REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 20 OF 2017

DENNIS MWANGI MBUTHIA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by

Hon. P. N. Maina. Principal Magistrate in Kehancha Principal

Magistrate's Court Criminal Case No. 89 of 2017

delivered on 14/06/2017)

JUDGMENT

1. The Appellant herein, **Dennis Mwangi Mbuthia,** was charged with the offence of defilement contrary to **Section 8(1)(2)** of the **Sexual Offences Act** No. 3 of 2006 and in the alternative committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. The appellant denied both counts.

2. The particulars of the offence of defilement were that on the 14th day of March 2016 at [particulars withheld] township in Kuria West Sub-County within Migori County, intentionally and unlawfully caused his penis to penetrate the vagina of G.C.B. a child aged 8 year.

3. The appellant was subsequently tried, convicted on the main count of defilement and accordingly sentenced.

4. The prosecution called six witnesses in support of its case. The minor testified as **PW1** (hereinafter referred to as **'the complainant'**) whereas her mother, **J C**, testified as **PW2**. **PW3** was the father to the complainant one **J C M**. **PW4** was a Clinical Officer then working at Isebania Sub-County Hospital one **David Ondieki**. **Benard Muriithi** testified as **PW5**. The investigating officer was one **No. 86730 PC Edwin Cherutich** from Isebania Police Station. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except for the complainant.

5. The prosecution's case was that in the morning of 14/03/2016 the complainant left home for [particulars withheld] Academy where she was in Standard 1. She walked to school alone. While on the way, the appellant appeared while carried on a motor cycle which the complainant could not recall its registration number and the rider as well and the appellant offered to take the complainant to school. Since the complainant knew the appellant whom she used to see around she did not hesitate but gladly enjoyed the ride.

6. The ride did not end up at school as expected instead the appellant took the complainant to his place of abode where he removed her clothes and after undressing his trousers had sex with the complainant. The complainant felt a lot of pain and bled. She was released to go to school and was warned not to go back to the house as the appellant was intending to relocate. The complainant went to school but did not tell her teacher of what had happened until when she went home.

7. As the complainant arrived home at around 1:00pm, PW2 watched her and noted that she was unusually walking with her legs apart. PW2 readily asked her what the problem was, and the complainant said that she had fallen. PW2 was not satisfied with the explanation and decided to inspect her. She noted that the vagina was blood soaked. PW2 rushed the complainant back to school and met her class teacher who informed PW2 that the complainant went to school late, at around 08:30am and that she was crying. That, the complainant instead slept on her desk.

8. PW2 rushed the complainant to Isebania Sub-County Hospital where she was examined and treated. That, the complainant disclosed to the

Nurse that a man known to her had taken her to his house and had sex with her. PW2 then proceeded to where PW3 worked and informed him about the matter. Both PW2 and PW3 then reported the matter to Isebania Police Station.

9. PW6 received them and noted that the complainant was in pain and walked with a lot of difficulty. After recording the complaint and interrogating the complainant, PW6 immediately commenced investigations. The complainant led PW6, PW2 and PW3 to the house she had been forced to engage in sex. The description of the house given by the complainant was confirmed by PW6 who inspected the house. There was no bed or any furniture; a mud-walled, iron roofed rental house with a polythene sack and an old jacket. Since the complainant had told PW6 that she was laid on the sack and a jacket, PW6 recovered the items. PW6 also recovered the complainant's blood-stained panty.

10. During investigations, PW6 established that the house was owned by PW5, a Miraa dealer in town whom he knew and that PW5 stayed with the appellant herein. PW6 went to see PW5 at his place of work and interrogated him. PW5 confirmed that he stayed with the appellant in his house as his friend who was a barber and later became a lorry turn boy. PW6 embarked on looking for the appellant whom he knew as a barber and had severally shaved PW6's hair.

11. PW3 also went to see PW5 with the complainant where PW5 re-affirmed the position that indeed he stayed with the appellant. The complainant confirmed to PW3 that PW5 was not her aggressor. With the aid of the villagers, PW3 sought for the appellant and caught up with him in the evening watching a video in a café. The appellant confirmed that he was Mwangi and PW3 pretended that he wanted to engage him in some business. They sat down to discuss the deal. PW3 then asked the appellant where he had taken the complainant to that morning and shocked, the appellant wondered whether the child he had carried in the morning was a girl. Members of the public who were with PW3 pounced on the appellant and gave him a severe and thorough beating before PW3 intervened and escorted the appellant to Isebania Police Station where the appellant was re-arrested and placed in custody.

