REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 46 OF 2011

IK.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrates Court at Eldoret (Hon. D.K. Kemei) dated the 1 March 2011 in Eldoret Chief Magistrate's Criminal Case No.4226 of 2010)

JUDGMENT

[1] This is an appeal by **IK**. It was lodged **11 March 2011** from the conviction and sentence imposed on him by the Principal Magistrate, **Hon. D.K. Kemei**, on the **1 March 2011**. The Appellant had been charged before the lower court 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**. In the alternative, he was charged with Indecent Act with a Child, contrary to **Section 11(1)** of the **Sexual Offences Act**. He denied the charges and after his trial, in which the Prosecution called 6 witnesses, the lower court was satisfied as to the truthfulness of the Prosecution Case. Accordingly, the Appellant was found guilty and was convicted of the offence of Defilement. He was sentenced to life imprisonment with hard labour.

[2] Being aggrieved by his conviction and sentence, the Appellant lodged this appeal. His initial Grounds of Appeal were that the Learned Trial Magistrate erred in law and fact by convicting and sentencing him to life imprisonment on insufficient, doubtful and contradictory evidence; by disregarding his defence; by failing to take into consideration the mitigating factors in the case; and that he was not sufficiently identified as the assailant. He also complained that the sentence is excessive, oppressive and defeats the objective of sentencing. With the leave of the Court, the Appellant amended his Grounds of Appeal on **5 October 2017**. He accordingly put forward the following 10 Grounds:

[a] The Learned Magistrate failed to notice that the Prosecution Case was not proved beyond reasonable doubt before convicting him;

[b] That he was convicted on the basis of a poorly investigated case;

[c] The Learned Magistrate convicted him using insufficient evidence;

[d] The Learned Magistrate erred in law and in fact by failing to consider that crucial witnesses were not called, especially the eye witness who was alleged to have witnesses the incident.

[e] The Learned Magistrate erred in law and in fact by relying on a fake, inconclusive an unreliable P3 Form;

[f] The Learned Magistrate failed to consider the defence evidence presented by three defence witnesses;

[g] The trial court erred in law by convicting him without complying with **Section 124** of the **Evidence Act, Chapter 80** of the **Laws of Kenya**;

[h] The trial court erred in law by going contrary to the provisions of **Section 163(c)** of the **Evidence Act** for **PW5**;

[i] The trial court erred in convicting him without eye witness;

[j] The trial court erred in law and fact by not noticing the prevalent grudge held by **PW2** against the Appellant and thus used the

Prosecution to revenge against him.

[3] In the premises, it was the Appellant's prayer that his appeal be allowed, and the conviction and sentence passed against him set aside. The appeal was urged by the Appellant by way of written submissions which were attached to the Amended Grounds of Appeal**. Ms. Kegehi**, Learned Counsel for the State responded orally to those submissions, contending that all the elements of the offence of Defilement were proved by the Prosecution Witnesses. She pointed out that penetration was proved not only by **PW1** but also by the medical evidence adduced by **PW5** by way of P3 Form. Counsel therefore urged the Court to dismiss the appeal and uphold both the conviction and sentence.

[4] I have given careful consideration to the appeal and taken into account the written and oral submissions made herein. I am cognisant of the requirement that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. (See **Okeno vs. Republic [1972] EA 32)**:

[5] In the Main Count, the Appellant was charged with Defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act.** The particulars of the Charge were that on the 25th day of July 2010 in Lugari District within Western Province, the Appellant unlawfully and intentionally caused penetration with his genital organ, namely penis, into the genital organ, namely vagina of **IKS**, a child aged 6 years. In the alternative, the Appellant was charged with Indecent Act with a Child contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars were that on the 25th day of July 2010, in Lugari District within Western Province, he unlawfully and intentionally committed an indecent act by touching the genital organ, namely, vagina of **IKS**, a child aged 6 years.

[6] The Prosecution called a total of 6 witnesses before the lower court, the first of whom was the Complainant herself, **IKS (PW1).** She told the lower court that she used to stay with her parents, the Appellant and her mother, until the date of this incident. Her contention was that she was playing with her brother **K** when the Appellant called her and took her to the maize plantation to cut grass for the cows; and that while there, the Appellant got hold of her and did bad things to her.

