REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 83 OF 2011

PAUL MUGO NYAGA …….APPELLANT

VERSUS

REPUBLIC OF KENYA……..…...…RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 10 of 2009 of the Chief Magistrate's Court at Malindi – L.W. Gitari, CM)

JUDGEMENT

The appellant was charged with the offence of defilement contrary to section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on diverse dates between the month of August 2006 and April 2007 at [particulars withheld], in Lamu District within Coast province, intentionally and unlawfully, did an act which caused penetration of his genital organ into the genital organ namely vagina of L.N.A. a girl aged 10 years.

The trial court convicted the appellant and sentenced him to serve life imprisonment. The grounds of appeal are that: -

1. The charge sheet was defective.

2. The medical evidence was not sufficient to sustain the conviction.

3. The evidence of PW1 and PW4 was not sufficient to warrant the conviction.

4. The arresting and investigation officer did not testify.

5. The case was not investigated and the prosecution did not prove its case.

6. The trial court unlawfully dismissed the appellant's defence.

In his written submissions, the appellant submit that a conviction on a sexual offence case is based on two ingredients of age and penetration. The evidence on record did not prove the age of the complainant. It is further submitted that the charge sheet was defective as section 8 (2) only deals with the punishment but does not create the offence. Therefore, the charge sheet was misleading and contrary to the provisions of Article 35 (1) (2) of the Constitution which provides that every person has the right to the correction or deletion of untrue or misleading information that affects him. The above errors cannot be cured by the provisions of section 214 of the Criminal Procedure Code.

The appellant further submit that no birth certificate was produced. PW3 DR. JOHN GIKONYO did not produce any age assessment certificate. The doctor testified that there was a whitish discharge from the complainant's private parts and that there were pus cells. The medical evidence showed that the complainant was infected with a sexually transmitted disease but the appellant was not taken for medical checkup contrary to the provisions of section 36 of the Sexual Offences Act. There is the evidence of two minors. The complainant testified that she had never had sex before. She also testified that she did not feel pain after the defilement. That could not be possible if she was indeed a minor. She testified that she was not injured after the defilement. That evidence is not believable as there was no harm or blood coming from the complainant's private parts. The evidence of the minors is unreliable. PW2 alleged to have witnessed the defilement and she is also a minor. The grandmother or the mother of the children were mentioned but did not testify. Their evidence lacks credibility. The arresting and investigating officers did not testify.

It is further submitted that the trial court errored in law by indicating that the investigating officer testified before the Lamu Court during the first hearing. This was a retrial and the trial court was retrying the case again. The case commenced afresh and the court could not rely on the earlier evidence. The prosecution did not prove its case as the burden of proof lied with the prosecution.

The State opposed the appeal. It is submitted that there was no violation of the appellant's constitutional rights. PW3, a medical practitioner, examined PW1 and found that her hymen was broken and there was penetration. A high vaginal swab showed there were pus cells which was an indication of sexual intercourse. The offence took place on diverse dates between August, 2006 and April, 2007. The P3 form was filled on 9.6.2007 and was not filled before the offence was committed as alleged. The witnesses who testified sufficiently proved the case. The trial court found that the evidence was well corroborated. The charge sheet was not defective and no issues on the charge sheet were raised during the trial. Section 8 (2) of the Sexual Offences Act was properly cited in the charge sheet. The case of **JOSEPHAT MUOKI V REPUBLIC Machakos High Court Criminal Appeal No. 1 of 2014 (2016) eKLR** is relied upon by the State where the court stated 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 record of the trial court shows that the appellant was initially charged in criminal case No. 277 of 2007 before the Lamu Court. He was convicted and sentenced to life imprisonment. The appellant filed Criminal Appeal No. 103 of 2007 before the Malindi High Court. The High Court observed that the record of the trial court did not show whether the witnesses were sworn or not. In view of that fact the court ordered for a retrial. The High Court noted that *voire dire* was conducted on the witnesses who were minors but it was not clear whether ultimately the witnesses gave sworn or unsworn evidence.

The case proceeded afresh before the Malindi Chief Magistrate's Court. PW1 informed the court that she was 13 years old. In 2007 she was 11 years old. In August 2006 during school holidays she went to her grandmother's home and stayed there with her cousin (PW2). The appellant was their neighbor and he started seducing her. She refused and he raped her. At one time the appellant asked her to escort him after the appellant had finished working at PW1's grandmother's home. She escorted him and on the way the appellant defiled her behind PW1's mother's house. The appellant told her not to tell anybody. In another occasion PW1's mother had gone go church and the appellant told her to have sex with him. She refused but the appellant insisted. He defiled her and she was not injured. She had not had sex before. The appellant was now defiling her on alternative days. PW1 did not tell anybody as the appellant threatened to kill her. At one time the appellant defiled her in her grandmother's bathroom. She started feeling pain on the lower side of her abdomen. She informed her mother and was taken to Mpeketoni district hospital. Examinations showed that she had an infection and pus cells. She told her aunt that it was the appellant who forced her to have sex with him. She was issued with a PW3 form.

