REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL 122 OF 2014

BONIFACE MUSAU MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. I. M. Kahuya. Ag. SRM

delivered on 18th November 2013 in Criminal S. O. Case No. 25 of 2013 in the

Senior Principal Magistrate's Court at Kangundo)

JUDGMENT

The Appellant was convicted of, and sentenced to serve thirty (30) years imprisonment for the offence of defilement of a child, contrary to section 8(1) (3) of the Sexual Offences Act. The particulars of the offence were that on 17th August 2013 at [particulars withheld] village, [particulars withheld] location, Matungulu District within Machakos County he intentionally caused his penis to penetrate the vagina of A M a child of 13 years. He was also charged with the alternative offence of committing an indecent Act with a child contrary to section 11(1) of the Sexual Offences Act with the particulars being that 17th August 2013 at [particulars withheld] village, [particulars withheld] location, Matungulu District within Machakos County he intentionally and unlawfully touched the vagina of A M.

The Appellant has filed an appeal against his conviction and sentence. He in this respect filed a petition and grounds of appeal on 12th June 2014, and availed two sets of amended supplementary grounds of appeal dated 24th May 2016 and 21st November 2016 respectively. He contended that firstly, the evidence adduced by PW1 was in the English language, without being interpreted to him, contrary to principle of fair trial under Article 50 (2)(m) of the Constitution and that the learned magistrate did not inquire whether he understood the English language or not.

Secondly, the Appellant also argued that the trial magistrate erred in law and facts in finding that the prosecution proved its case beyond any reasonable doubts. It was contended in this respect that the evidence of PW1 did not link him as the person who defiled the complainant, and the prosecution did not call the siblings whom PW3 testified she was with on the material day to give evidence.

Thirdly, that the learned trial magistrate erred in law and facts in sentencing him for an excessive term of 30 years imprisonment, without consideration of his mitigating factors of being an orphan in early teenage without evidence of effective up-bringing care, and he sought a minimal imprisonment sentence of non- custodial term under police supervision. Lastly, that the learned trial magistrate erred in law and

facts in shifting the onus of proof in her finding that he did not counter the prosecution's evidence through cross-examination.

Ms Rita Rono, the learned prosecution counsel, filed written submissions in response dated 7th June 2016, wherein she urged that the charges against the Appellant were proved beyond reasonable doubt, and proceeded to analyse the evidence of the complainant and other witnesses in light of the ingredients for the offence of defilement. Further, that the testimony of the complainant was enough to convict the Appellant without any corroboration. Lastly, that a clinical card was produced in court that showed the age of complainant to be 13 years old.

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

In this regard after going through the grounds of appeal and the arguments made thereon, I note that the three issues raised by the Appellant are firstly, whether his right to a fair trial was violated, secondly, whether he was convicted for the offence of defilement on the basis of sufficient and satisfactory evidence, and lastly whether the sentence imposed upon him was excessive.

On the first issue as to whether the Appellant's right to a fair trial was infringed, a perusal of the record of the proceedings in the trial Court shows that PW1 did testify in English as alleged by the Appellant, and there is no record of the language the accused understood or of any translation. The Constitution provides in this regard in Article 50(2)(m) that one of the rights of a fair trial is the right to have the assistance of an interpreter without payment, if the accused person cannot understand the language used at the trial. Section 198 of the Criminal Procedure Code also makes it a statutory requirement that the court records the language used by the witnesses, the accused persons or any other person who appears before it, and that interpretation is provided if an accused person does not understand the language used.

