



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 183 OF 2017**

**STEPHEN KIDAMBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 33 of 2015 delivered by Hon. Kamau, RM on 23<sup>rd</sup> August, 2017).*

**JUDGMENT**

1. Appellant Stephen Kidamba was charged with the offence of the defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars were that on the 23 July 2015 [Particulars Withheld] within Nairobi County, unlawfully and intentionally inserted his male genitalia into female genitalia namely vagina of S.A.S a girl aged 13 years old. He was in the alternative charged with indecent act with a child contrary to Section 11(A) of the Sexual Offences Act in that he unlawfully and intentionally allowed his male genitalia to get into contact with a female genitalia namely vagina of S.A.S a girl aged 13 years old.

2. At the close of the trial he was convicted of the main charge. Aggrieved with both the conviction and sentencing he preferred the instant appeal. The Appellant's grounds of appeal are set out in a Petition of Appeal filed on 27<sup>th</sup> December, 2017. I duplicate them as under;

*a) The learned magistrate erred in law and fact in finding that the Prosecution had not proved the case of defilement against the Appellant beyond reasonable doubt.*

*b) The learned magistrate erred in law and fact in failing to analyze and evaluate the entire evidence.*

*c) The learned magistrate erred in law and fact in failing to assess the evidence of the minor who was of unsound mind to satisfy himself that their testimony was worthy of being believed.*

*d) The learned magistrate erred in law and fact in failing to find that PW2, D S N, concocted and fabricated the allegations against the Appellant and further influenced the Complainant PW1.*

*e) The learned magistrate erred in law and fact in failing to address the issue of irreconcilable contradictions and omissions in the testimony of prosecution witnesses besides the medical reports which exonerated the Appellant from the defilement accusations.*

*f) The learned magistrate erred in law and fact in failing to note that key witnesses had not been called especially the alleged neighbours of the accused person for the purpose of concealing material facts.*

*g) The learned magistrate erred in law and fact by failing to consider the Alibi defense of the Appellant which was never dislodged by the prosecution.*

*h) The sentence was manifestly harsh and excessive in the circumstances.*

3. The appeal was canvassed before me on 31/07/2018. Prof. Hassan who represented the Appellant relied on written submissions filed on 7/6/2018 which he highlighted on the date of the hearing. I will consider both the written and oral submissions simultaneously.

4. Prof. Hassan submitted that the medical evidence did not link the Appellant to the offence. He pointed to the fact that although penetration was established, it was not proved that the culprit was the Appellant. He singled out the DNA analysis examination which concluded that the

semen and blood on the minor's pants were from unknown male.

5. Counsel took issue with the evidence of the minor. He submitted that the same could not be relied upon as the minor was mentally challenged. Effectively, the said evidence required corroboration. According to the counsel, PW2 the mother of the minor through whom she (minor) testified adduced mere hearsay evidence which could not be relied upon.

6. Counsel also took issue with the failure of the prosecution to call crucial witnesses. He pointed to the evidence of PW2 and PW6 who said that the Appellant's neighbours had seen the minor in his house and had heard noises on the fateful day. However, none of the neighbours was called as a witness to confirm the assertion. As such, the Appellant could not be convicted on the basis that his neighbours saw the minor in his house. Counsel asserted that the conviction of the Appellant was therefore premised on concocted evidence of PW2.

7. Prof. Hassan also submitted that the Appellant's defence was not considered. He stated that the same was plausible and dislodged the prosecution's case.

8. Finally, counsel submitted that the sentence imposed was harsh and excessive in the circumstances. He pointed to the fact that under Section 8(3) of the Sexual Offences Act, a minimum sentence of fifteen years imprisonment is provided for but the trial court imposed a sentence of 25 years imprisonment. He submitted that the court failed to take into account the Appellant's mitigation that he was remorseful, was a first offender and had spent three years in prison. These factors, according to the counsel, ought to have mitigated for a more lenient sentence. Counsel urged the court to allow the appeal, quash the conviction and set aside the entire sentence.

9. The Respondent relied on written submissions filed by learned State Counsel, Miss Sigei on 24<sup>th</sup> July, 2018. She zeroed in on the fact that the three elements of the offence of defilement namely, penetration, age of the victim and identification of the perpetrator were established. On penetration, she submitted that the same was established through the oral evidence of the minor victim as well as her mother, PW2 and subsequently corroborated by the medical evidence of both the Clinical Officer from Nairobi Women's Hospital and Dr. Maundu of police Surgery which disclosed that the hymen was broken. In addition, there was evidence of injuries on the minor's face and neck inflicted when she resisted.

10. With respect to age, counsel submitted that the same was established through a Birth Certificate which indicated that PW1 was born on 9<sup>th</sup> November, 2002.