12. The following morning two people identified the appellant at the station. The first one was PW5 who confirmed that the person whom he used to stay with was the appellant and who was in police custody and the second one was the complainant who confirmed that the aggressor was the appellant. PW6 then took the appellant to hospital for treatment out of the injuries he had sustained.

13. On completion of investigations, PW6 charged the appellant accordingly. PW4 produced the treatment notes, P3 Form and a Child Health Clinic Card as exhibits. PW6 produced the polythene sack, the jacket and the panty as exhibits.

14. At the close of the prosecution's case, the trial court placed the appellant on his defence where the appellant opted to and gave sworn statement. The appellant denied committing the offence and stated that indeed he was at Isebania on 14/03/2016 having arrived from Nairobi that morning driving a lorry which had delivered some goods in Isebania and before loading some other goods for the return journey, he took the lorry registration number KBT 225D to a mechanic in Isebania as it had developed some problems. That, he was at the garage the whole day overseeing the works and even slept in the vehicle's cabin until in the evening when he went to watch a video before retiring for the day. That, as he was inside the café he was informed by the owner that some people were looking for him and he went out to see them. That, the people were initially three, but the number increased. He learnt that one of them was PW3. That, the people attacked him, before he got a chance and ran towards the road while screaming and headed to Isebania Police Station where he learnt of the defilement allegations he knew nothing about. He was surprised to be charged. The appellant while admitting that he knew PW5 denied that he ever worked as a barber and ever shaved PW6's hair at any time. The appellant did not have any witness.

15. By a judgment rendered on 14/06/2017 the trial court found the appellant guilty and convicted him of the offence of defilement. The appellant was then sentenced to life imprisonment upon mitigations.

16. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal and filed his Petition of Appeal filed on 29/06/2017 challenging both the conviction and sentence. He preferred the following five grounds of appeal: -

> ***a) THAT I maintained my plea of not guilty throughout the trials.***
>
> ***b) THAT the trial court erred in law and facts by relying upon very poorly or non- investigated evidence /s to convict appellant.***
>
> ***c) THAT the trial learned court erred in law and facts by failing to observe critical elements of Section 143 of Evidence Act – that the section was / is in favour of appellant when analyzing evidence /s of complainant in the testimonies of all the prosecution witnesses.***
>
> ***d) THAT the trial learned court erred in law and facts by failing to award appellant and complainant the provisions of Article 43 (i) (a) upon relying on insufficient medical analysis by incompetent medical practitioners in the names of clinical officers. Article 43 9i) (a) constitution of Kenya 2010.***
>
> ***e) THAT this appeal be allowed, considered urgent, Judgment reviewed, conviction set aside to warrant acquittal further that the appeal be heard in appellants presence.***

17. The appeal was heard by way of written submissions where the appellant expounded the foregone grounds. He submitted that police carried out incomplete investigations, that the trial court did not comply with the provisions of **Section 124** of the **Evidence Act**, that the testimony of the complainant was at variance with that of PW2 and PW3, that crucial witnesses were not availed and that the appellant was not subjected to a DNA examination. The State opposed the appeal and relied on the record to support the conviction. This Court was urged to dismiss the appeal.

18. The role of this Court as the first appellate Court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial

court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

19. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the written submissions.

20. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them.

(a) <u>On the age of the complainant:</u>

21. The age of the complainant was not contested in this appeal. The prosecution produced the complainant's Child Health Clinic Card from Isebania Sub-District Hospital which indicated that the complainant was born on 05/02/ 2008 to PW2 and PW3. The age of the complainant was hence 8 years at the time of the commission of the alleged offence. The complainant was a child of tender years in law.

(b) <u>On the issue of penetration:</u>

22. **Section 2** of the Sexual Offences Act defines penetration as:

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

23. This position was fortified in the case of **<u>Mark Oiruri Mose vs R (2013) eKLR</u>** when the Court of Appeal stated thus:

> ***"…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. <u>So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ</u>…."*** (emphasis added).

24. Later the Court of Appeal, then differently constituted, in the case of **<u>Erick Onyango Ondeng v. Republic (2014) eKLR</u>** held as such on the aspect of penetration:

> ***"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."***

25. The appellant contended that penetration was not proved. He submitted that there was evidence that the complainant had instead been injured on her private parts when she fell and that the medical notes had not been produced by the maker further to the fact that there was no proof that the penetration, if any, was by a penis. There was as well the contention that a DNA examination, which was not conducted, would have confirmed penetration.

