REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 78 OF 2017

BETWEEN

SIMON BUNDI MUTEGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Nyeri CMC Cr. Case (S.O) number 42 of 2014 by Hon. C. Mburu, Resident Magistrate on 20th December 2016)

JUDGMENT

Introduction

1. The appellant herein was arraigned before the Chief Magistrate's Court on 7th November, 2014 to answer a charge of ***defilement contrary to section 8(1)[as read with section 8](2) of the Sexual Offences Act, number 3 of 2006,*** the particulars thereof being that on the 16th day of October, 2014 within Nyeri County, he unlawfully and intentionally caused his penis to penetrate the vagina of FWW a child aged nine years.

2. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to ***section 11(1) of the Sexual Offences Act, No. 3 of 2006.*** It was alleged that on the same day and in the same place, within Nyeri County, he unlawfully and intentionally touched the vagina of FWW, a child aged nine years with his penis.

3. The appellant pleaded not guilty the charge, but after a full trial during which the prosecution called 6 witnesses and the appellant testified and called one witness, the learned trial court was satisfied that the prosecution's case against the appellant on the main charge was proved beyond reasonable doubt. The appellant was found guilty as charged, convicted and sentenced to life imprisonment.

The Appeal

4. Being completely dissatisfied with both conviction and sentence, the appellant brought this appeal premised on 10 grounds. The main complainants raised by the appellant are that the medical evidence did not disclose any sexual assault, that the learned trial magistrate dismissed the appellants defence without assigning any reasons for the same and further that the learned trial magistrate failed to consider the provisions of ***sections 124, 125 and 129 of the Evidence Act***, all to the appellant's detriment. The appellant has also complained that the learned trial magistrate erred in law in failing to find that the prosecution did not prove the case against the appellant beyond any reasonable doubt; in addition to failing to comply with the provisions of ***section 208(2) and (3) of the Criminal Procedure Code.***

5. In view of the above, the appellant prays that his appeal be allowed, conviction quashed and sentence set aside.

6. This being a first appeal, it behoves this court to rehear the appellant's case to enable it reach its own independent conclusions as to whether the conviction and sentence in this matter should be upheld. However, in carrying out this duty this court must bear in mind the fact that it does not have the opportunity to see and hear any of the witnesses who testified during the trial. ***See Okeno versus Republic [1972] EA 32.***

The Prosecution case

7. The complainant, FWW who testified as PW1 was taken through a *voir dire* examination in which she was found unable to appreciate the

solemnity of an oath. In her unsworn statement, PW1 testified that at about 7.00pm on 16th October, 2014, her mother, VWK PW2 left her in the house as PW2 went to work. PW1 then left the house and went to the appellant's house which was only one door away from the house where PW1 and her mother stayed. Upon knocking on the appellant's door, the appellant who was a pastor with 'ARISE AND SHINE' church asked PW1 where her mother was. When PW1 told him that her mother was at work, the appellant asked PW1 to remove her clothes so he could show her something. PW1 obliged by removing her clothes. The appellant also removed his clothes and told PW1 to lie on the couch. She did so. The appellant then lay on top of her and removed his urinating thing (read penis) and entered her. When PW1 complained that she was feeling pain, the appellant gave her Kshs.10/- and told her not to say anything to anybody. PW1 then went back to her mother's house. PW1 visited the pastor again on 30th October, 2014 and on 31st October 2014.

8. On the 1st November 2014, PW2 caned PW1 for going to the '**pastor's**' house and that is when PW1 told her mother , PW2 that the pastor had done '**tabia mbaya'** (bad manners) to her. On 16th October, 2014 PW2 took PW1 to Kiganjo Health Centre and then to Nyeri County Referral Hospital for treatment.

9. PW1 also told the court that the appellant used to live alone though he never went to their house. She also testified that she was born on 20th February 2006 as per the birth certificate which was produced in evidence as Pexhibit 3.

10. During cross examination, PW1 testified that PW2 and the appellant had been friends at some point. She also testified that whenever PW2 went to work at the bar at 4.00 pm, she (PW1) would be left alone in the house, and that on the day she was defiled she washed her own blood stained clothes, although ordinarily PW2 was the one who used to wash her clothes.

11. PW2 testified that on 1st November 2014 at about 9.00am, she woke up to find that PW1 had not done the chores she had assigned to her, the reason being that she had gone to Pastor Simon's house. PW2 caned PW1 when PW1 narrated to her what the appellant had done to her previously. When PW2 confronted the appellant, the appellant only asked her to cool down so they could pray together. PW2 went and reported the matter to the police. PW2 also confirmed that whenever she was at work, which was between 5.00pm and 11.00pm or even midnight, PW1 would be alone in the house..