11. On identification, counsel submitted that although the minor was mentally challenged, she was able to take her mother, the police and chief to the house of the Appellant where the offence took place. Furthermore, after the Appellant was arrested, she further identified him at the Police Station.

12. As to the ability of the victim to testify, counsel submitted although she had a mental disability, it did not bar her from giving evidence. This was informed by the evidence of her mother who testified that she used to also experience lucid moments. She referred the court to Section 125(2) of the Evidence Act which provides that:

***“a mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them”.***

13. In view thereof, it was submitted that the minor was indeed able to recount vividly what transpired on the material date. Court was referred to a Court of Appeal decision in **Leonard Mwangemi Munyasia v Republic [2015] eKLR** in that regard.

14. Counsel added that the appointment of an intermediary, PW2, to testify on behalf of the minor was proper and accorded with Section 31 of the Sexual Offences Act and Article 50(7) of the Constitution.

15. She also submitted that although the DNA analysis did not link the Appellant to the offence, there was other sufficient evidence on which the prosecution case was founded that linked the Appellant to the offence. One such instance cited was the proviso to Section 124 of the Act which allows the court to convict on uncorroborated evidence of a minor if the court believes that the minor spoke the truth. It was submitted that in this case, the minor spoke the truth.

16. On sentence, Miss Sigei submitted that the same was legal because the law provides for a minimum of 20 years imprisonment. That the enhancement of the sentence to 25 years was warranted as the Appellant had preyed on a young child and needed to be removed from the society. Miss Sigei urged the court to dismiss the appeal in its entirety.

## **Evidence**

17. The summary of the prosecution's is that on 23/7/2015 at about 7.00 p.m. when the complainant's mother one D S N returned from work, she did not find her daughter, the complainant, at home. She looked for her from house to house to no avail. She finally found her on the following day at about 6.30 a.m. on the road. She had visible injury marks on her face. The face was swollen and one eye was bleeding. She also had scratch marks on the neck. She was wearing a skirt, T-shirt and a sweater.

18. The mother to the complainant was listed as PW2 after PW1, the complainant was stepped down and the court ruled that on account of her disability, she would give her testimony through an intermediary, her mother. The court nevertheless still invited her to testify after her mother. After a *voire dire* examination, the court ruled that she would be given an unsworn statement of evidence but would be cross-examined.

19. In her own testimony, she stated that the Appellant pulled her from the road and took her to his house where he defiled her after undressing her. She stated that he Appellant assaulted her after she resisted. In cross examination, she stated that the Appellant kept slapping her on the face and was unable to scream. He then threw her out of the house after he was done and told her never to return to his house again. She went and slept on the road. She recalled that she took her mother to the house of the Appellant which she personally identified.

20. Back to the evidence of PW2, she corroborated the evidence of PW1, pointing that PW1 took her to the house where she was defiled. She did not find anybody in the house and she opted to report the matter to Muthangari Police Station. The police reported the incident to the area Chief. The Appellant was later arrested after he opened his house.

21. PW2 took her daughter to Nairobi Women's Hospital on 24/7/2015 where she was treated and a post care Rape Form filled. Police also issued her with a P3 Form which was filled by **PW5, Dr. Joseph Maundu** of Police Surgery. He noted no bruises on the genitalia. The hymen was broken. She had bruises on the neck, right breast and face. He adduced the P3 Form as an exhibit. The medical report from the Nairobi Women's Hospital was adduced by **PW3, Joseph Mwanzia**, a Clinical Officer on behalf of his colleague, Maina Grace who examined the victim. No injuries were noted on her genitalia but on the forehead. Her hymen was broken. She had not changed clothes nor taken a bath. It was concluded that she had been defiled. The examination was done on 24/7/2015 a 11.00 a.m.

22. PW2 further testified that sometime in the month of July, 2015, she went to the police Station and handed over the clothes that PW1 was wearing on the material date for purposes of subjecting them to DNA analysis. They included a blouse, a skirt, a black biker pant, blue pants and a sweater.

23. The Appellant was arrested on 25/7/2015 at 12.00 noon from his house in Kawangware 56 by **PW4, CPL Stephen Mbutia** of Kawangware AP Post. He was accompanied by Sgt Oketch. According to PW4, it is PW1, the victim who identified the house where she was defiled. Inside it, they found the Appellant whom they arrested and escorted to Muthangari Police Station.

24. The case was investigated by **PW6, PC Veronica Thuo** of Muthangari Police Station, gender desk. She entirely corroborated the testimonies of PW1 and 2 with respect to how the offence occurred. She confirmed the report of the offence was made on 24/05/2015. She observed that PW1 had physical injuries on the neck and the forehead was swollen. She confirmed that PW1 was found on the road on 24/5/2015 by her mother where she had spent the night after the Appellant threw her out of the house. She further testified that PW1 identified the Appellant after his arrest. She took PW1 and the Appellant for medical examinations on 27/5/2015.

