REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO.298 OF 2013

GEOFFREY MUTUKU KIMETU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Sentence of Principal Magistrate's Court

at Mavoko Law Courts delivered by Honourable L. A MUMASSABBA

(Resident Magistrate) on 26TH July, 2013 in MAVOKOP.M.

CR. CASE NO. 459 OF 2012)

JUDGMENT OF THE COURT

1. The Appeal arose from the judgement delivered on the 26th July, 2013 by the Resident Magistrate L. A. Mumassabba at Mavoko Law Courts. The accused was charged with the offence of defilement of a boy contrary to Section 8(1) (2) of the Sexual Offences Act No.3 of 2006 and with an alternative of committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. He was found guilty, convicted and sentenced to serve fifteen (15) years imprisonment.

2. Not being satisfied by the conviction and sentence the Appellant filed this Appeal raising the following grounds of Appeal:-

(a) That the learned trial Magistrate erred in law and fact by finding that the Prosecution had established the Appellant guilty beyond reasonable doubt to warrant the conviction.

(b) The learned trial Magistrate erred in law and fact by believing the alleged medical evidence relating to the said defilement.

(c) The learned trial Magistrate erred in law and fact by relying on the circumstantial evidence which did not meet the threshold of proof beyond any reasonable doubt to convict the Appellant.

(d) The learned trial Magistrate erred in law and fact by relying on the evidence of PW.3 which was uncorroborated.

(e) The learned trial Magistrate erred in law and fact by not taking into consideration the

appellant's submissions.

(f) The learned trial Magistrate erred in law and fact by not ensuring that the Complainant's age was properly established.

3. The Appellant prays that the Appeal be allowed, conviction quashed and Sentence set aside.

4. The Appeal is opposed by the state through the submissions filed herein on the 21st November, 2016. The Respondent's case is that the trial Court did not err in convicting and sentencing the Appellant. The Respondent submitted that the case was proved beyond reasonable doubt and that the trial court's Conviction and sentence should be upheld.

5. It is the duty of the Court as the first Appellate Court to re-evaluate and to re-examine the evidence tendered at the trial and to reach its own conclusion in the matter. To this end therefore this court will critically look at the evidence adduced before the trial court.

6. The trial court Prosecutor had called five (5) witnesses in support of its case and that at the end of its case, the Appellant was placed on his Defence whereupon he tendered an unsworn statement and did not call any witnesses.

7. **Summary of the Prosecution's Evidence:**

PW.1 testified that he left his house in Athi River where he lived with another man and proceeded towards Lukenya and on reaching *Mto Wa Mawe,* he met the Appellant herein who requested him to assist him ferry some metal bars to which the Complainant acceded. It was the Complainant's evidence that the Appellant led him to a forested area where he (Appellant) ordered him to remove his clothes and then proceeded to defile him while at the same time ordering him to keep quiet. The Complainant managed to run away while naked and was assisted by good Samaritans who assisted him with some clothes.

PW.2 testified that he was at Mto Mawe stage when he was approached by the Complainant who was then walking naked and who alerted him that he had been sexually attacked and he led them to the scene where the Appellant on seeing him attempted to run away but was subsequently apprehended after being pointed out by the Complainant. The Appellant was handed over to the Athi River Police Station.

PW.3 testified that upon receiving the report she referred the Complainant to Athi River Health Centre where he was examined and P.3 form filled and later charged the Appellant.

PW.4 testified that she examined the Complainant and more particularly the anus and noticed some laceration on the rectum. She prescribed some treatment and filled the P.3 form and she confirmed that the Complainant had been sodomized and that the muscles needed to hold stool had been destroyed as they were loose.

PW.5 testified that he was in a group of three (3) boys when they saw the Complainant running from a nearby bush while naked and informed them he had been defiled by someone and he led them towards the scene where the minor pointed out the Appellant as the one who had defiled him. They managed to arrest the Appellant.

8. **Appellant's Defence:**

In his defence the Appellant opted to give unsworn statement where he denied committing the offence. He stated that he was heading to the bus stage when some former workmates of his accosted him and forcefully took him to Athi River Police Station where he was surprised to learn of some false allegations.

9. **Submissions:**

Parties filed submissions which I have considered. The only issue for determination is whether the case against the Appellant had been proved beyond any reasonable doubt.