12. PW3, number 220016 CPL Thomas Kipker was the arresting officer. After the arrest, the appellant was taken to Kiganjo Police Station. PC 2008081850 CPL Margaret Yator received PW2's report concerning this case. She also interrogated PW1 who gave her details of how the appellant had defiled her after they had been to some funeral meetings. PW3 escorted PW2 and PW1 to Kiganjo Police Station where the report was booked.

13. Dr. Martin Mwaura Macharia of Nyeri Provincial General Hospital testified as PW5. He testified on behalf of Dr. Aruwa with whom he had worked for 2 years and was thus acquainted with her signature as well as her handwriting. From the P3 form Pexhibit 1, Dr. Macharia testified that though PW1's external genitalia was normal, the vagina was inflamed and the hymen was also broken. The breaking of the hymen appeared like something that had happened at some earlier time. There was also a whitish vaginal discharge but no microorganisms.

14. During cross examination, Dr. Macharia told the court that the examination of PW1 was done some 2 weeks after the incident, and that the examination showed that the hymen was not freshly broken. He also testified the inflammation and the discharge observed in PW1's vagina could have been due to an infection.

15. The last witness, PW6, was number 79436 CPL Betty Chepkoech. She investigated this case which was assigned to her on 2nd November, 2014. After receiving the report, she interrogated both PW1 and PW2. She also produced PW1's birth certificate – P exhibit 3. She also issued PW1 and PW2 with the P3 form that was later filled by Dr. Aruwa.

The Defence Case

16. In his defence the appellant testified that he was a pastor at ARISE AND SHINE church, and that he knew PW1 because they all live in the same compound. He denied defiling PW1 and pleaded alibi defence saying that on 16th October 2014 he was a guest preacher at a church meeting in Kerugoya town where he remained for 4 days. He also stated that while he was away, he left J his wife in the house. His further testimony is that he only learnt of the alleged incident on 30th October 2014 after PW2 beat her daughter, PW1. Further that PW1 had slept in his house at the invitation of his wife Judy. The appellant alleged the case against him was a fabrication because he had refused PW2's advances for a love affair. He also testified that PW1's story of the alleged defilement was a pack of lies which she had to say after the mother beat her, and further that PW2 wanted to be paid kshs.100,000/- in order to drop the charges.

Issues for Determination

17. From an analysis of all the above evidence, the issues that arise for determination are:

a. Whether the age of the complainant was proved;

b. Whether there was penetration as defined under the Sexual Offences Act, and

c. If the answer to (b) above is in the affirmative, whether it was the appellant who caused the penetration.

Submissions

18. The parties made their oral submissions. Mr. Gisore, counsel for the appellant submitted that the contradictions in the prosecution's evidence were so glaring that the benefit of the doubt arising from the same should have gone to the appellant. Counsel urged the court to set

the appellant free.

19. Prosecution counsel, Miss Jebet opposed the appeal and contended that the alleged contradictions were all immaterial and secondly that the ingredients of the offence of defilement were all proved beyond any reasonable doubt, namely that the age of the complainant was proved through the production of the birth certificate, that the issue of penetration was settled in favour of the complainant and that there was no doubt that the appellant was clearly and properly identified as the culprit. That the appellant and PW1 were neighbours as indeed the fact was admitted by appellant and that the mere fact that appellant was a pastor did not mean that he could not commit the offence. Counsel also submitted that appellant's contention that his defence was not considered is clearly not true because the learned trial magistrate considered the same.

Analysis and Determination

20. After carefully analyzing the evidence on record afresh, as well as the petition of appeal, the judgment of the learned trial magistrate and the submissions, I now move to consider the issues as framed.

a. Whether the age of the complainant was proved

21. The age of a victim in a sexual offence is critical because it is the age that determines the extent of the sentence to be meted out to the culprit. In the instant case, the punishment provided under ***section 8(2) of the Sexual Offences Act*** is life imprisonment if the child is eleven years and below. The age of the complainant, PW1, was proved beyond reasonable doubt. PW2, the mother of the complainant testified that her child was born on 20th February, 2006. The birth certificate produced in court also showed the same details.

b. Whether there was penetration

22. Under ***section 2 of the Sexual Offences Act***, Penetration can either be partial or complete, so that even where there is no deep entry into the vagina, penetration can still be proved.

