offences Act, the *minimum* sentence is *twenty years*. The trial court sentenced the appellant to serve *twenty years* imprisonment. It was lenient considering that the appellant was a *second* offender. He had earlier served sentence for 10 years for manslaughter. I am accordingly unable to disturb the sentence.

24. The entire appeal is devoid of any merit. The upshot is that the conviction and sentence are *upheld*. The appeal is *dismissed*.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MURANG'A** this 24th day of May 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant (in person).

Ms. Gichuru for the Republic.

Mr. Kiberenge and Ms. Dorcas, Court Clerks.