REPUBLIC OF KENNYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.22 OF 2015

(An appeal from original conviction and sentence of Ogembo SPM'S C Criminal Case No. 721 of 2011 by Hon. C.R. Ateya Resident Magistrate dated 10TH March, 2015)

EVANS NYAMARI AYAKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein **EVANS NYAMARI AYAKO** was charged with the offence of defilement contrary to **Section 8 (1) as read with 8 (2) of the Sexual Offences Act No. 3 of 200**6. The particulars were that on 10th July 2011 at [Particulars Withheld] village in Nyamache District within Kisii County did cause his penis to penetrate the vagina of **MMJ** *(name withheld),* a child aged six (6) years. The appellant pleaded not guilty to the offence and a trial ensued in which the prosecution called a total of 6 (six) witnesses and at the close of the trial, the appellant was found guilty of the offence of defilement and consequently sentenced to life imprisonment.

2. Aggrieved by the conviction and sentence, the appellant filed the instant appeal and set down the following grounds of appeal.

> **1. That, the Honourable Magistrate never gave me the opportunity and information to digest the evidence of the prosecution.**
>
> **2. That, the honourable court of trial erred in both law and fact by not allowing me to consult any law experts or advocate so as to make the right decision on the plea.**
>
> **3. That, the learned trial magistrate erred in the law and the fact by relying on hearsay evidence as a basis of conviction and sentence.**
>
> **4. That, the trial magistrate erred in law and facts by convicting and sentencing the appellant to serve life imprisonment without considering the age of the appellant.**
>
> **5. That, the trial magistrate erred in law and facts by not considering the appellant's mitigation.**
>
> **6. That the conviction and the sentence is irregular and bad in law.**

3. When the appeal came up for hearing on 8th September 2016, parties agreed to canvass it by way of

written submissions.

4. Mr. Ochoki advocate for the appellant raised three pertinent issues in his submissions which I will summarize hereunder.

5. The first issue raised was that the complainant's age was not proved in view of the fact that the complainant's birth certificate, which was marked as "MFI1", was not produced as an exhibit. According to the appellant, failure to produce the birth certificate was fatal to the prosecution's case in view of the fact that Section 8 of the Sexual Offences Act No,3 of 2006, under which the appellant was charged, provides for different age categories of the complainants.

6. Secondly, the appellant submitted that he was not properly identified by the complainant as the person who defiled her in view of the fact that the complainant named her defiler as Nyamagosa yet the appellant was known as Evans Nyamari Ayako. The appellant argued that the prosecution did not lead any evidence to confirm that the name Nyamagosa mentioned by the complainant referred to him.

7. Lastly, the appellant contended that there were glaring inconsistencies in the testimonies of the prosecution witnesses that made the conviction unsafe especially in regard to the witnesses account of the circumstances under which the appellant was arrested. The appellant faulted the prosecution for failing to call crucial witnesses who were mentioned as having been present during the time of his arrest and further for failing to produce the clothes that the complainant wore at the time she was allegedly defiled. It was the appellant's case that the complainant's evidence was not corroborated, thereby making the conviction unsafe.

8. This is a first appeal and therefore the duty of this court is to analyze the evidence tendered before the trial court afresh and re-evaluate the same with a view to arriving at its own conclusion while bearing in mind the fact that I neither heard nor saw the witnesses testify. In the case of **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR** it was held:

> ***"It is a duty to re-evaluate and re-analyze the whole evidence in afresh and exhaustive way before arriving at its own independent decision."***

