**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.46 OF 2014**

**MICHAEL KIPKORIR YEGON.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal against the conviction and sentence in Kericho CM Cr. Case No. 38 of 2012 by Hon. S. Soita Ag. CM dated 7th August 2014)

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, No.3 of 2006. The particulars of the offence were that on the 11th day of April 2012 at about 1800 hours in Kericho district within Rift Valley Province did cause his penis to penetrate the vagina of C C a child aged 10 years. The accused also faced an alternative charge of committing an indecent act with a child in violation of section 11 (1) of the sexual Offences Act No.3 of 2006. The particulars of the offence were that on the 11th day of April 2012 at about 1800 hours in Kericho District, within Rift Valley Province did intentionally or unlawfully cause his penis to come into contact with the vagina of C C a child aged 10 years.

2. The accused pleaded not guilty to the offence and the trial proceeded before Ndururi (PM). After a full trial, the accused was found guilty as charged on the main count of defilement. He was sentenced to life imprisonment.

3. Dissatisfied with both the conviction and sentence, he filed his petition of appeal on 11th August 2014. His first ground is that the trial court erred in convicting him without a medical report on him and the complainant. Secondly, that the court erred by ignoring the grudge between him and the complainant's mother. Thirdly, that the court erred by relying on hearsay evidence; fourth, that the court ignored the witnesses who were of the same family; fifth, that the court erred by convicting him on contradictory evidence adduced by the prosecution.

4. He later placed before the court at the hearing of his appeal submissions in which he raised additional grounds. These were that the charge sheet was defective, that the court ignored the fact that the charge sheet stated that the complainant was C C while she stated in evidence that she was J C; that the court erred by relying on hearsay evidence in that the prosecution failed to distinguish between C C and J C. He was also aggrieved that the court relied on the evidence of the clinical officer without considering that the clinical officer examined C C while the clinic health card indicated that the child was J C.

5. The prosecution case was presented through 4 witnesses. PW1 was J C, a class one pupil at [particulars withheld] Primary School. She stated that she stays with her grandmother. On 11th April 2012, in the evening, she was at home grazing goats when the accused, whom she referred to by his name, Michael, came and held her. She identified Michael as the accused in the dock. He held her and did *'tabia mbaya'* on her private parts, which she pointed at. He had then left after he finished. She had told L, an age mate, who had told her grandmother. Her grandmother had taken her to hospital at Kipsitet. PW1 knew Michael, who was a neighbour at home.

6. PW2 was S C, the grandmother of the complainant. According to PW1, the complainant was an only child whose parents were deceased. PW2 had gone to the shamba on 11th April 2012, leaving PW1 grazing goats near their home. PW2 returned home about 4.00 p.m, but PW1 did not tell her anything. She told PW2 after two days that she was feeling unwell, that her private parts had injuries. She then told PW1 that she had been defiled by the appellant. PW2 bathed PW1, then took her to hospital. She was examined and it was found that she had been defiled twice. The accused, who was PW2's immediate neighbour, had disappeared. He was later arrested. She produced a health card issued at Sirat Clinic in respect of the child.

7. In cross-examination by the accused, she stated that the child had been defiled on a Wednesday but had told PW2 on a Friday. She had given money to the accused to buy shoes for the child. She had talked to the accused on the material day at about 7.00 p.m about the money, but did not know then that he had defiled the child.

8. PW3 was Misoi Isaac, a clinical officer at Kericho District Hospital. He had examined the child, aged 10, on 16th April 2012. The child

had been referred to Kericho District Hospital by the OCPD, Kipsitet, on allegation of being defiled by someone known to her. He had found that she was having difficulty walking and had a torn hymen. The tear was fresh. She also had bruises on the external genitalia and on the vaginal wall. She also had a vaginal discharge. Since she had been examined 5 days after the defilement, no spermatozoa could be seen in laboratory tests. He concluded that the child had been defiled, and that there was complete penetration of her genitalia.

9. When placed on his defence, the appellant opted to say nothing in his defence. Judgment was delivered by S.M.S. Soita, who had taken the matter over from Ndururi, (PM) and the accused had elected to proceed with the case from where it had reached.