It is the evidence of PW1 that she did not feel pain the first time she was defiled. At one time the appellant pulled her to the bush and they had sex. She was taken to hospital before the case was reported to the police. The PW3 form was filled on 25.5.2007. PW2 witnessed one incident when the appellant

was defiling her. Her aunt by the name E is the one who took her to the police.

PW2 E.Z testified that she was 14 years old when she was testifying in February 2011. In 2007 she was in class four. She was staying with PW1 at their grandmother's place in 2007. She knew the appellant who used to work at their grandmother's place. The appellant used to pick mangoes and cut grass for their cows. At one time they were playing when the appellant asked PW1 to go with him to pick mangoes. The two left and PW2 kept on playing. PW1 overstayed and she went to look for her. She saw the appellant seated on a log with his trouser on the knees. PW1 was sitting on the appellant with her legs apart while facing the appellant. Upon seeing her PW1 quickly put on her underpant and the appellant put on his trouser quickly. Their grandmother had warned them not to have sex with anybody. They decided to keep quiet. PW1 developed abdominal pains and informed their aunt. She informed the aunt that she had at one time saw the appellant defiling PW1.

PW3 JOHN GIKONYO was a clinical officer based at Mpeketoni sub-district hospital. He examined PW1 on 25.5.2007. PW1 had no injuries. Her hymen was broken. The vaginal orifice admitted a finger meaning that there was penetration. There was whitish discharge from her vagina. Vaginal swab showed there were pus cells. He concluded that defilement was possible and that there was penetration. In view of PW1's age the only reason for the presence of pus cells was due to sexual intercourse. He filled the P3 form on 9.6.2007. PW1 complained of lower abdominal pain. The complainant was escorted by a police officer when she went to have her P3 form filled.

PW4 E K was a teacher at [particulars withheld] school in Mpeketoni. The complainant is her sister's daughter. She was living with her and on 25.5.2007 she complained of stomach ache. She sent PW1 to hospital. She went to the hospital after work and the doctor told her that PW1 had sexually transmitted disease. She talked to PW1 who informed her that she was defiled by the appellant. She knew the appellant. The matter was reported to the police at Mpeketoni. The appellant was arrested and charged with the offence. The appellant used to be left at PW4's mother's house to take care of the children and do casual jobs.

In his sworn defence, the appellant testified that he comes from Mpeketoni. On 16.6.2007 he went to Mpeketoni town when two people told him they were police officers. He was arrested and taken to Mpeketoni police station. He was charged with the offence of defilement and was found guilty by the trial court. He appealed to the High Court and in October 2009 a retrial was ordered. The first report to the police indicated that the offence was committed in 2007 and not 2006. It is his evidence that there were two P3 forms. One indicated that PW1 was escorted to the hospital by the police while the other one did not provide that information.

The issues for determination are whether the complainant was defiled and whether it's the appellant who defiled her. The evidence shows that the incident occurred on diverse dates between August, 2006 to April, 2007. PW1 knew the appellant as he used to work at her grandmother's place. PW1 narrated to the trial court the several instances she had sex with the appellant. She was defiled on a day she was escorting the appellant. On another occasion her mother had gone to church and she had sex with the appellant. On a different occasion she was defiled in her grandmother's bathroom. It is PW1's further evidence that the appellant was now defiling her on alternative days. PW2 witnessed one incident when she saw PW1 seated on the appellant's legs with her legs wide open. The appellant quickly put on his trouser after PW1 rose and dressed up. The appellant's defence did not deal with the issue of defilement. It does not raise doubt on the prosecution case as it dwelt on the way the appellant was arrested.

The appellant contends that the charge sheet was defective. This ground of appeal is based on the fact that the charge sheet cited section 8 (2) instead of 8 (1) of the Sexual Offences Act. The appellant all along knew that he was charged with the offence of defilement. The fact that section 8 (2) which is the punishing section was used in the charge sheet instead of section 8 (1) which is the section which creates the offence of defilement cannot be a good ground to allow the appeal. The issue arises as to whether there was miscarriage of justice. The entire section 8 of the Sexual Offences Act deals with the offence of defilement. Once an accused is charged under section 8, he or she knows that the offence preferred is that of defilement. The most important aspect of the charge is to know the sentence to be meted out in

case of conviction. Sections 8 (2), 8 (3) and 8 (4) prescribes the punishment for defilement depending on the age of the victim. The charge sheet was not defective. That ground of appeal must fail.