9. As I have already stated in this judgment, the prosecution called a total of 6 witnesses as follows:

> **PW1 L K**, the complainant's aunt produced the complainant's birth certificate which was marked MFI1. She testified that the complainant was aged 6 years as at 10th July 2011 when she was defiled having been born on 15th June 2005. Her testimony was that on 10th July 2011 at about 6pm, she sent the complainant to deliver milk to the home of one Ronald Nyaoka situate about 100 meters away from her home but that the complainant took an unusually long period to return back home thereby prompting her husband, PW2, R O N, to go to the home where the complainant was to deliver milk, but that he (PW2) did not find her. PW1 and PW2 then set out to look for the complainant and after a brief search, they found her at the gate of her school ([Particulars Withheld] PRIMARY SCHOOL) while still holding the can of milk but unable to walk. They saw blood trickling on the complainant's legs and on her clothes. Upon enquiring from her what had transpired, she informed them that a man known as Nyamogosa had defiled her while threatening to kill her if she screamed. On their way back home, they saw the appellant whom the complainant pointed out to them as the man who had defiled her and when the appellant saw them, he ran away but was later arrested.
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> **PW3** was **M M J** *(name withheld)* the complainant herein. Her unsworn testimony was that on 10th July 2011, her aunt (PW1) sent her to deliver milk to the home of one Ronald Omari and upon arriving at the gate of the school, the appellant held her and took her to the maize farm where he defiled her. She screamed for help but the appellant held her throat and threatened to kill her if she did not stop. After defiling her, the appellant escorted her up to the gate of Omari where he sat on the grass. PW1 and PW2 found her shortly thereafter and she narrated to them what had transpired. As they were walking back home, she saw the appellant whom she knew as Nyamagosa and she

pointed him out to PW1 and PW2. She stated that she knew the appellant was called Nyamagosa as she used to go to school with his (appellant's) children and she would hear them call him Nyamagosa. On being cross examined by the appellant, the complainant reiterated that she knew the appellant well as she was in the same class with his child and that it is the appellant's children who told her that he (appellant) is called Nyamagosa.

PW4 CHARLES ONCHANGWA was the member of Community Policing who on 15th July 2011 assisted in the arresting of the appellant.

PW5 WYCLIFFE ATAMBO was the clinical officer at Gucha Level 4 Hospital where the complainant was treated following the defilement. His testimony was that the complainant was admitted at Kisii Level 5 Hospital for 4 days on a case of defilement during which period, she underwent an operation. He added that an examination of the complainant's vagina revealed a perennial tear, a broken hymen, spermatozoa was noted and there was laceration of the labia minora and majora. He added that the case was noted as a rape case. He produced the P3 form and the Discharge summary as Pexhibit 3 and 5 respectively. The injury was assessed as grievous harm and weapon used indicated as penis.

PW 6 was **No. 92233 PC JOEL MACHARIA**, the police officer who investigated the case. He re-arrested the complainant who had earlier been arrested by members of the community policing. He also issued the complainant with a P3 form.

10. When placed on his defence, the appellant gave sworn testimony. He stated that on 6th July 2011 he was constructing a house at Bobaracho where he stayed till 15th July 2011 when he was arrested by community policing team who took him to Nyangusu police station. He stated that he did not know the complainant and did not defile her as alleged. He also denied that he was also known as Nyamagosa as there were about 10 people in his family called Nyamagosa.

11. I have carefully considered and evaluated the evidence adduced at the trial by both the prosecution witnesses and the defence together with the parties' rival submissions. The issues for determination are:

a. Whether the ingredients of the offence of defilement were proved.

b. Whether the sentence meted against the appellant lawful.

12. The critical ingredients that need to be proved for a successful conviction on defilement charge are the age of the complainant, penetration and positive identification of the appellant. On the age of the complainant, Mr. Ochoki, learned counsel for the appellant, submitted that the same was not proved in view of the fact the complainant's birth certificate was not produced as an exhibit in court. This brings this court to question whether; failure to produce a birth certificate deals a fatal blow to the prosecution's case in defilement cases.

13. The Court of Appeal in the case of **Francis Omuroni –vs- Uganda Criminal Appeal No.2 of 2000,** observed as follows:-

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense….."

14. In the instant case, the trial court conducted a *voir dire* before taking the evidence of PW3 who stated that she was aged 6 years. At the end of the *voir dire,* the court made a finding as follows:-

"I have considered the apparent age of the child. She is of tender age. I have tested her intelligence. I am not convinced that she understands the meaning of taking an oath. I rule that she may give unsworn evidence. Evidence to be taken in camera."

15. The above finding on the age of complainant was not contested by the Appellant. The complainant stated that she was 6 years old, attended [Particulars Withheld] school in pre-unit and was in the same class with the appellant's child.