26. In this case the complainant narrated how the ordeal unfolded. She partly stated as follows: -

> ***"…..I thus got on the motor cycle……. however took me into the house. There was no bed. I saw sacks and clothes on the floor. He made me lie on those sacks. I had a pant……removed my pant. He also undressed by removing his trousers. He then defiled me. He came on top of me. He used the thing he uses to urinate and inserted it in my private parts. I felt a lot of pain and bled……..I then went to school…..I was still bleeding….."***

27. PW2, who was the mother stated that she observed that the complainant was walking with difficulties as she returned home from school and PW2 acted in the following manner: -

> ***"…..I asked her what was wrong. She told me that she had fallen. I decided to inspect her. I noted that her vagina was blood soaked. I then took her back to school…..teacher told me that the complainant had gone to school at around 08:30am and was crying. She then slept on the desk…"***

28. PW4 had the following to say in part in his testimony: -

> ***"…The child …….was brought while bleeding from her private parts…….She was examined. The vagina had injuries. The labia majora had a rear wound extending up to the clitoris. The hymen was broken. The vagina was bleeding on the tear and broken hymen. The minor was also referred to the lab. The urine had blood. A high vagina swab also showed blood cells…..the immediate clinical observation was that the minor had been defiled….***
>
> ***….On 15.3.2016 the minor appeared before me with a P3. I reviewed her condition. I confirmed my colleague's observations…..there was a tear wound on the labia majora extending to the clitoris. Blood was also seen. The hymen was broken…..I confirmed that the ….minor had been defiled……When the minor was brought to hospital she could not walk properly….."***

29. There is no doubt that the complainant sustained injuries on her private parts. The complainant narrated how she sustained the injuries. The trial court had the following to say on the demeanor to the complainant: -

> ***"….The complainant was quite clear and consistent in her testimony…..the accused person…..could not even shake or discredit the same as his questions were answered quite concisely. That cross-examination made the complainant reaffirm her earlier testimony……***
>
> ***…..it is clear that the trustworthiness of the complainant and the credibility of her testimony is clearly not doubt. This court has taken caution and carefully subjected that evidence to rigorous tests which tests have not only established the credibility and trustworthiness of the complainant's evidence but also revealed some corroborative/supportive evidence. Her testimony can therefore be safely relied upon……."***

30. It is the trial court which had the advantage of observing the demeanor of the witnesses and hearing them give evidence and I must give allowance for that. There is no material placed before me challenging the demeanor of the complainant for me to arrive at a finding that the complainant was not truthful. I must therefore re-affirm the finding of the trial court that the evidence of the complainant can be safely relied upon.

31. Going by the narration by the complainant, the ordeal that occurred between herself and the assailant was a male-female genital sexual intercourse. It is that intercourse which led to the undisputable injuries on the complainant's private parts.

32. The appellant submitted that a DNA examination ought to have been conducted to settle the issue of penetration. I have severally stated that such an examination is just one way of proving penetration but not the only way. Even without such an examination still penetration can be proved depending on the evidence tendered.

33. The appellant also challenged the way the medical treatment notes were produced. He took the position that they be expunged from the record since they were not produced by the maker. Whereas it is true the said notes were not produced by the maker, who was Joyce a colleague Clinical Officer to PW4, three things are of utmost importance. First, the appellant did not oppose the production of the notes. Second, **Section 33** of the **Evidence Act**, Cap. 80 of the Laws of Kenya provide for instances where documents can be produced in evidence by other people other than the makers. In this case PW4 prepared the P3 Form after perusal of the medical notes which had been earlier on prepared. But, that was not the end. PW4 stated in evidence that he also examined the complainant and confirmed the contents of the medical notes. Third, the medical notes are public documents and can be produced by any appropriate officer in which case PW4 was one. I hence find no merit in this ground and is hereby dismissed.

34. From the foregone, the complainant, generally out of fear of reproach and as expected of any child of such an age, was not truthful in alleging that she had injured her private parts from a fall when she was first asked by PW2. There is evidence that the complainant opened later and laid bare what had transpired that led to the injuries.

35. I therefore have no difficulty in finding, which I hereby do, that penetration into the complainant's vagina by a penis was proved.

c) <u>On whether the appellant was the perpetrator:</u>

36. Having believed the evidence of the complainant, suffice to say that the said evidence also touched on the identity of the assailant. The complainant stated that he knew the appellant having seen him at P.A.G. School and even elsewhere before. She described how the appellant met her on the way to school and ended up taking her to his place of abode. When the complainant was taken by PW3 to PW5 she immediately stated that PW5 was not the aggressor. When she was taken to the police station the following day and saw the appellant the complainant readily identified him as the assailant.

