REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 17 OF 2017

PETER MIRINGU MBAIRE.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. J. N. Nthuku – Senior Resident Magistrate delivered on the 1st February, 2017 in A/CR Case No. 43 of 2012*)*

JUDGMENT

1. The Appellant herein is Peter Miringo Mbarire. He has appealed against his conviction and sentence arising from ***Nakuru Chief Magistrate's Criminal Case No. 43 of 2012***. In that case, he was charged with the offence of defilement contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act. The facts alleged were that the Appellant intentionally and unlawfully inserted his penis into the vagina of R N, a child of seven years on 06/02/2012.

2. The Appellant faced an alternative count of committing an indecent act with the same child contrary to section 11(1) of the Sexual Offences Act. The alternative count allege that on 06/02/2012, the Appellant intentionally and unlawfully committed an indecent act with the child by touching her vagina.

3. The Appellant pleaded not guilty and the case proceeded for trial. The Prosecution called six witnesses to prove its case. Upon being put on his defence, the Appellant gave a sworn testimony and called one witness. At the conclusion of the trial, the Learned Trial Magistrate convicted the Appellant of the offence charged and sentenced him to life imprisonment as dictated by law.

4. The Appellant is dissatisfied with both conviction and sentence and has appealed to this Court. He has listed the following grounds of appeal:

> *1) The trial magistrate erred in law and fact by appreciating the medical evidence produced before the trial court and which was not representative of the alleged defilement.*
>
> *2) The trial magistrate erred in law and fact by appreciating an evidence from a lying witness (complainant)*
>
> *3) The trial magistrate erred in law and fact by failing to evaluate the evidence given by PW5.*
>
> *4) The trial magistrate erred in law and fact by failing to evaluate the medical evidence and the supporting documents.*

5. The Appellant filed written submissions and informed the Court during the hearing of the appeal that he had nothing else to add to those submissions. His submissions concentrated on two points:

> a. First, the Appellant argued that the medical evidence presented to convict him was not "representative" because the Clinical Officer who examined the Complainant stated that the hymen was "freshly" torn yet the examination happened on 13/02/2012. According to the charge sheet and page 1 of the P3 Form, however, the alleged defilement occurred on 06/02/2012. This means, argues the Appellant, the medical evidence did not converge with the allegations.
>
> b. Second, the Appellant says that there was material contradictions between the story given by the Complainant to the Police and that she first gave to her Cousin, N, who testified as PW6. These contradictions should, the Appellant argues, been resolved in his favour to raise reasonable doubts.

6. The State opposed the Appeal. Mr. Chigiti, Learned State Counsel, appeared for the State.

7. Mr. Chigiti argued that the prosecution proved all the ingredients of the offence of defilement: age, penetration, and identification. He argued that the age was proved by oral and documentary evidence including the P3 form, the treatment notes and a birth certificate. All these three documents confirm that the child was 7 years old. The child said she was 8 years old and in class 2 when the incident occurred.

8. On penetration, Mr. Chigiti argued that the child told the Trial Court that the Appellant removed her clothes and his clothes and put his penis in her genitalia and that she had difficulties in walking as a result. Mr. Chigiti indicated that there was also a P3 form confirming lacerations on her labia majora and discharge on her genitalia. The Complainant was treated for a sexually transmitted disease.

9. On identification, Mr. Chigiti state that the child properly identified the Appellant. She said Appellant was a neighbor and the Appellant confirmed that the child was a neighbor.

10. Mr. Chigiti, finally, argued that the appellant was convicted and sentenced to life which is the only sentence available for an offence under section 8(2) – when the child is less than eleven years old.

11. This is a first appeal. Therefore, this court has the duty to re-evaluate all the evidence given at trial and come to its own independent conclusions. The Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.

12. The main charge which the Appellant faced is defilement. Sections 8(1) and 8(2) of the Sexual Offences Act provide that:

> *8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life*.

13. Section 2 of the Act defines "penetration" as:

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

14. Going by this definition of defilement, I would agree with Mr. Chigiti that to successfully obtain a guilty verdict, the Prosecution was required to prove three elements:

> a. That the Complainant was a child – in this case below eleven years old;
>
> b. That there was penetration of the Complainant's genital organs;
>
> c. That it was the Appellant who caused the penetration.

