REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 151 OF 2016

MUSAU NGUMBI MAKAU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From an original conviction and sentence in criminal case number 1527 of 2013 in the Chief Magistrate's court at Kiambu)

JUDGMENT

1. This appeal is against both conviction and sentence meted upon the appellant on the 28th March 2015 who had been charged with the offence of defilement Contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act No.3 of 2006,** to a girl child aged eight(8) years.

The particulars of the offence were that on diverse dates between 15th March 2013 and 12th July 2013 at [particulars withheld] area within Kiambu County intentionally an unlawfully caused his penis to penetrate the vagina of A W a child aged eight years. Count two was an alternative charge of indecent **Act Contrary to section II (1) of the Sexual Offences Act No. 3 of 2006**.

2. As the first appellate court, I have re-analysed an re-examined the entirety of the evidence adduced before the trial court to satisfy myself, and come to my own conclusion, being aware that I never heard or saw the witnesses testify – **Republic -vs- George Anyango Anyang & Dennis Oduol Onyojo – Criminal Appeal No. 53 of 2016(2016) e KLR.**

I am also minded that it is not the function of an appellate court to look for evidence that may support the trial courts findings – In **Okeno -vs- Republic [1972] EA 32;** the court stated,

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination *(Pandya v R* [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions *(Shantilal M Ruwala v R* [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424."**

3. The appellant in his Amended petition of appeal filed on the 11th June 2018 preferred three grounds on the trial magistrates findings on **penetration, unlawful shifting of the burden of proof and admitting unlawful hearsay evidence.**

4. I have considered the appellant's written submissions.

Section 8(1) of the Sexual Offences Act No.3 of 2006 states:

> **8(1) "A person who commits an Act which causes penetration with a child is guilty of *an offence termed defilement."***

5. The issues for determination as framed by the appellant, and that I agree with are:

> **1. whether there was penetration of the complainant's genitalia**

2. whether the complainant was a child

3. Whether the penetration was by the appellant.

6. The Childrens Act No.8 of 2001 describes and gives a meaning to:

"1."a child" as "any human being under the age of eighteen years."

2. "genital organs" to include the whole or part of male or female genital organs and for purpose of this act – Sexual Offence Act – includes the anus.

3. "Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

7. The critical ingredients of defilement are the:

a) age of the child

b) proof of penetration and

c) positive identification of the assailant – these were stated in the case of

Dominic Kibet Mwareng -vs- Republic and in **Hilary Nyongesa -vs- Republic. Mwilu J(**as she then was) stated that:

"age is such a critical aspect in sexual offences that it has to be conclusively proved--- and this becomes more important because punishment(sentence) under the Sexual Offences Act is determined by the age of *the victim.*"

8. However, **Motende J in Musyoka Mwakari -vs- Republic** held that the age of a child may also be proved "**by** birth certificate, victim's **parents** or guardian and **observation or common sense**."

See also **Criminal Appeal No.40 of 2013 (2016) e KLR Francis Muthee Mwangi -vs- Republic** where the above were upheld.

9. **PW1** the complaint nine years old at date of trial was categorical that the appellant and another person (her brother) while her father was away

"used to remove my clothes and sleep on top of me --- they did this several times ---they would also remove their clothes and lay on top of me--- They were doing bad things to me. They were inserting the things they use to urinate in the one I use to urinate. I used to cry when they do this---"

10. Upon examination of the minor by **PW5**, **Dr. Joseph Maundu,** in his report stated thus:

" I examined A W 8 years. Alleged to have been defiled. There were no physical injuries. She had normal external genital. No injuries were noted but the hymen was broken. There was no discharge noted. I signed the P3 Form on 15th July 2013."

It is worth noting here that the appellant did not cross examine the Doctor on his report at all.

11. Penetration was therefore sufficiently proved by the child herself as well as by the medical examination. By her evidence, the sexual intercourse happened many times and that explained lack of physical injuries on her genitalia and discharge as such would have healed over the period.

12. Although the evidence was uncorroborated by an eye witness, **proviso to Section 124 of the Evidence Act** empowers the court to convict an offender if it is satisfied that the child or victim was being truthful. The trial magistrate who saw and heard the victim testify believed in the child's evidence as being truthful.

13. The appellant testified as **DW2**. His only defence was that he was arrested for something he did not do. He did not cross-examine the victim or any other witness.

I find no substance in the appellant's submissions that the matter of penetration was not proved.

14. On the victim's age, it is true that no birth certificate or baptismal card or any document was provided.

As I have stated earlier, and supported by numerous judicial decisions, other methods including observation and common sense would prove the approximate age of a minor – **Musyoki Mwakori -vs- Republic (Supra)-**

In her evidence, the victim testified that she was in class 4. The doctor who examined her stated her age as 8 years. Common sense would ordinarily place a child in class four at between age 8 to 10 years, and below 11 years. No contrary submission was offered by the appellant. I find the trial magistrates finding to have been sound and reasoned supported by the evidence.

15. As to who committed the offence, the victim was candid that it was the appellant who used to come home with her father. She knew him by name, and that it was her father who brought him home – and she pointed at him in court.

This was identification by recognition. The other person who was raping her was her brother, an accused and appellant in a different appeal.

16. I find no reason why this young girl would accuse her own brother and this appellant if they did not commit the offence.

If indeed the appellant was being framed he would have cross examined the victim who pointed to him and PW2 and other witnesses which he failed to.

For the above reasons, I find that the trial magistrate analysed the entire evidence sufficiently and made proper conclusions. My own reexamination of the evidence brings me to the same conclusion. A conviction was inevitable.

17. Just like the trial magistrate, I have noted that the Section of the Sexual Offences Act under which the Penalty was stated as **Section 8(2)** was wrong, as it ought to have been Section 8(4). The trial magistrate noted the error and rendered that as the appellant was aware of the offence he was charged with, and the penalty if found guilty, and he participated therein without any objection, the error caused no prejudice to the appellant

I am of a similar view, that the error caused no miscarriage of justice to the appellant.

18. Consequently, it is my conclusion that the offence of defilement was proved beyond reasonable doubt, and the appellant has was unable to persuade or cast any doubt in my mind that he was not the offender.

I uphold both the conviction and sentence. The appeal is dismissed.

Dated and signed at Nakuru this 26th Day of July 2018.

J.N.MULWA

JUDGE

Delivered at Kiambu this 2nd Day of August .2018.

J. NGUGI(PROF.)

JUDGE