10. I have considered the appellant's grounds of appeal and the submissions of the appellant and the state. With respect to the contention that the magistrate erred by convicting him without his medical report being produced, I believe that the law is that such a medical test on a person charged with a sexual offence is not mandatory. Section 36 of the Sexual Offences Act gives the court discretion to determine whether samples should be taken for purposes of medical tests. The fact that there was no medical report on the appellant does not amount to an error on the part of the trial court. There was sufficient evidence, in the view of the court, to show that the appellant committed the offence, and the trial court did not therefore have to make an order for medical testing of the appellant. This ground of appeal therefore has no merit.

11. The appellant has argued, secondly, that the trial court erred by ignoring that there was a grudge between the appellant and the mother of the complainant. I note that the child in this case was an orphan who was being looked after by her grandmother. In any event, the record indicates that the appellant elected to keep silent when placed on his defence. In addition, he did not raise the issue of a grudge in his cross-examination of the complainant's grandmother, PW2. I find therefore that this ground has no merit, either.

12. In his third ground, the appellant contends that the magistrate erred by relying on hearsay statements. I have set out above the prosecution evidence adduced before the trial court. I agree with the submissions of the State that contrary to the contention by the appellant, the prosecution did not rely on hearsay evidence. Each of the prosecution witnesses gave an account of what happened from their own knowledge.

13. The complainant, PW1, testified about how the appellant defiled her while her grandmother had gone to the farm. PW2 testified about what her granddaughter told her, and how she had taken her to hospital where she was examined by PW3, the clinical officer. The clinical officer, on his part, testified about what he found when he examined the complainant. He had noted that her hymen was torn and she had bruises on her external genitalia, and he had concluded that there was penetration and she had been defiled. The clinical officer had produced the P3 form which he had completed on the complainant. The prosecution evidence was therefore direct evidence, and this ground of appeal must also fail.

14. The appellant has complained in his fourth ground that the trial court erred by relying on evidence from the same family. However, this assertion is not factually correct. The complainant was the granddaughter of PW2, who was her care giver as her parents were deceased. PW2 is the one to whom the child had reported the defilement, and she is the one who had taken her to report the defilement and for the medical examination.

15. However, PW3 and PW4 were independent witnesses, being the clinical officer and the investigating officer respectively. The complaint with respect to the witnesses being from the same family is therefore unfounded.

16. With regard to the complaint in the fifth ground that the trial court relied on contradictory evidence, having considered the evidence on record, I find the ground to be without merit. From the evidence adduced before the trial court, it emerged clearly that the appellant, who was a neighbour and well known to the complainant and her grandmother, defiled the child, a fact that was confirmed by the medical evidence. This ground must also fail.

17. The appellant argued in his submissions three final but connected grounds which the State did not respond to: that the charge sheet was defective as it showed that the complainant was C C while she stated in her evidence that her name was J C; that the prosecution failed to distinguish between C C and J C; and that the court relied on the evidence of the clinical officer without considering that the clinical officer examined C C while the clinic health card indicated that the child was J C.

18. The evidence before the trial court indicated that the complainant before the court, a child of 6 years, was the one who had been defiled by the appellant. She was the one who had been examined by the clinical officer, and found to have been defiled. The medical evidence given was with respect to her. The charge sheet does indicate that the name of the child who was defiled was C C. The question is whether this error in the charge sheet, which doubtless also resulted in the error in the P3 form, was so substantial that the conviction of the appellant should be interfered with, in the face of the rest of the evidence against him.

19. I have considered the provisions of section 214 of the Criminal Procedure Code. It provides as follows:

> **Variance between charge and evidence, and amendment of charge**
>
> **(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case..**:

20. The trial court could have noted that the name of the complainant in the charge sheet did not correspond with the name that the child, PW1, gave in her testimony. More importantly, the prosecution should have noted the discrepancy and sought to amend the charge. This did not happen.

21. However, in my view, the defect does not amount to such a defect as would cause prejudice to the appellant and warrant a reversal of his conviction and sentence. Section 382 of the Criminal Procedure Code, which is titled ***"Finding or sentence when reversible by reason of error or omission in charge or other proceedings"*** provides that:

> **Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
>
> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.**

22. I do not find the error in the name of the complainant in this case occasioned any prejudice to the appellant. He was fully aware of the charges facing him; and he knew full well the name of the child he was charged with defiling. I find that raising the issue of her name at this stage, when he could have done so during the proceedings, is a last ditch effort to escape paying for his heinous act against an innocent child.

23. I accordingly find no merit in this appeal, and it is hereby dismissed, and the conviction and sentence are upheld.

**Dated Delivered and Signed at Kericho this 27th day of June 2018**

**MUMBI NGUGI**

**JUDGE**