In the present appeal however, I have come to the conclusion that the Appellant did understand and follow the proceedings before the learned trial magistrate, even though it was not noted on the record if there was any interpretation. This is for reasons that firstly, the Appellant did not complain or raise any issue of not understanding the proceedings in the trial Court and specifically the evidence of PW1; and secondly, he cross-examined PW1 and other witnesses. The record therefore shows that he participated in the trial which negates his allegation that he did not understand the evidence given by PW1. I am in this respect guided by the decision of the Court of Appeal in **George Mbugua Thiongo vs Republic, Criminal Appeal 302** of **2007 as follows:**

> **" For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial. That is not the case here. The appellant cross-examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice."**

On the second issue, the ingredients of defilement were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

> "**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

The relevant evidence adduced in the trial Court as to defilement was that of the complainant who was PW3, and who narrated the events of the material day as follows:

> **"On that day I was from the river with my two small siblings. Then the accused chased after me and hit me on the foot with a catapult. I fell down then he whipped me on the legs with**

cow peas sticks. He caught me when I was trespassing on Mutua's farm. When I fell he tore up my dress and underpant. Then he inserted his penis into my vagina. I started bleeding from my private parts. I screamed but he ordered me to keep quiet. Thereafter, I went home and waited for my mother. I told her the cattle herder for Musembi had defiled me. I had seen the accused before especially on weekdays."

The evidence by PW3 therefore addresses the requirement as to penetration and identification of the Appellant, who she positively identified, having known him from before and therefore this was a case of recognition. No evidence was adduced as to PW3's credibility as a witness and her evidence was consistent under cross-examination; was confirmed by the account given by PW2 who was her mother and PW5 the investigating officer to whom the reports of the defilement were made; and therefore PW3's evidence was sufficient on its own and did not require to be corroborated under section 124 of the Evidence Act.

Section 124 of the Evidence Act in this regard provides as follows:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

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."

The element of penetration was also sufficiently corroborated by the evidence of PW1 who examined the complainant and filled a P3 form that was produced as an exhibit, and which showed that the complainant had a penetral tear, her hymen was perforated and that she was actively bleeding from the vagina .

Lastly, as regards proof of the age of the complainant, PW5 who was the investigating officer produced the complainant's clinic card and baptism card as the Prosecution Exhibit 7 and 8 respectively, and which showed that the date of birth of the complainant was 1st May 2001. Therefore, at the time of the offence the victim was 12 years and not 13 years as indicated on the charge sheet, however this mistake is not fatal to conviction, as it was apparent that the complainant was a minor, and her age in this respect was only relevant as regards the sentence that was to be meted. In addition the issue of the legality of the sentence shall be considered later on in this judgement.

It is thus my finding that the prosecution did prove their case beyond reasonable doubt, and the observations made by the trial court that the Appellant said nothing to counter the evidence on penetration did not shift the onus of proof to the Appellant, but only clarified that the strength of the prosecution case was not shaken nor was any doubt introduced by the Appellant during cross-examination.

In addition, failure to call PW3's siblings as witnesses does not weaken the prosecution's case, for the reasons that even though the East Africa Court of Appeal in **Bukenya & Others vs Uganda, [1972] E.A. 549**, held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent, in this appeal the prosecution did in my view call the essential witnesses and there were no gaps in its case that required additional evidence. Secondly, section 153 of the Evidence Act, provides that, unless otherwise required by law, no particular number of witnesses shall be required for the proof of any fact. Lastly, as noted in the foregoing, the proviso to section 124 of the Evidence Act allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful.

On the last issue as to whether the sentence imposed by the trial Court was excessive, the Appellant was charged with, and convicted of the offence of defilement under section 8(3) of the Sexual Offences Act,

which provides as follows:

> **"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."**

The sentence imposed on the Appellant of thirty years imprisonment was therefore legal as the law provides for a minimum sentence of twenty years' imprisonment. The trial Court noted in this respect that the victim's life has been tarnished since the commitment of the offence, and that a punitive sentence should be meted to deter others.

However, the record shows that the Appellant was a first offender and that he was remorseful as he pleaded for leniency, and the sentence may have been excessive in the circumstances, as the minimum sentence of twenty years is in my view deterrent enough.

I accordingly uphold and affirm the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (3) of the Sexual Offences Act. I however reduce the sentence imposed upon the Appellant for this conviction from a term of imprisonment of thirty years to a term of imprisonment of twenty years, that shall run from the date of conviction by the trial court.

It is so ordered.

DATED AT MACHAKOS THIS 31st DAY OF JANUARY 2017.

P. NYAMWEYA

JUDGE