25. PW6 went on to state that she visited the scene of the incident which was a plot with two rows of iron sheet houses. That PW1 identified with ease the house belonging to the Appellant. She drew a sketch plan of the plot and the scene at which PW1 was found on 24/5/2015 and adduced it as an exhibit.

26. PW6 also corroborated the testimony of PW2, 3, 4, and 5 that PW1 was mentally challenged and was attending a special school. On 2/9/2015, she took the clothes PW1 was wearing on the material date to the Government Chemists for DNA analysis. **PW7, Henry Kiptoo Sang** a government Chemist confirmed that he received the exhibits on the said date. His analysis did not find any semen or blood on the biker, blouse skirt and pull over. The pant was lightly stained with semen and blood cells. He concluded that the semen and blood on the pant came from an unknown male person. He signed the analyst report on 2/9/2015 and adduced it as an exhibit. The Appellant was charged on 28/7/2015.

27. After the close of the prosecution case, the court ruled that a prima facie had been established and accordingly put the Appellant on his defence. He gave a sworn statement of defence. He confirmed he hailed from Kawangware, Muslim Area and worked as a mason. He merely stated that he was arrested by administration police officers on 25/7/2015 from his house and on 26/7/2015 he was taken to Muthangari Police Station from where he was charged on 27/7/2015.

### **Determination**

28. This being the first appellant court, its duty is to re-evaluate the evidence afresh and arrive at its own conclusion. In so doing, the court must have regard to the fact that it has neither seen nor heard the witnesses and give due regard to that. See **Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32**. I have accordingly considered the entire evidence on record. I have also given regard to the respect rival submissions. I have concluded that the following issues arise for determination.

a) Whether the testimony of PW1, the complainant ought to have been recorded after the court ruled that she would testify through an intermediary. And if so, whether the court consider the evidence that was recorded.

b) Whether the case was proved beyond a reasonable doubt.

### **Whether the evidence of PW1 should have been recorded and considered.**

29. The record shows that the complainant, S.A.S who was recorded as PW1 would have been the first prosecution witness to testify. The trial court undertook a *voire dire* examination from her. Before the same commenced, the court noted that the child appeared to have a mental condition and was not alert. She was accordingly stood down. The learned prosecutor, M/s Thunguri then addressed the court and informed it that the child had special needs and attends a mental school. She sought leave of the court that PW1 through an intermediary. The court granted the request pursuant to Section 31 of the Sexual Offences Act. It ruled that PW1 was a vulnerable witness who had intellectual impairment. Earlier, Ms. Thunguri had proposed PW1's mother as her intermediary. She testified as PW2.

30. In an interesting twist of event, after testimony of PW2, the court allowed PW1 to be recalled and testify. It conducted a *voire dire* examination but after four questions to the minor observed as follows:

***“child seems retarded or mentally challenged, she doesn’t understand the nature of proceedings or an oath. She will give unsworn statement (in Kiswahili).”***

31. It at this juncture that the learned trial magistrate erred. Once she declared the witness vulnerable and ruled that she would testify through an intermediary, the witness ought not to have been recalled again to testify. After all, the basis on which PW1 was declared a vulnerable witness (a person with mental disability) had not been dispelled. See: Section 3(1) (c) of the Sexual Offences Act. I say so because even after PW1 was recalled, the court still observed that she was mentally impaired and she did not understand where she was, the nature of the proceedings or of taking an oath. It was then illogical, unnecessary and irregular to call her to give evidence.

32. Under Section 2 of the Sexual Offences Act, an intermediary is defined as:

***“means a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children’s officer or social worker.”***  
***(emphasis added)***

33. Therefore, once the learned trial magistrate ordered that PW1’s mother would testify on behalf of PW1, it was illogical to purport to duplicate her evidence yet she was deemed to be adducing evidence equal to what the vulnerable witness would adduce. In my candid opinion, as the reason occasioning PW1 to be declared a vulnerable witness manifested itself even after she was recalled, an injustice would be occasioned to the case if a determination would be arrived upon a reevaluation of her (PW1) evidence. Simply stated, since PW1 was declared a vulnerable witness, whose evidence would be adduced by an intermediary, any evidence recorded from her was inadmissible. After all, there is no doubt that PW1 was mentally impaired. She attended a special school for this reason with a referral letter from the Ministry of Education attesting to this fact. Furthermore, all prosecution witnesses did observe that she was mentally impaired. In re-evaluating the prosecution evidence, therefore, I shall not have regard to her evidence.