10. According to the evidence on record the offence took place during the day. The Complainant positively identified the Appellant as the perpetrator. In fact the perpetrator had earlier requested the Complainant to assist him carry some metal which the Complainants accepted in good faith only for the Appellant to turn against him and defiled him. The Complainant managed to free himself and ran while naked and came across some good Samaritans who assisted him with some clothes and accompanied him to the scene where Complainant pointed out the Appellant who was promptly arrested and escorted to Athi River Police Station. The Complainant was later examined in Hospital and the Clinical Officer checked the rectum and confirmed lacerations with minimal bleeding and confirmed that indeed the Complainant had been defiled. The time between when the Complainant met the Appellant who requested him to assist carry some metal bar to the time of the defilement and escaping and then coming back while in company of Samaritans was sufficient time for him to properly point out the Appellant as the perpetrator and therefore there was no issue of mistaken identity. Moreover the Appellant was arrested within the vicinity of the crime and further on seeing the Complainant and the good Samaritans ran away forcing the Samaritans to keep chase and apprehend him. Hence I find the Appellant was positively identified by the victim.

11. On the issue of penetration, I find the same was established in that the Complainant gave a vivid account in his testimony of how the Appellant led him into a forested area where he ordered him to undress and then sodomized him repeatedly. The doctor who examined the Complainant confirmed the same when she did a rectal examination where she noticed lacerations and minimal bleeding. This therefore confirmed penetration. Again the Complainant appeared unshaken on cross-examination as can be seen from his evidence tendered before the trial court. Even in the absence of the evidence of the good Samaritans, I find the evidence of the Complainant was sufficient and it seems even the learned trial Magistrate in her judgment at Page 52 of the record of Appeal line 10 was convinced of the Complainant's truthfulness regarding the incident. The relevant part of the Judgment reads thus:-

> ***"On his first appearance in Court I also presumed that but when he gave his evidence I realized that he was able to understand and comprehend what he was saying. Based on the foregoing I find that the Complainant herein was defiled."***

12. On the aspect of the age of the Complainant, it is indeed a requirement that proof of age be established as an ingredient of the offence of defilement since the aspect of the punishment to be meted out upon conviction is tied thereto.

In the case of **HILARY NYONGESA =VS= REPUBLIC – ELDORET HCCRA NO. 123 OF 2009** Justice Mwilu (as she then was) held that age is such a critical aspect in Sexual Officers that it has to be conclusively proved.... since punishment (sentence) is determined by the age of the victim. In the case of **MUSYOKI MWAKAVI =VS= REPUBLIC - MACHAKOS HCCRA NO.172 OF 2012** Justice Mutende held that age of Complainant may also be proved by birth Certificate, the victim's parents or guardian and observation or common sense. Also in the Ugandan case of **FRANCIS OMURONI =VS= UGANDA CR. APPEAL NO. 2 OF 2000** it was held 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."***

The doctor who testified herein as PW.4 stated that the Complainant was aged 16 years old and also the P.3 form indicated as such. Hence I find the victim's age despite absence of a birth Certificate was properly established.

13. The Appellant has raised an issue that he was not subjected to a DNA profiling so as to link him to the crime. It is the finding of this court that it was not mandatory that he be escorted to hospital since what

was crucial was the evidence of the Complainant. The Complainant pointed him out as the person who had sexually assaulted him and that the sexual assault was proved by the doctor who examined the victim. The Appellant was arrested within the vicinity of the crime while attempting to run away on being pointed out by the Complainant. It has been held in the case of **KASSIM ALI =VS= REPUBLIC CR. APPEAL NO.84 OF 2005:-**

> ***"The absence of medical evidence to support the fact of rape is not decisive as to the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence as so is the offence of defilement..."***

The above authority therefore renders the need for a DNA test as sought by the Appellant superfluous and unnecessary since the evidence of the Complainant and the doctor was quite sufficient.

14. The Appellant has also submitted that the evidence of the Prosecution had some contradictions or discrepancies as regards the issue of the colours of a T- shirt and trouser that had been worn by the Appellant at the time of his arrest. Even though that might have arisen, the Complainant who was the victim of sexual assault was quite categorical as to the person who had sodomized him and whom he pointed out as the Appellant before he was arrested. In any event such discrepancies are bound to arise in any trial and if they arise they can easily be cured by **Section 382** of the Criminal Procedure Code since they do not at all cause any prejudice to the Appellant as they are in consequential to the conviction and sentence which in my considered view is sound.

15. Having carefully considered the Appeal herein and evidence together with submissions, it is the finding of this court that this Appeal lacks merit. The same is dismissed. The conviction and sentence by the trial court is upheld.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **24th** day of **JULY**, 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Machogu for Respondent

Appellant: in person

C/A: Kituva