REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.124 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.2258 of 2013 by: Hon. A.W. Mukenga – R.M.)

SAMUEL NJERU MAHIUHA…..……APPELLANT

- V E R S U S –

REPUBLIC……..……..……..RESPONDENT

J U D G M E N T

By a petition of appeal dated 13/9/2016, the appellant, **Samuel Njeru Mahiuha** seeks to have the conviction meted on him by **Hon. Mukenga (R.M)** on 13/8/2016 quashed and the sentence set aside. The appeal is based on the following grounds:

1. The Trial Magistrate erred in law and fact by failing to find that the prosecution evidence did not prove that the Appellant caused his genital organs to penetrate the genital organs of the complainant;

2. The Trial Magistrate erred in law and fact by failing to find that the initial medical notes did not disclose any Sexual Offence having been committed against the Complainant on the alleged date;

3. *The Trial Magistrate erred in law and fact by failing to find that the prosecution evidence was full of glaring contradictions and discrepancies that could not sustain the charges facing the accused person;*

4. The Trial Magistrate erred in law and fact by failing to find that the prosecution evidence of the identification of the appellant was contradicting and thus raising doubts as to whether there was positive identification of the appellant as the person who committed the offence;

5. The Trial Magistrate erred in law and fact in failing to find that there was unexplained discrepancy of delay as to the date of the offence and the date of reporting the offence at the police station;

6. The Trial Magistrate erred in law and fact in failing to find that the initial report had indicated that the complainant was defiled by unknown person, and yet it became clear in the evidence that complainant had known the appellant;

7. *The Trial Magistrate erred in law and fact in failing to find that the identification parade was of no probative value under the circumstances;*

8. The Trial Magistrate erred in law and fact by failing to find that the prosecution had not medically connected the appellant to the offence of defilement;

9. The Trial Magistrate erred in law and fact in finding that the prosecution had proved the charge of defilement beyond reasonable doubt;

10. The Trial Magistrate erred in law and fact in finding a conviction that was against the weight of evidence;

11. The Trial Magistrate erred in law and fact by passing a harsh sentence under the circumstances.

The appellant is represented by learned counsel, **Mr. Nderitu Komu** and **Mr. Obutu** who also filed written submissions. The prosecution was represented by learned counsel Mr. Mong'are who opposed the appeal.

This is the first appeal and it behoves this court to re-examine and re-evaluate all the evidence adduced in the trial court and make its own findings and conclusions but bearing in mind that this court did not have an opportunity to see or hear the witnesses to ascertain their demeanor. **See *Okeno v Republic (1972) EA 32*.**

In support of the grounds, the defence counsel submitted that the offence of defilement was not proved because relate the insertion to her genital organs; that the offence allegedly occurred on 22/10/2013 the complainant visited hospital on 24/10/2013 and that on 11/1/2013. She went to Rumuruti Dispensary where the P3 was filled but the complainant did not disclose that she had been treated anywhere else and that the person who made the medical notes at Nyahururu Hospital and that PW5 did not have the previous medical documents to help him fill the P3 form; that it was expected that the notes made by the medical officer after two days should have indicated that the complainant had injuries to the labia majora and further the report did not specify when the hymen was broken and whether it was a fresh injury or an old one.

Mr. Obutu submitted on the issue of identification and urged that the complainant denied having known the assailant, then PW2 said the appellant was new in the village and the complainant had been seeing him evening in the farm and that when PW2 informed her husband PW3, she said that the assailant was known. Counsel argued that since defilement is a very serious offence, it should have been reported immediately and it is not clear how the complainant identified the appellant; that the complainant talked of meeting 3 people whereby the appellant was an old mzee but the court was asked to look at the appellant to see if he is old. Counsel urged this court to find that identification was not proved to the required standard.

Mr. Mong'are is opposing the appeal argued that penetration had been proved and is not necessarily proved by medical evidence; that the treatment notes did disclose that a sexual offence was committed and that is why the complainant was taken to hospital. According to counsel, there were no discrepancies in the prosecution evidence and that PW1, 2 and 5's evidences was consistent.

Counsel also submitted that PW1 positively identified the assailant and pointed him to the mother before he was arrested; that this being a serious case of defilement, there was no time limit as to when the report should have been made to the police.

Mr. Mong'are further submitted that the initial report did not indicate that the appellant was unknown and the identification parade was necessary because the appellant was not known to the complainant.

The evidence adduced before the court was as follows:

PW1, T.W. a minor aged 6 years was subjected to a *voire dire* examination and found to be intelligent enough and to have understood the meaning and seriousness of the oath and was allowed to testify on

oath. PW1 recalled that on 22/10/2013, she was coming from school when she met 3 people, 2 children and a man. The man called her and she refused to heed to him and ran but he chased and caught her, removed her jacket, took her to the bush and threatened to kill her. He removed her pant, inserted his fingers, then inserted his thing in her private part". She felt pain; that he covered her with leaves and left her. PW1 went home, reported the incident to her mother, was taken to hospital and was later asked to identify the person who defiled her and she identified the appellant in court. She said that it is her father who identified the appellant to the police and she denied knowing where he was arrested.