It is contended that the case was not investigated and was not proved beyond reasonable doubt. As indicated herein, the trial initially took place before Honourable R.K. Ondieki in Lamu. Five witnesses testified in that case. PW5 P.C. SAMUEL MAIYO investigated the case. The High Court ordered a retrial. When the case was heard afresh only three civilian witnesses plus the doctor testified. There is evidence that PW1 was escorted to the hospital by a police officer. The P3 form was produced. The trial court took note of the fact that the investigating officer did not testify. The trial court simply observed that the appellant in his defence testified that it was P.C. Maiyo who placed him in the cells and charged him. There is no reference by the trial court to the evidence of P.C. Maiyo adduced in the Lamu court. I do find that even if the arresting or investigation officer did not testify, that is not fatal to the prosecution case.

There is the issue involving the complainant's age. I have noted that the second charge sheet indicate that the complainant was a girl aged 10 years old. The first charge sheet which led to the first appeal before the Malindi Court (Criminal Appeal No. 103 of 2007) did indicate that the complainant was under eleven years old. The P3 form indicate that the complainant was 10 years old. The complainant testified on 15.10.2010 that she was thirteen years old. She indicated that she was eleven years old in 2007. She did not give her date of birth. The investigating officer did not testify. No age assessment was done. There is no birth or baptismal certificate. The appellant contends that it was not possible for PW1 to have had sex without feeling any pain if she was ten years old. Further, it is submitted that there was no bleeding observed after the alleged defilement. Although the age of ten and eleven years fall within the same age bracket under section 8 (2) of the Sexual Offences Act, it is not proper to make an assumption that the complainant was ten (10) or eleven (11) years old. There was need to prove the age of the complainant beyond reasonable doubt. The prosecution did not prove the complainant's age. PW1 alleged that she was being defiled on alternative days but opted to remain silent due to threats by the appellant. PW1 had all the opportunity to report to her parents. She opted to keep quiet for all that long and used to have sex with the appellant.

The trial court in its proceedings of 15.10.2010 indicated that the complainant was a girl aged about 14 years old. This was before the trial court conducted voire dire on the complainant. When the complainant started talking, she said she was 13 years old. The complainant was cross-examined on her statement and she told the court that her report to the police that the offence occurred on diverse dates between 5th April and 25th April, 2007 was true. It is therefore not exclusively established that the complainant was under the age of eleven year old. She was in class 4 in 2007. It is quite speculative to pin-point the exact age of the complainant. The is quite crucial as the sentence in sexual offence related cases is determined by the age of the complainant.

Given the evidence on record and the fact that no age assessment report was produced to the trial court, I do find that the complainant's apparent age was above eleven years old and below sixteen years old. This will give the appellant the benefit of doubt on the issue of age. The trial court gave an estimation of one more year on top of what PW1 alleged to be her age. PW1 herself did not tell the trial court the specific dates of birth. The apparent age of the complainant can be estimated. It is clear that she was not above eighteen (18) years old.

The evidence on record does prove that indeed the appellant defiled PW1. The incident took place several times. PW1 knew the appellant. It cannot be a case of mistaken identity. There is no evidence that PW1 was being used to fix the appellant. The defence evidence does not raise any doubt on the prosecution case. I am satisfied that the appellant defiled PW1.

The upshot is that the appeal on conviction lacks merit. The appellant's appeal on the conviction under section 8 (20 of the Sexual Offences Act is allowed since the age of the complainant was not proved beyond reasonable doubt. That anomaly cannot be a ground for an acquittal. The appellant is found guilty of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act and shall be convicted accordingly. This is in line with the provision of section 179 (2)

and186 of the Criminal Procedure Act.

In the end, the conviction of the appellant under section 8 (2) of the Sexual Offences Act is set aside. The life sentence is set aside. The appellant was initially convicted on 30.11.2007. He has been in custody since 2007. There is no justification to impose a sentence above the minimum sentence provided under section 8 (3) of the sexual Offences Act. The appellant is hereby sentenced to serve twenty (20) years imprisonment. The sentence shall run from the time of the initial conviction on 30.11.2007.

Dated, signed and delivered in Malindi this 23rd day of March, 2017.

S.J. CHITEMBWE

JUDGE