[7] PW1 explained that the Appellant pushed her to the ground and removed his thing and put it in hers after undressing her of her skirt and under-pant; that although she felt pain, the Appellant ordered her not to scream. It was further her evidence that her uncle, who she referred to as **Baba M**, came to the scene and demanded to know what was happening. At that juncture, the Appellant released her and instructed her to go and bathe. **PW1** further told the lower court that she did not tell her mother about the occurrence; and that, when her mother got to know about it the following day, she took action by taking her to **Lumakanda Hospital** before reporting the matter to the Police.

[8] The Complainant's mother, **SS,** testified before the lower court as **PW2.** It was her evidence that she had gone to Kipkaren market to buy clothes for her children, leaving the children, including the Complainant, under the care of her husband, the Appellant. When she returned home at about 1.00 p.m., she did not find the Complainant at home. She was at the home of her uncle, one **IM**; and that she looked gloomy and weak. She did not seem excited over her new clothes like her siblings. **PW2** told the lower court that she learnt from her brother in law, **IM**, that he had found the Appellant defiling the Complainant in the maize plantation; and that the matter had been brought to the attention of her mother-in-law. She then involved the clan elder, whereupon the Appellant pleaded with her to have the matter resolved at the family level. On the **27 July 2010**, she took the Complainant to hospital for treatment and then to **Lumakanda Police Station** where she was issued with a P3 Form.

[9] PW2 further testified that the Complainant was then aged 6 years and was learning at **[Particulars withheld] School**. She produced the Complainant's Child Health Card as an exhibit, to prove that she was born on **12 November 2003**. As she was opposed to the Appellant's suggestion that the matter be hushed up, the matter was investigated fully and the Appellant was arrested and charged.

[10] The evidence of **PW2** was augmented by that of **Margaret Sakaya (PW3),** who told the lower court that, as a Counselor dealing with issues involving children, she was approached by **PW2** on the **27 July 2010** for help in connection with her daughter, the Complainant, who was said to have been defiled by her father. She accompanied **PW1** and **PW2** to **Lumakanda Police Station** and thereafter to **Lugari District Hospital** for examination. Her evidence was that the medical examination confirmed the alleged defilement. The medical evidence was adduced before the lower court by **Dr. Ambundo (PW5)** who testified that he was on duty at **Lugari District Hospital** when the Complainant, a 6 year old girl, was presented to her for examination. She claimed that she had been defiled by her father and looked frightened. He examined her and noted that her hymen was torn and that the defilement was about four days old.

[11] PW4, APC Geoffrey Kibet Chepkwonyi, was the arresting officer. He told the lower court that, while at **Chekalini AP Camp** on **28 July 2010**, he received a call with instructions to proceed and arrest the Appellant who was alleged to have defiled his daughter; and he did so. He handed over the Appellant to **Lumakanda Police Station**. The matter was investigated by **PW6, PC Kevina Ngitia**. Her evidence was that when the Complainant was presented to her, she escorted her to **Lugari District Hospital** for check up. The girl was examined and a P3 Form filled; and that this took place three days after the alleged incident. She produced the Complainant's Child Health Card as **Prosecution's Exhibit No. 2** before the lower court.

[12] On his part, the Appellant gave a sworn statement in his defence before the lower court. While conceding that the Complainant is his daughter, he denied the allegations that he defiled her. His version was that on the date in question, he left church and came back home and found his wife with the children; and that later, his wife went to the market with the Complainant. He called his mother, **MM (DW2)** and sister, **LK (DW3)** as his witnesses. Their evidence was that the Appellant's wife had accused him falsely to get back at him on account of their matrimonial differences.

[13] The foregoing being the summary of the evidence upon which the Appellant was convicted by the lower court, can it be said that conviction and sentence were based on a sound foundation? The main charge was presented under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**, which provide as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement;

(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.