23. In the instant case, PW1 narrated how on 16th October, 2014 at about 7.00pm, she left the house where she stayed with her mother, PW2, for Pastor Simon's (appellant's) house which was one house away. On knocking on the door and after being ushered into the house, she sat on the couch. After the appellant established that PW1's mother was at work, he asked PW1 to remove her clothes and lie on the couch as he also removed his clothes. In PW1's own words, **"I removed the clothes and he removed his. He told me to lie on the couch. He slept on top of me. He removed his thing [for] urinating and entered me. I told him I am feeling pain. He gave me 10/- and told me not to say [anything] to anybody**." PW1 went on to say that on 1st November 2014, her mother caned her for going to the pastor's house. From the record, she had been to the pastor's house on 30th and 31st October, 2014 even after she had been told not to go there.

24. I am satisfied that PW1 was defiled. The use of the words "**tabia mbaya**" is synonymous with defilement in the scheme of matters sexual in this jurisdiction. This kind of language is a relic from traditional times when people did not speak about sex and sexual encounters in explicit terms. In this regard, I would agree with ***Nyamweya J's*** observations in ***Josephat Muoki Muundo versus Republic Machakos HCCRA No. 1 of 2014*** to the effect that "***under section 60(1)& (o) of the Evidence Act, one of the facts that courts can take judicial notice of are all matters of general or local notoriety. It is a matter of local, notoriety that the term 'thing' or 'kitu' in Kiswahili Language is a term normally used to refer to the genitalia of both males and females."*** And I would hasten to add that the words "**kitu ya kususu"** or "**the thing for urinating**" is interpreted in the same manner in matters of sex.

25. The medical evidence by Dr. Martin Mwaura, PW5, was to the effect that PW1's vagina was inflamed and her hymen though not freshly broken, was broken. PW1 also had a whitish vagina discharge. A high vaginal swab test revealed no micro-organisms. Dr. Mwaura explained during cross examination that the examination conducted on pW1 was done some two weeks after the alleged incident and this was the reason why the hymen was not freshly broken.

26. A question has arisen as to why if indeed, PW1 was defiled, it took so long to report the incident to her mother. In her own evidence in chief, PW1 told the court that the applicant warned her not to say anything to anybody. This was after the appellant gave her 10/- after she complained to him that she was feeling pain as he '**entered**' her. PW1 was hardly 10 years old at the time, and the appellant was her neighbor. In fact they met a number of times after the ordeal, and I find that PW1's failure to tell her mother the truth immediately the incident took place was excusable and has been adequately explained by PW1.

c. Whether the appellant was the defiler

27. The appellant gave an alibi defence, saying that on the day and at the time of the alleged offence, he was attending a function in Kerugoya. He also alleged that PW2 fabricated the case against him because he had declined her advances for a love affair. Regarding alibis in general the duty falls on the prosecution to prove the falsity, if any on the alibi. And in deciding whether or not to believe the alibi, the court is under a duty to test it against the whole of the other evidence for the purpose of ensuring that the defence is not an afterthought.

28. In her evidence in cross examination, PW1 stated that appellant and PW2 were friends at the time. During cross examination, there was no suggestion by the defence that PW2 had fabricated the case against the appellant. The only evidence I can see is that the appellant and PW1 were not enemies, they had each other's phone contacts and on one occasion when PW1 had been arrested, she telephoned the appellant to check on her child, PW1. The evidence from PW2 also reveals that the reason why she caned PW1 was twofold – failure to do her homework and her going to the appellant's home in spite of being against the habit.

29. In my considered view, the appellant's defence of alibi was an afterthought. The evidence against him is watertight and was not displaced by the alibi defence. In any event, the appellant's evidence did not add up. In his judgment, the learned trial court considered the

appellant's alibi defence and concluded, and rightly so in my view, that the alibi defence did not raise a reasonable doubt in the prosecution's case. The prosecution evidence was not only corroborative, but was consistent. PW1 gave the same story to her mother and to the police officers who interrogated her. One cannot say that such evidence was couched.

Conclusion

30. From all the above analysis, I am satisfied that this appeal lacks merit on both conviction and sentence and is accordingly dismissed.

31. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH. N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Nyeri on this 20th day of December, 2018

NGAAH JAIRUS

JUDGE

In the presence of

Karanja for Owino for appellant

Njue for respondent

Rahab - Court assistant