37. The assailant was hence well known to the complainant. In such instances an identification parade is not necessary. The Court of Appeal in **<u>Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)</u>** had the following to say on identification parades in cases of identification by recognition: -

> ***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. <u>We also reject the argument that failure to hold an identification parade,</u> and the non- recovery of the stolen articles <u>made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary</u>. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."*** (emphasis added).

38. But, the appellant raised a defence. Whereas he admitted having been in Isebania in the morning of 14/03/2016, he denied ever engaging in the alleged impugned act with the complainant. He stated that he instead spent the whole day in the garage. I have considered the defence alongside the prosecution evidence. I note that the appellant admitted knowing PW5. It was PW5 who testified that the appellant was a barber before he became a lorry turn boy. PW6 as well testified that he knew the appellant as a barber and that the appellant had even shaved him severally before. However, the appellant denied ever having been a barber at any time. The evidence of PW5 was therefore corroborated by that of PW6. PW5 testified that he had known the appellant for some time and that he had accommodated him in his house at the time of the incident.

39. PW5 and PW6 were cross-examined by the appellant. Nothing came out to suggest that the appellant was not getting along well with any of the two. There would then be no reason for PW5 and PW6 fabricating a lie against the appellant. I am convinced that PW5 and PW6 were

truthful witnesses as well and I hereby find and hold that the appellant at one time worked as a barber and that by denying such the appellant was not being truthful. Having portrayed himself as untruthful, the defence of the appellant is rendered unbelievable and of no probative value. He defence cannot hold and is hereby dismissed.

40. The third ingredient of the offence of defilement is also answered in the affirmative. For avoidance of doubt, I concur with the trial court that the identification of the appellant as the aggressor was not in error.

Other issues raised by the Appellant:

41. The appellant also argued that the case was not well investigated at all as crucial witnesses did not testify. My position on the issue is this: The prosecution has a duty to prove its case but not necessarily that it avails all the people mentioned during investigations. Only evidence which tend to prove the charge as required in law is, but sufficient. I have perused the evidence tendered before the trial court and I have no doubt that the same was enough to find conviction even without the evidence of the other potential witnesses. That is why **Section 143** of the **Evidence Act**, Chapter 80 of the Laws of Kenya gives the prosecutor the discretion to choose the witnesses to testify. (Also see the cases of **Bukenya & Others -versus- Uganda (1972) EA 549** and **Nguku -versus- Republic (1985) KLR 412).** Therefore, the usual inference that evidence of crucial witnesses who fail to testify without any justification meant that such evidence would have been adverse to the prosecution's case does not apply in the circumstances of this case.

42. As the appellant submitted that there were contradictions and inconsistencies on the record, I must state that I have carefully addressed my mind on the record. The alleged contradictions, if any, were adequately explained and reconciled by the court. Indeed, they were of a minor nature and cannot be said to have adversely affected the final finding of the court. In so finding, I echo the words of the Learned Judge in **R =vs Pius Nyamweya Momanyi, Kisii HCRA No. 265 of 2009 (UR)** when he stated thus: -

> ***"...It is trite law that minor discrepancies and contradictions should not affect a conviction."***

In any event the provisions of **Section 382** of the **Criminal Procedure Code Cap. 75 of the Laws of Kenya** safely come into play.

43. Lastly, the appellant also contended that the trial court did not comply with the provisions of the proviso to **Section 124** of the **Evidence Act,** Chapter 80 of the Laws of Kenya which states that:

> ***" 124. Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*** (emphasis added).

44. I have intently looked at the judgment by the trial court. The court observed the demeanors of all the witnesses as they testified. I did not find any adverse notes by the trial court on any of the witnesses in the proceedings as well as in the judgment. The court believed the witnesses and stated that their evidence was candid and truthful. The court recorded its reasons in the judgment for believing that the complainant was telling the truth. The trial court also repeatedly warned itself of the dangers of relying on the evidence of a single witness and was satisfied that the case was a suitable one. I have also carefully perused the proceedings and cannot fault the trial court on that finding. I therefore find that the trial court complied with the provisions of **Section 124** of the Evidence Act and as required in law.

45. Having found all ingredients of the offence of defilement in favor of the prosecution, this Court finds that the appellant was properly found guilty and convicted.

46. On sentence, as the complainant was a child of tender years, the appellant was sentenced to the only prescribed sentence under **Section 8(2)** of the Sexual Offences Act. The concurrent life sentences remain legal.

47. Consequently, no ground of appeal succeeds, and the appeal is hereby dismissed.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 24th day of May 2018.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Dennis Mwangi Mbuthia the Appellant in person.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Miss Nyauke – Court Assistant