[14] Thus, the Court would be interested in finding answers to the following issues:

[a] Whether the ingredients of the offence of Defilement as laid in the particulars of the Charge were proved against the Appellant beyond reasonable doubt; and if so,

[b] Whether the Learned Trial Magistrate was constrained to mete out the sentence of life imprisonment with hard labour as he did;

[a] <u>On the Ingredients of the offence of Defilement</u>

[15] The three key ingredients that the Prosecution was under duty to prove before the lower court were: that the Complainant was a child then aged 6 years; that there was penetration of her vagina; and that the same was perpetrated by the Appellant. Before the lower court, the Complainant testified that she was then a pupil at Erica Nursery School. During the *voir dire* examination, she gave her age as 6 years old. Her mother similarly gave evidence that the Complainant was 6 years at the time of the incident, having been born on **12 November 2003.** To augment her testimony regarding the age of the Complainant, **PW2** produced as an exhibit the Complainant's Child Health Card (marked as the **Prosecution's Exhibit No. 2** before the lower court). That document does give the Complainant's date of birth as **12 November 2003.**

[16] The Appellant did not refute the evidence that the Complainant is a child for purposes of the Sexual Offences Act. Indeed, he conceded that she is a child though he was unable to state her exact age. Moreover, the Complainant's Child Health Card that was produced before the lower court in proof of her age. This was done pursuant to **Rule 4** of **the Sexual Offences Rules of Court Rules, 2014** which recognizes that:

"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

The Child Health Card does qualify as a "similar document" under **Rule 4** aforementioned. Consequently, there was credible evidence presented before the lower court to demonstrate beyond reasonable doubt that the Complainant was a 6 years old at the material time, and was yet to attain her 7th birthday.

[17] On whether penetration was proved to the requisite standard, the lower court record shows that, though the Complainant did not promptly report to her mother the ordeal she had been subjected to, **PW2** noted, on returning home from Kipkaren market, that she looked weak and was gloomy; and that when she got to learn of the incident the following day, she caused the Complainant to be taken to hospital for treatment. Later, the girl was examined by **Dr. Ambundu (PW5)** whose evidence was that, the Complainant had her hymen torn. He produced the P3 Form that he filled and signed in respect of the Complainant at the **Prosecution's Exhibit No. 1**. I note that, in his submissions, the Appellant took issue with the P3 Form calling it fake, basically because the Record of Appeal appears not to include Part B of the P3 Form. He therefore faulted the lower court for not noticing this anomaly, yet that was the critical part in a case of this nature as that is the section where the degree and age of injury is shown and leads to the conclusions set out in Section C. Having looked at the original court record, I have no hesitation in holding that that submission has no foundation as the original P3 Form is complete in all its aspects, including Section B.

[18] Again the evidence of penetration was uncontroverted. It proved to the requisite standard that the Complainant was subjected to penetration as envisaged by **Section 2** as read with **Section 8(1) and (2)** of the **Sexual Offences Act**. Indeed, the Appellant did not, and could not, dispute the fact that the Complainant was defiled, his defence being that the offence was not committed by him, and that he was being framed by his wife on account of their marital discord. Accordingly, there was proof beyond reasonable doubt that penetration occurred in this instance and therefore the Learned Trial Magistrate cannot be faulted for coming to that conclusion.

[19] On whether the defilement was perpetrated by the Appellant, the Appellant took issue with the fact that **PW1** was the only eye witness; and that she is a child of tender years who gave unsworn evidence before the lower court. He also pointed out that two critical witnesses were not called by the Prosecution, namely, his brother, **IM** and his (Appellant's) son, **K**, with whom the Complainant was allegedly playing before the incident took place. Thus, the only eye-witness account was that of the Complainant herself. It is however trite that a conviction can be based on the sole evidence of a complainant, if the trial court is satisfied that the witness is truthful. The proviso to **Section 124** of the **Evidence Act** is explicit that:

"...Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth"

[20] Accordingly, the question is, what probative value was given by the trial court to the evidence of the Complainant and what impression did she create on the mind of the court in terms of her credibility as a witness? In his Judgment, the Learned Trial Magistrate had the following to say in this regard:

"The complainant minor appeared to be a truthful witness and she narrated a vivid account of how her father had defiled her and threatened her not to scream and further how her father later ordered her to bathe and wash her clothes. This must have been accused's attempts at erasing evidence of the defilement or any tell tale signs of it. The complainant

appeared to me to be an intelligent girl and she was not even shaken on cross-examination...she was yet to turn seven years at the time of the incident herein but nevertheless she appeared possessed with sufficient intelligence and knew the duty of speaking the truth...I am satisfied with the complainant's testimony that the accused herein who is her father had defiled her. I herein warn myself of the danger of convicting the accused on the evidence of the complainant in the absence of an eyewitness. Indeed the complainant's testimony was confirmed by that of her mother and the medical doctor that indeed she had been defiled. There was absolutely no reason for the complainant to frame up her own father whom she looked up to for all the necessities of life and protection. The eye witness one IM was said to be a brother to the accused herein and it seems he opted not to testify against his sibling. Moreover it came out quite clearly that the entire family of the accused who included his mother and siblings appeared to have ganged up against the complainant's mother for harassing their son..."