15. I have carefully evaluated and analyzed the evidence presented at the trial.

16. The first ingredient is not at all in issue: the oral testimony of the Complainant was supported by the oral testimony of her mother (PW2) as well as the documentary evidence produced in the case: a Birth Certificate; Treatment Notes and P3 Form.

17. It would appear that the Appellant does not question the second element either: that there was penetration given the evidence produced in Court. The Complainant testified that the Appellant penetrated her severally until she had trouble walking. The Complainant's mother, PW2, testified about learning about the defilement and examining her daughter – finding evidence of diseased genital organs. Finally, the P3 Form and the Treatment Notes are unequivocal that there was penetration. Indeed, they chronicle presence of a sexually transmitted disease. Hence, there is no question that the Complainant in this case was defiled.

18. The only open question seemed to be who committed the offence. The Learned Trial Magistrate had no doubt that it was the Appellant. She concluded as follows:

> *On the identity of the defiler, the child pointed fingers at the [Appellant]. The [Appellant] denied having defiled the child. He said that the child came with PW5 and sold maize to him at his home and he was in the company of his wife, sister in law and grandmother. After he bought maize the girls went away. Interestingly, his own witness i.e. his wife who was allegedly with him said that on that day 06/02/2012, the Complainant never at any time came to their home. So whereas the [Appellant] says PW1 came and left, DW2, the wife, says she never came to that home at all. This is what happens when witnesses lie to Court; they contradict themselves and tender their evidence wholly unbelievable (sic)…. I find that the child herein was defiled by the [Appellant]….*

19. As aforesaid, the Appellant has complained that the medical evidence linking him to the defilement is problematic. In particular, he quibbles with the fact that the date of defilement is indicated in the P3 form as 06/02/2012 yet the Clinical Officer, Jaco Jelimo, who examined the Complainant said that the Complainant had a fresh perforated hymen meaning that the accident had occurred on the same day.

20. I have looked at the P3 Form and re-evaluated the evidence of PW4, the Clinical Officer. I do not think the alleged discrepancy alleged by the Appellant amounts to anything. The P3 Form is clear that the approximate age of injuries was one week. On page 1 of the form it states that the assault allegedly occurred on 06/02/2012. The Clinical Officer found evidence of penetration including a "freshly" perforated

hymen and lacerations on the labia majora and labia minora. He also found whitish discharge which had pus cells – evidence of a venereal disease.

21. Although the Trial Court record appears to show that the Clinical Officer said that the "fresh" perforation of the hymen means that intercourse took place on the same day of the examination, the written record is clear that the Clinical Officer was conscious that the assault was a week old. I take that by "fresh", he was referring to the medical use of that term to contradistinguish it to perforation of distant origin. The evidence in the P3 Form tallies with the testimony of PW1, PW2, PW3 as well as PW5. There is, therefore, not enough there to raise any reasonable doubt.

22. I would say exactly the same about the complained discrepancies in the testimonies of PW1 (The Complainant) and PW5 (N W, the Cousin). The complaint is that the Complainant appears to have told PW5 that the Appellant had inserted fingers in her vagina while she told the Police that he had inserted his male member on her vagina.

23. First, PW5 in cross examination said that in the course of their conversation the Complainant did say that they had done "*tabia mbaya*" with the Appellant – which is the polite street word for having sex used by children. Second, this discrepancy would be too minor to shake the other consistent evidence presented by the Prosecution. Courts convict on credible evidence; not necessarily perfect evidence. It is often the case that the testimonies or recollections of witnesses might differ slightly. Such differences if minor and non-material do not necessarily mean that the testimonies are not reliable or credible. They merely betray the humanness and mortality of the witnesses. Such is the case here – especially considering that the recollection demanded of the two witnesses is one of a profoundly traumatic event for the Complainant, a child of tender years.

24. Based on this analysis, the Learned Trial Magistrate was perfectly entitled to find that the main charge of defilement contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act was proved and to convict the Appellant. Similarly, there is no error, and no appeal is possible against the sentence imposed: it is the only one possible under the Act for the offence charged.

25. **Consequently, this appeal has no merit and it is dismissed.**

26. Orders accordingly.

Dated and delivered at Nakuru this 21st day of June, 2018

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(PROF). J. NGUGI

JUDGE