PW2 M W is the mother of the complainant. She recalled that on 22/10/2013, PW1 arrived home about 7.00 p.m. and on enquiring why she had come home late, she explained that she had been defiled. She observed PW1's private parts on which she saw bruises; she took the complainant to hospital the next day and reported to Rumuruti Police Station where PW1 was issued with a P3 form; that later on 1/11/2013 PW1 saw the suspect at a drinking den and reported to her; that PW2 went there to see him and noticed that she had seen him twice before. Her husband went to the police station, got police who went to arrest the appellant and that later PW1 identified him on an identification parade. PW2 said that she reported to the police after 2 weeks because PW1 had not yet identified the assailant; that PW1 and **PW3, Joseph Ndumia Kariuki** a village elder at [particulars withheld], received a report of defilement from PW2 on 22/10/2013 and she went to PW1 and 2 to the scene in a bush besides the road. PW3 denied that PW2 told him who had defiled PW1.

PW4 M M M is the father of PW1. He received a report from PW2 that PW1 had been defiled. PW1 told him that she could identify the assailant as he used to farm in a nearby plot. PW4 called police whom he took to the appellant's home to arrest him.

PW5 Kimani Patrick Mburu, a clinical officer at Rumuruti Dispensary filled the P3 form in respect of PW1 on 1/11/2013. He examined PW1 with a history of sexual assault; he found bruises on the labia majora, and minora; torn hymen, he formed the opinion that she was sexually assaulted and put her on medication. PW5 denied knowing whether PW1 had been treated earlier at Nyahururu.

PW6, APC Christopher Koech Philip of Muhotetu AP Post is the one who went to arrest the appellant after PW4 went to the post with a letter from Rumuruti Police Station requesting for the arrest.

PW7, PC Omboto of Rumuruti Police Station told the court that the appellant was taken to the Police Station in company of the complainant and her parents. He later organized an identification parade where the complainant identified the appellant. During cross examination he said that the complainant went to the Police Station later after the appellant had been arrested.

PW8, CIP Nicholas Nyongesa of Rumuruti Police Station recalled that, the investigating officer called him to conduct an identification parade; that the appellant chose in which position to stand on the parade as the complainant remained in an office where she could not see the appellant; that the complainant identified the appellant on the parade.

When called upon to defend himself, the appellant testified on oath that on 22/10/2013, he went to harvest maize at one Mzee Kiarie's home, till 4.00 p.m., then transported the maize to the store till 5.30 p.m.; He then went home. He said that his house is near the road and school children used to pass there in company of their teacher but he did not see them on that day. He admitted that the complainant used to see him as she passed by his farm going to school.

DW2 Charles Kiama testified that on 22/10/2013, the appellant worked for him, harvesting maize from morning till 4.30 p.m. and left his home at about 6.15 p.m.

DW3, J Na teacher at [particulars withheld], Academy told the court that the complainant was her student in 2012 and is a neighbor; that PW1 used to report to work by 7.30 p.m. till 4.20 p.m; that she used to use the same route with the complainant; that on 22/10/2013, she was on duty she released pupils and remained in school; that by the time she was branching off to her home, PW1 had reached home as she could see her from behind. DW3 used to see the appellant on the road and did not know why he was

suspected.

The appellant was charged with the offence of defilement under Section 8(1) as read with Section 8(2) of the Sexual Offences Act. This being a criminal case, it is the duty of the prosecution to prove beyond reasonable doubt the following ingredients:

1. **The age of the complainant;**

2. **That there was penetration.**

As regards the complainant's age, no doubt she was a very young girl. When she testified before the court, a *voire dire* examination was carried out. PW1's mother PW2, told the court that PW1 was born on 16/3/2010. The clinical officer who examined PW1 was also of the view that she was about 6½ years old. Unfortunately, the birth certificate was never produced in evidence as an exhibit. But the courts have held that the age of a child can be proved in other ways other than by the use of a birth certificate. In ***Flappyton Mutuku v Republic (2012)*** which the trial court correctly relied upon, the Court of Appeal held that other modes of proof of age are available when the case is not necessarily a border line case. This case is not a borderline case; see also the case of ***Zablon Ongonyo Matoke v Republic HCC.168/2012*.** The mother of the complainant is best placed to know the age of the complainant and I agree with the trial curt that the age of the complainant was proved. The complainant was about 6½ years of age at the time this offence was committed.

Whether there is evidence to support penetration; under Section 2 of the Sexual Offences Act penetration is defined as ***""penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

The complainant narrated her ordeal to the court. The assailant tore her pant, inserted his fingers in her private parts, then '***his thing'***. Unfortunately the prosecution or the trial court did not seek an explanation from the complainant as to what this thing that he inserted in the complainant's genitalia was.

PW2 observed the complainant on 22/10/2013 and noticed that she had injuries to her genitalia. PW5, the Clinical Officer at Rumuruti examined the complainant after about 10 days. She had washed her clothes and most likely bathed.