[21] It is manifest from the foregoing that the Learned Trial Magistrate properly directed and cautioned himself as appropriate and was of the view that the Complainant was trustworthy and that her evidence was credible. It is instructive that, when it comes to credibility, as an appellate court, this Court is expected to defer to and be guided by the impression formed on the trial court by the by the witnesses. Hence, in **Shantilal Maneklal Ruwala vs. Republic [1957] EA 570,** it was held, *inter alia*, that when the question arises touching on the credibility of a witness, which question turns on demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses.

[22] Accordingly, I find no basis for differing with the conclusion reached by the Learned Trial Magistrate that the Complainant's evidence her evidence was credible and sufficient to sustain a conviction. Nevertheless, right after **PW1** testified, the lower court ought to have put the Prosecution to election as to whether or not they ought to have laid charges under **Section 20** of the **Sexual Offences Act**, it having been made manifest that the accused person was the father of the Complaint.

[23] On the Appellant's argument that critical witnesses were not called by the Prosecution in the court below, and therefore that an adverse inference should be made in respect of that omission, it is manifest from the above excerpt of the lower court's Judgment that the court reasoned on the matter and formed the impression that the witnesses took a position as a family against the Complainant's mother.

[24] It is also noteworthy that, in her evidence, **PW2** made reference to the attempts by the Appellant to have the matter settled at the family level. Her evidence in this connection was entirely unrebutted. In the premises, the court was at liberty to make a determination on the basis of the evidence on record as it did. Indeed, **Section 143** of the **Evidence Act, Chapter 80** of the Laws of Kenya, provides that:

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

[25] Accordingly, in **Daniel Muhia Gicheru vs. Republic Criminal Appeal No. 90 of 2007 (UR)** it was held that:

"The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In BUKENYA AND OTHERS V. UGANDA [1972] EA 349 the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the material witnesses..."

[26] Accordingly, not much turns on the Appellant's argument that neither his brother **IM** nor his son **K** was called to testify, granted the aforementioned circumstances. In the same vein, I find no merit in the Appellant's contention that his defence was not taken into account by the lower court because at pages 29 and 30 of the Record of Appeal, it is manifest that the defence evidence was analyzed and given due consideration in the Judgment of the lower court; and that both his *alibi* and revenge theory were found to have been displaced by the Prosecution. In particular, the Trial Magistrate found that:

"I find even if accused had taken up another woman as alluded by accused's witnesses, the complainant's mother though feeling betrayed could not have used her own daughter as the guinea pig so as to settle scores with her husband. She could not have done that knowing the repercussions she would be visiting her young and vulnerable daughter who would be emotionally scarred for her entire life. I am convinced beyond any shadow of doubt that the accused committed the offence herein. His defence does not shake that of the prosecution which I find quite overwhelming against him..."

[b] A comment on the Sentence:

[27] Having been convicted of the offence of Defilement under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**, the Appellant was liable to the penalty provided for in **Subsection (2)**, which provides thus:

"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."

[28] It is plain therefore that, where the victim is aged eleven years or less, as was the case in this matter, the sentence is mandatory and it is life imprisonment. There is however no provision for hard labour. Thus, save for the aspect of hard labour which is hereby set aside, the sentence is lawful; and although the Learned Trial magistrate did not specifically state so, as he ought to have done, there is no question that the conviction was in respect of the Main Count of Defilement.

[29] In the result therefore, I am satisfied that the conviction of the Appellant for the offence of Defilement contrary to **Section 8(1**) as read with **Section 8(2)** of the **Sexual Offences Act** was based on sound evidence, and that although the facts commended themselves to a charge of incest, under **Section 20** of the **Sexual Offences Act**, the offence laid and all its elements was proved. I am further satisfied that the sentence is not only lawful but also deserved. I would accordingly confirm the Appellant's conviction, set aside the aspect of hard labour

imposed on the accused and otherwise confirm the sentence of life imprisonment. Thus, other than to the extent aforementioned the Appellant's appeal fails and is hereby dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF NOVEMBER, 2018

OLGA SEWE

JUDGE