REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO. 82 OF 2016

JACKSON KARIUKI NDUMIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence in Criminal

Case No. S.O. 33 of 2013 in the Chief Magistrates' Court at Murang'a

by Mr. A. K. Mwicigi, Principal Magistrate, dated 28th September 2016.]

JUDGMENT

1. The appellant was convicted on two counts 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 of the first count were that on 14th November 2013 within Murang'a County, he caused his penis to penetrate the vagina of F. W. I. *[particulars withheld]* a girl aged 12 years. On count two, he was charged that on the same date and place, he caused his penis to penetrate the vagina of E. M. W. *[particulars withheld]* another girl also aged 12 years.

3. The appellant has preferred an appeal. The petition was filed on 3rd November 2016. There are *three* grounds. First, that the sentence passed was punitive; secondly, that the appellant was not taken for a medical examination to link him with the offences; and, thirdly, that the prosecution failed to prove the charges beyond reasonable doubt.

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

5. At the hearing of this appeal on 7th May 2018, the appellant protested his innocence. He said the complainants visited his homestead. It was common for them to do so. He gave them some money and flour. He was at a loss why their parents turned around to pursue criminal charges. He said that he was unaware that he committed any offence.

6. He also questioned how the complainants managed to get to the shops if they had suffered injuries to their private parts. He alleged that his property was destroyed; and, that in the course of his incarceration, his farm has been invaded. Lastly, he submitted that the sentence was excessive in all the circumstances of the case.

7. I have considered the grounds of appeal, 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 and PW2 were girls aged *12 and 13 years* respectively. After a detailed *voire dire* examination, the learned trial magistrate recorded their evidence on oath.

10. On the material date, the appellant called the complainants into his home. He sent them to the shops to buy flour and cooking oil. When they returned, the appellant locked the door, placed a sack on the floor and inserted his penis into PW2. After he was through, he inserted his penis into PW1. It was the fourth time he had defiled PW1 but she had not disclosed it to her parents.The appellant then gave the minors Kshs 50. PW1 and PW2 said that the appellant threatened them not to disclose the matter to their parents.

11. However, PW2's cousin, S (PW3), told PW1's and PW2's parents (PW4 and PW5) that the minors had gone to the appellant's house. PW4 rushed to the appellant's house. She did not find the two girls. She caught up with them on the opposite ridge. They had already spent Kshs 10 from the money given to them by the appellant. The girls opened up to her.

12. That narrative was largely repeated by PW5. PW4 and PW5 reported the matter to the police. They also took the minors to Murang'a District Hospital for medical examination.

13. The report was first made to the police on 14th November 2013. The witness statements were recorded by PW7, Police Corporal Namutali on 25th November 2013. The appellant was eventually arrested on 28th December 2013.

14. PW6 was Linus Kaburu. He was a clinical officer at Murang'a District Hospital. He examined PW2 on 15th November 2013. The examination revealed *"vaginal penetration had taken place"*. Her hymen was broken. Her vaginal canal was *"roomy and it was not the first time she had had sex"*. There were no bruises or blood stains. There was a whitish discharge. There were pus cells and *"2+ gram-positive loci was noted"*.

15. PW6 examined PW1 on 14th November 2013. PW6 testified that there was vaginal penetration. However, it was not the first time that the complainant had sex. He found no bruises or blood stains. However, there was a whitish discharge from the genitalia. He prescribed drugs for both complainants including antibiotics, Post Exposure Prophylaxis and e-pills.

16. When the appellant was placed on his defence, he gave a brief unsworn statement. He stated:

> *"I did not commit the offence. The children came to visit me. They always visit me. If I committed the offence they would not have gone to the shop. They would have had injuries. That is all to state".*

17. A number of issues arise from that evidence. I will deal first with the *identification* of the appellant. Both complainants were *not* strangers to the appellant; they were his *neighbours*. The appellant confirmed the two had visited his homestead on previous occasions. The identification of the appellant was thus never 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 and PW2.

18. The next key question is whether the appellant *penetrated* the complainants. That is the crux of this appeal. *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".*

19. The complainants were emphatic that the appellant removed his trousers and inserted his penis into their vaginas in *turns*. That evidence was *corroborated* by the clinical officer, PW6. True, the appellant was not subjected to a medical examination to connect him with the offence. But the material evidence from PW1, PW2 and PW6 established *penetration* by the appellant.

20. 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.

21. From the unchallenged testimony of PW1 and PW2; the treatment notes (exhibits 2 [a] and [b]); and, the P3 forms, it is evident that the two minors were aged 12 and 13 respectively 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."*

22. Lastly, I have weighed the unsworn statement of the appellant against the evidence of PW1, PW2, PW4, PW5 and PW6. When juxtaposed against that evidence, the appellant's defence is a mere sham. It raised *no* doubt in his favour. He was placed squarely at the *locus in quo*; and, he was positively *identified* as the person who *penetrated* the two complainants. His ignorance of the law is *not* a defence. I concur with the learned trial magistrate's finding of guilt.

23. In the end I have reached the conclusion that the prosecution proved *all* the elements of the two counts 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*.

24. I will now turn to the appeal on sentence. 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 on each count; the sentences to run *concurrently*. I am accordingly unable to disturb the sentence.

25. The upshot is that the conviction and sentence are *upheld*. The entire appeal is accordingly *dismissed*.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MURANG'A** this 17th 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.