REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 260 OF 2013

PETER NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Judgment of the Chief Magistrate's Court at Molo

Hon. H. M Nyaga – Senior Resident Magistrate delivered on

the 16th October, 2013 in CMCR Case No.* 101 of 2013*)

JUDGMENT

The appellant **PETER NJOROGE** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at the Molo Law Courts.

The appellant had been arraigned before the trial court on 23/1/2013 facing a charge **of DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(2) OF THE SEXUAL OFFENCES ACT, 2006**.

The particulars of the offence were that

> ***"On the 18th day of January 2013 in Molo District within Nakuru County intentionally did cause his genital organ namely penis to penetrate the genital organ namely vagina of ZW a girl aged 8 years old"***

The appellant also faced an alternative charge of **INDECENT ASSAULT ON A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES AT, 2006**.

The appellant pleaded **'Not Guilty'** to both charges and his trial commenced on 23/1/2013. The prosecution led by **CHIEF INSPECTOR MWITI** called four (4) witnesses in support of their case.

PW1 D W told the court that she is the aunt to the complainant. **PW1** told the court that the child is an orphan whom she has been living with since the parents of the child passed on.

On 20/1/2013 whilst on their farm the complainant was playing with other children. **PW1** heard the complainant say that she feels pain in her ***'chuchu'*** private parts when urinating. **PW1** questioned the child who informed her aunt that she had been defiled.

The complainant who testified as **PW2** in this matter was a girl aged 8 years old. She told the court that the appellant whom she named as **'Njoroge'** took her to a cowshed where he defiled her. When the child revealed the matter to **PW1** she reported the matter to the police and also took the child to hospital for medical attention. The appellant was eventually arrested and charged with the offence of defilement.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused gave an unsworn defence in which he denied having defiled the child.

On 16/10/2013, the learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of defilement and thereafter sentenced the appellant to serve life imprisonment.

Being aggrieved by both his conviction and sentence the appellant filed this appeal.

The appellant who was not represented by counsel during the hearing of his appeal chose to rely upon his written submissions which had been duly filed in court. **MR. CHIGITI** learned State counsel made oral submissions in which he opposed the appeal.

This being a first appeal the court has a duty to re-examine and re-evaluate the prosecution case and to draw its own conclusions on the same. [see **AJODE Vs REPUBLIC (2004)2 KLR 81**]

I have perused the written submission made by the appellant. He submitted that he was denied the opportunity to defend himself as his request to be supplied with witness statements was denied.

I have anxiously perused the record of the trial. I note that at page 6 of the record the appellant did ask to be supplied with witness statements. The trial magistrate responded as follows

> ***"COURT – witness statements to be supplied at accused's cost"***

Thus the court did in fact grant the appellants request to be supplied with witness statements. The appellant did not raise this issue of statements again. He did not tell the court that he was unable to afford to photocopy the statements. This court can only presume that the witness statements were supplied to the appellant as was ordered by the court.

In a case of defilement the prosecution must prove the age of the victim beyond reasonable doubt. The victims ages is a crucial ingredient of the charge as it is the age which will determine what sentence to be meted out in the event of a conviction.

In this case the child herself did not know her age. **PW1** the child's aunt told the court that she was eight (8) years old. No documentary proof eg birth certificate or an immunization card to prove the age of the child was availed to the court. However the failure to adduce documentary evidence does not mean that the complainant's age was not proved.

In the case of **FRANCIS OMUROMI Vs UGANDA [2006] EALR** it was held

> ***"In defilement cases, medical evidence is paramount in determining 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".***

Similarly in **MANGUNYU Vs REPUBLIC** Hon. Ouko Judge (as he then was) observed that

> ***"Age may be proved by a birth certificate or particularly in the case of Africans, by the evidence of a person present at the birth"***

Finally on this point of age in the case of **RICHARD WAHOME – CHEGE Vs REPUBLIC [2014]e KLR** the Court of Appeal held that

> ***"What better evidence can one get than that of the mother who gave birth….."***

In this case the complainant was an orphan who lived with her aunt. As such she had no parent to testify regarding her age. However **PW1** who was the child's guardian and who stood **'in loco parentis'** confirmed that the complainant was 8 years old. The trial court must itself have noted that the child was of tender years and that is what necessitated the conducting of a *voire dire* examination before the child testified. The court has no reason to doubt this testimony of the guardian regarding the age of the child. I therefore find that this child was indeed 8 years old.