16. Furthermore, the P3 form produced by PW5 as exhibit 3 showed that the Complainant was 6 years old. PW1 and PW2, the complainant's guardians, testified that she was 6 years old. Under **Section 2** of the **Children Act**, age means apparent age where the exact age is not known. In the instant case, I find that there was sufficient proof of the age of the complainant and therefore, the mere fact that the complainant's birth certificate was not produced as an exhibit does not wash away the fact that the complainant was a child aged 6 years.

17. On penetration I find that the prosecution tendered credible, consistent and uncontested documentary and oral evidence to prove that the complainant was defiled. PW1 and PW2 found the complainant bleeding from her private parts and unable to walk, just a few minutes after she had been defiled. PW3 narrated to PW1 and PW2 how the appellant had attacked and defiled her. They took her to hospital where she was treated and underwent an operation for the injuries that she had sustained in her vagina following her assault. PW5, the clinical officer stated that an examination of the complainant's vagina revealed that she had sustained a broken hymen, perennial tear, spermatozoa was seen and lacerations of the labia minora and majora. The P3 form, treatment notes and Discharge summary were produced as exhibits before the trial court. I am therefore satisfied that even though the clothes that the complainant wore at the time of her defilement were not produced as exhibits, the prosecution still proved, beyond reasonable doubt, that the complainant had been defiled. PW5 concluded that that there was penetration in the complainant's vagina by a penis. In my humble view and observation, penetration was also established through the complainant's own testimony which was corroborated by medical evidence. The complainant's testimony that she was defiled was supported by the medical evidence of PW5. I find that the prosecution proved, beyond reasonable doubt, that the complainant was defiled.

18. On identification of the appellant and whether or not it was established that the appellant indeed defiled the complainant. PW1 had the following to say about the appellant;

> **"The truth is that the child used to meet accused on the way as she took milk. His home is about 200 meters from our home like court to the gate."**

19. On cross examination, PW1 said;

> **"The child told us that she had been defiled by Nyamagosa. When I asked which one, she said the one who is the father of M. I then knew it is Evans, the accused.....Then as we were going to Ronald's home, we found the accused seated by the road and the child again pointed at him that he is the one."**

20. The complainant had the following to say about the identity of her assailant,

> **"I know the accused as Nyamagosa. I go to school with his children and I hear them call him Nyamagosa."**

21. On cross examination, the complainant was very emphatic on the identity of the appellant when she stated;

> **"It is not another Nyamagosa, but you."**

22. From the above foregoing extracts of the witnesses testimonies regarding the identity of the appellant, it is abundantly clear to me that the complainant knew the appellant very well as not only were they were neighbors but that she also went to the same school with the appellant's children. On cross examination, the complainant confirmed that it was the appellant who defiled her. She was categorical that she knew him very well and added that she was in the same class with the appellant's child. The offence of defilement took place in broad daylight at 6 p.m. and so she was able to see him clearly. The complainant

and her guardians met the appellant shortly after he had defiled the minor and she was able to point him out to them before the appellant ran away. From the above foregoing, I have no doubt in my mind that the complainant knew the appellant very well and that she positively identified him to her guardians immediately after she was defiled. It is therefore my finding that the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant.

23. I find that the appellant's defence that he was on 6th July 2011 constructing a house a Bobaracho where he stayed till 15th when he was arrested and placed in cells to be farfetched and an afterthought. The said defence consists of mere denial which does not displace the watertight evidence presented by the prosecution witnesses that placed him at the scene of the crime. I reject his defence and his claim that there were many people with the name Nyamagosa because the complainant was able to identify him.

24. Turning to the appeal on sentence, **Section 8 (2) of the Sexual Offences Act No. 3 of 2006** stipulates as follows:

> **" 8 (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."**

25. The appellant was charged with defilement contrary to section 8(1)(2) of the Sexual Offences Act. The sentencing provided by the Sexual Offences Act is a minimum mandatory sentence which is usually pegged on the age of the victim in which case the younger the victim the stiffer the sentence. Therefore once the trial court was satisfied that all the ingredients of defilement had been proved beyond reasonable doubt, as I have already found in this judgment, there was no room for court to exercise discretion and the only minimum mandatory sentence provided for under the Sexual Offences Act was life imprisonment.

26. In the end, I find that the instant appeal lacks merit and it is hereby dismissed.

Dated, signed and delivered in open court this 24th day of May, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Mr. Magara for Mr. Ochoki for the Appellant
- Omwoyo court clerk