The genitalia was bruised and the hymen was broken. Unfortunately, PW5 did not tell the court how old these injuries were. It is apparent that the complainant had been seen by a doctor in Nyahururu but PW5 did not know about it. Ordinarily, PW5 was expected to take the history of PW1 before the examination and it is surprising that he did not. Even though it is not always necessary that an offence of defilement be proved by way of medical evidence, since the parents had taken too long to report this incident and have the complainant examined, it would have been useful if the prosecution called the doctor who first treated the complainant to shed light on what he saw on the 22/10/2013, soon after the alleged offence. Whatever the case, there is evidence of sexual assault on the complainant. The complainant was a child aged about 6½ years and the court appreciates the difficulty she may have in describing a sexual act.

I find it unlikely that PW1 would wake up with false allegations of a defilement or sexual assault without any basis. The injuries found support on an act of penetration.

The next question then is who sexually assaulted the complainant?

PW1 is the only witness to the offence. The offence occurred at daytime. PW1 is a minor aged about 6½ years old. In her testimony she saw three people, one older than the other 2. That is the only description she made to PW2. No report was made to the police till about a month later and according to PW7, the investigating officer, the initial report showed that the assailant was unknown person. Indeed PW1 stated in her evidence that she had never seen the assailant before. PW2 however came up with a different version that PW1 had told her that she had been seeing the assailant tilling in a nearby farm PW4 on the other hand said PW1 used to see the appellant every morning when going to school. If that was the case,

then PW1 would have described to her parents where she used to see the assailant as soon as the offence was committed so that he could be apprehended. In addition, that information as to where the assailant could be found would have been availed to the police soon after the incident.

The defence was concerned about the delay in reporting this incident. PW2 said that they did not report to the police because PW1 had not shown them the assailant. The analysis of the evidence on record, it is evident that the complainant did not give any description of who the assailant or where he could be found and hence the delay in reporting to the police. It is not ascertainable at what stage the complainant decided that she knew now the assailant. The incident was reported to the village elder PW3 but he was not told who the suspect was or whether PW1 knew the suspect. The other question is, if the complainant had known her assailant and had told her parents where he could be found, why did they not tell PW3 on the same day or the police soon thereafter but instead waited for about a month. No explanation at all was given for the delay.

Further, PW1 told the court that it is the father who identified the appellant to the police before he was arrested. Faced with all these questions on identification of the appellant, this court has difficulty believing that PW1 identified the appellant as the perpetrator on the day of the incident and whether the identification parade was necessary.

Identification parades are meant to test the correctness of a witness's identification of a suspect. In the case of ***Gabriel Kamau Njoroge v Republic (1982 – 1988) I KAR 1134***, the court commenting on dock identification said:

> **"A dock identification to generally worthless and the court should not place much reliance on it unless it has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade".**

The question is whether failure to describe a suspect as PW1 did in this case renders the identification parade worthless. In ***Nathan Kamau Mugwe v Repulic CRA.63/2008,*** the court said:

> **"As to the compliant in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.**
>
> **In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."**

In the instant case, PW1 never described the suspect to anybody. She denied having known him before contrary to PW2 and PW4's testimonies. The first report to the mother and police was that PW1 did not know the assailant. She never told the police that if she met the person she would know him. If it is PW1

who went to point out the appellant on the day of his arrest as alleged, then the parade was unnecessary because she had seen him.

I have looked at the parade form. First, PW7 never told the court that he warned the witness in terms of Paragraph 6(iv)k that she would see a group of people and the appellant may or may not be among them. If she was not warned, the question is whether she went to the parade with the view that the assailant had to be on the parade. Further, PW7 did not comply with requirements of sub Para B whereby the witness should have recorded what the appellant said to him; whether the appellant consented to an identification parade, whether the desired a friend, relative or advocate to be present at the parade. He was never invited to sign and the court cannot confirm whether that section was complied with. That leaves doubt as to whether the parade was properly conducted and therefore if it was fair.

In his defence, the appellant raised an alibi that he was working at DW2's home the whole day. When an accused raises an alibi defence, it means that he was not at the scene of crime but at a different place. This is something that the appellant knew all along and having had counsel during the trial, a basis should have been raised during the prosecution case so that if necessary, the prosecution would try to rebut the alibi. In my view, the alibi was an afterthought. The above notwithstanding, even when an alibi defence is raised, the burden still rests on the prosecution to prove its case beyond any reasonable doubt. In the case of ***Kiarie v Republic (1984) KLR*** the Court of Appeal held:

> **"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court that is not unreasonable. The Judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons."**

In the instant case, I find that the appellant's alibi having been raised so late in the day as an afterthought, would not have created any doubt in the prosecution case and in this case Section 309 Criminal Procedure Code would not have been necessary.

Although there is evidence that the complainant was sexually assaulted, the medical evidence did not positively connect the injuries to the time of the offence and hence the appellant. Further, I find the prosecution did not prove to the required standard that the appellant was the perpetrator and he must therefore be given the benefit of doubt.

I find that the appeal has merit, I allow it. I quash the conviction and set aside the sentence and the appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***22nd*** day of ***September,*** 2017.

…….....

R. P. V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei - Prosecution Counsel

Tirian - Court Assistant

Appellant – present

Mr. Nderitu Adv. - for appellant