The next ingredient requiring proof is the proof of the fact of penetration.

The complainant herself told the court that the appellant led her to cowshed where he defiled her. In her own words the child says that

> ***"I know the accused. He is called Njoroge. He is a bad person. He did bad manners (tabia mbaya) to me. He took me to the cow shed. He then removed my pants and he did 'tabia mbaya' to me. He threatened to kill me if I told anyone…."***

The complainant being a young child lacked sufficient vocabulary to describe the sexual act. She used the term ***'tabia mbaya'*** to mean sexual intercourse. I take judicial notice of the fact that many young children similarly describe sexual act as ***'tabia mabya'.***

PW1 the complainant's mother told the court that her child reported to her that she had been defiled. **PW1** as a guardian examined the child and found there was a tear in her vagina. Such a tear in a child so young can only be evidence of a sexual assault.

PW4 DR. FRANCIS THIATHI BLANO was the doctor who examined the complainant. His findings were as follows

> ***"On her genitalia, the hymen was torn. The vagina was hyperemic (reddish). A white discharge was noted"***

Again all this are signs of some interference with the genitalia of the child. The torn hymen is clear proof that penetration had occurred.

Indeed **PW4** concluded his testimony by stating.

> ***"I opined that there was penetration….."***

PW4 filled and signed the complainant's P3 form which he produced as an exhibit **P. exb 1**.

The evidence of the complainant was corroborated by **PW1** and by the medical evidence adduced by the doctor. From this evidence, I am satisfied that it has been proved beyond reasonable doubt that the complainant was indeed defiled as she has stated.

The final ingredient requiring proof is the identity of the perpetrator. The complainant identified the appellant as the man who defiled her. The child identified the appellant by his given name **'Njoroge' PW1** the complainant's aunt confirmed that when the child reported the incident to her, she named **'Njoroge'** as her assailant.

The incident occurred in the day time when the child was out in the farm. There was daylight and visibility was good. The complainant told the court that the appellant took her to a cowshed where he defiled her. As such the child was in close proximity with the appellant and was able to see him well.

The appellant was not a stranger to the complainant. He was a neighbour and a person whom he knew well. The child knew the appellant and referred to him by his name **'Njoroge Macho Nne'**.

PW1 the complainant's guardian confirmed to the court that the accused was a person who was well known to the family. In her evidence **PW1** stated

> ***"When Z (complainant) said Njoroge, I knew it was the accused".***

Under cross-examination **PW1** stated

> ***"Z said that 'Njoroge Macho Nne' had done tabia mbaya to her".***

Thus the child was clear and specific about the identity of the man who had defiled her. She never wavered at all in her identification of the appellant.

The identification of the appellant by the complainant was evidence of recognition. In **ANJONONI AND OTHERS Vs REPUBLIC [1980] KLR 59** the court held that

> ***"…… recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"***

In his defence the appellant claimed that his identification by the complainant was erroneous. This is because although the child was HIV positive, the appellant who was tested was found to be HIV negative. The appellant argues that if it was he who had defiled the complainant then she too would have tested positive for the virus. This logic by the appellant is misguided. It is not every sexual encounter with an infected person that leads to infection with the HIV virus. It is common knowledge that many couples who relate sexually are discordant *ie* one has the virus and the other does not. The mere fact that the appellant was apparently not infected with the HIV virus does not exclude him as the man who defiled the complainant.

Based upon the evidence on record, I am satisfied that the appellant has been properly identified as he man who defiled the complainant. I therefore find that his conviction for the offence of Defilement was sound and I do confirm that conviction.

Section 8(2) of the Sexual Offences Act provides for a mandatory minimum sentence of life imprisonment where one is convicted for having defiled a child aged 11 years or below. In this case the child was aged 8 years. The sentence imposed by the trial court was lawful and I do uphold that sentence.

Finally this appeal fails in its entirety and is hereby dismissed.

Dated in Nakuru this 30th day of October, 2017.

Appellant in person

Mr. Motende for State

Maureen A. Odero

Judge