**Whether the case was proved beyond a reasonable doubt.**

34. The prosecution was enjoined to prove three basic ingredients namely, penetration, age of the minor and identification of the perpetrator. With respect to penetration, PW1 candidly gave an account of how, after she returned from work on 23/7/2015 she did not find her daughter. She traced her on the following day at 6.30 a.m. by the road side at a place called Sweet Waters. The child then narrated to her how the Appellant had on the previous dated at 7.00 p.m. grabbed her from the road and dragged her to his house where he defiled her. She noted that her pant was soiled with blood and semen. Medical evidence produced by PW3 and 5 confirmed that there was penetration as the hymen was missing. The child had also narrated to PW2 that the Appellant assaulted her when she tried to raise alarm, a fact that was confirmed by the medical evidence that she had bruises on her neck, a swollen face and a bleeding eye. The evidence of PW2 having been corroborated by the medical evidence leaves no doubt in my mind that PW1 was defiled.

35. The age of the minor was of course established by a Birth Certificate which was identified by PW2 and produced by PW6 as P.Ext 12. She was born on 9<sup>th</sup> November, 2002 which put her age at 13 years as at the date of the incident.

36. I now determine whether the Appellant was identified as the perpetrator of the heinous offence. This is a case in which no independent eye witness testified; a case also where the evidence of the minor is dispensed with on account that she was a vulnerable witness. The court must therefore critically re-evaluate the evidence of PW2, PW4 and PW6 and determine whether it linked the Appellant to the offence.

37. The only direct evidence that the court would have relied upon was that of the DNA examination. Unfortunately the same did not yield positive results owing to time taken to preserve the evidence. The offence took place on 22/7/2015 while the exhibits for examination were taken to the government chemists on 2/9/15. The buccal swab (cells from the mouth) from the Appellant was collected on 16/9/15. In the analysis, PW7 the government chemist testified that the DNA cells from both the semen and blood found on the minor’s pants belonged to an unknown male person. He did explain in his evidence in chief that appropriate DNA results cannot be gotten unless the specimens are well preserved.

38. Be that as it may, according to PW2, the minor identified the house of the Appellant three times. The first occasion was immediately after PW2 found her on the morning of 23/7/2015 but did not find the Appellant as the house was closed. She then led the arresting officers, area Chief and PW2 to the same house during which time the Appellant was found in the house and arrested. On the third occasion, she led the investigating officer and PW2. On this occasion, PW6 testified that she first patiently listened to the minor recount what happened and where it happened. She then drew a sketch plan of the area and proceeded accordingly. Surprisingly, without any mistake, the minor identified the Appellant’s house. It was one among many in a plot with houses made of iron sheets. It was located on Mau Mau Road off Muslim Road. The Appellant’s house was on the right side row after the gate to the plot. The sketch plan adduced as an exhibit correctly mapped out the scene. Indeed, the house was 200 metres from a place called Sweet Water where the minor was found on the morning of 23/7/2015.

39. I would have no doubt in mind that it was convincing that three times the minor, a child with mental disability traced the steps to the house of the perpetrator. That was no mean task. It was done conspicuously at different times. The minor as narrated by PW4 and 6 was close to her mother. She recounted that the Appellant was alone at the time of the incident and for sure, was found alone in the house. This cannot be regarded as an odd coincidence. It can only be concluded as corroborative evidence to that of PW2. I can only conclude that the evidence of PW2, 4 and 6 was meticulously corroborative to the circumstances leading to the arrest of the Appellant. They dispel any other inference that the Appellant was innocent. He was definitely the perpetrator of the offence.

40. His defence was merely that he was arrested for unknown reasons. It fell short of addressing the grave allegation facing him. It did not dislodge the strong prosecution case that he committed the offence. I conclude that the conviction was therefore safe.

41. On sentence, **Section 8(3)** of the **Sexual Offences Act** provides for a minimum jail term of twenty years. The trial court however may enhance the sentence if there are aggravating factors. The learned trial magistrate did note that the Appellant took advantage of a mentally

sick child which called for a more stringent sentence. I cannot agree more. Besides, he even assaulted her on her face in a bid to silence her. This cannot be condoned. I find in the circumstances that the trial magistrate did not apply the wrong principles or failed to take into consideration the circumstances for the case when she enhanced the sentence. I have no reasons to disturb the same.

42. In the result, I find that the prosecution proved the case beyond all reasonable doubt. This appeal lacks merit. It is dismissed in its entirety. I uphold both the conviction and sentence. The sentence shall however be reduced by three years and 25 days, being the period the Appellant was in remand custody prior to sentencing. It is so ordered.

**DATED and DELIVERED this 22<sup>nd</sup> day of October, 2018**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Professor Hassan for the Appellant.*
2. *Miss Atina for the Respondent*