REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 126 OF 2011

K B M ……..……...…….…….....…… APPELLANT

VERSUS

REPUBLIC ……..……..... RESPONDENT

(An appeal arising out of the judgment and sentence of J. Omange PM in Sexual Offence Case No. 9 of 2010 delivered on 14th June 2011 at the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant has appealed against his conviction for the offence of defilement and sentence of life imprisonment by the original trial court. The Appellant was charged in the said trial Court with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the offence were that on the 20th day of February 2010 at [Particulars Withheld] village, Masii location in Mwala District within Eastern Province, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of N M, a girl aged 11 years.

The Appellant was also charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the alternative offence are that on the 20th day of February 2010 at [Particulars Withheld] village, Masii location in Mwala District within Eastern Province, the Appellant indecently assaulted N M, by touching her private parts (vagina).

The Appellant was first arraigned in the trial court on 24th February 2010, and he pleaded not guilty to the charges against him. He was tried and convicted, and subsequently sentenced to life imprisonment. The Appellant being aggrieved by the judgment of the trial magistrate appealed his conviction and sentence. His grounds of appeal as stated in his Amended Memorandum of Appeal are as follows:

1. **The learned trial magistrate erred in law and facts by failing to note that part of this case was conducted by a police officer whose rank was below the rank stipulated for prosecution under the law thus, rendering a serious miscarriage of justice on me, the appellant herein.**
2. **That the learned trial magistrate gravely erred in pints of law and fact in (sic) failing to appreciate the fact that the complaint's evidence as adduced against me lacked integrity and credibility thus, contravention of the provisions of the law under Section 124 of the Evidence Act hence a prejudice.**
3. **That the learned trial magistrate further faulted in matter of law and fact by failing to observe that the police officers did not order me to undergo a DNA sampling procedure so**

as to confirm or disprove that it was the appellant who had committed the alleged offence. And therefore, section 122 A (i)(2) (a) and (b) of the Penal Code was wrongly contravened. Furthermore, the learned trial court magistrate gravely fell into error by failing to comply with the provisions of section 36(1) of the S.O.A. No. 3 of 2006.

4. **That the learned trial magistrate gravely erred in points of law and fact bny convicting me on contradictory, inconsistent, incredible and unreliable evidence in breach of the provisions of section 163(1) and (2) of the Evidence Act. Thus rendering a prejudice against me, the appellant herein.**
5. **That the learned trial magistrate gravely erred in matters of law and fact in failing to observe the shoddy and devoid of investigations whose proof was far below the required threshold of proof as required by law, thus occasioning a serious dereliction of justice upon the appellant.**
6. **That the learned trial magistrate gravely erred in both points of law and fact in holding in his judgment that the complaint's testimony was corroborated by the medical evidence in the P3 form that the complaint (PW 1) had no hymen and had blood oozing from the vagina, yet failure to consider that there was no any confirmation from the doctor (PW 7) as to whether or not I was the one who had infected PW 1 with syphilis disease. On the other hand, there was no original birth certificate which was issued before court as to proof whether the child was eleven years old.**
7. **That the learned trial magistrate grossly erred in pints of law and fact by holding that the evidence by the prosecution witnesses was strong and consistent, yet failure to consider the bad blood existed by the prosecution witnesses and the appellant.**
8. **That the learned trial magistrate erred in law and fact by failing to analyze the entire trial record and observe that the alleged existing grudge was enough to prove the complainant to frame the case against me.**
9. **That the learned trial magistrate erred in law and fact while basing my conviction on charge that were not adequately proved to point my guilt as it was wholly wanted. And by failing to observe that the mode of my arrest did not irresistibly point to my guilt as required by law.**
10. **That the pundit trial magistrate erred further rin law and fact by failing to observe that the case for prosecution was not affirmatively proved beyond all reasonable doubts as required by law.**
11. **That the learned trial magistrate grossly erred in points of law and fact by demonstrating open bias in favour of the prosecution evidence to the detriment of the defence.**
12. **That the pundit magistrate gravely erred in law and fact while basing my conviction on the purported visual identification by the child (PW 1) against me, of which the same remained to be doubtful and questionable as confirmed by the investigating officer (PW 5) in the light of no any names nor descriptions to suit the same of which was in contravention to section 165 of the evidence Act.**
13. **That the learned trial magistrate gravely erred in law and fact in making conclusive stated in respect to penetration which was not proved without appraising the defence evidence which was the only answer to my mode of arrest and thus failed or grossly violated the law provisioned under section 169(i) of the CPC, hence rendering serious miscarriage of law and justice against me, the appellant herein.**
14. **That the learned trial magistrate finally faulted in matters of law and fact while rejecting my defence statement as an afterthought and no convincing at all, yet failure to consider that no any evidence was brought in court by the court prosecutor to rebut the same defence evidence as provided by law under section 212 of the C.P.C., and hence erosed a grievous error which was accessioned in respect of the prosecuting side, thus rendering to a breach of natural justice upon me the appellant herein.**

The Appellant availed written submissions to the Court on the said Grounds of Appeal. He submitted on his Grounds of Appeal 1 to 10 that the evidence by the prosecution in the trial Court was insufficient to base a conviction and sentence against him. This was for reasons that the evidence by the complainant was inconsistent as she refused to tell PW2 and PW3 what had happened and said that she had fallen from a mango tree, and upon cross-examination denied that she had said so. Further, that the trial magistrate showed bias against the Appellant as she did not consider the complainant's evidence that on the material

day she was picking mangoes from a tree.

The Appellant also submitted that none of the prosecution visited the scene of the crime to confirm what happened, and that he was not examined by a doctor to verify whether he was the one who had infected the complainant with syphilis. Further, that no DNA sampling was done on him pursuant to section 122 A(1) of the Evidence Act to confirm if he participated in the defilement.

The Appellant alleged that PW2 and PW3 had an existing grudge against him arising from a land dispute and had previously threatened him, and that the trial magistrate did not consider this defence, and also the evidence that he was not at home on the material day. Lastly, the Appellant submitted that the identification and recognition by the complainant at the *locus in quo* was not supported by any prompt and conclusive first report, as his name and description was not given to the investigating officer. The Appellant relied on various judicial decisions in his submissions.

Ms. Rita Rono, the learned counsel for the Prosecution, opposed the appeal and filed written submissions on 09.12.2015. It was stated therein that the charges against the Appellant were proved beyond reasonable doubt. It was further submitted that the Director of Public Prosecutions had delegated his powers to gazetted prosecutors and among them was PC Muyei who prosecuted the case. A gazette notice to this effect was availed.

The Prosecution submitted that PW1 had positively identified the Appellant by name and stated that he was a neighbor and knew him well. Further, that it was confirmed that the complainant's hymen was not intact and blood was oozing from her vagina confirming the defilement. In addition the complainant had contracted a disease from the ordeal and her evidence was consistent in court convincing the court that defilement had occurred. On the issue of age assessment the prosecution contended that the court was guided on the proper age as assessed. The learned counsel concluded that the decision of the court was well reasoned and supported by evidence.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The key evidence given at the trial is as follows. The prosecution called seven witnesses. After a *voire dire* examination, the complainant (PW 1) was found to understand the meaning of an oath and gave sworn testimony. PW1 testified that on 20/2/10 at 10.00 a.m. she was picking and eating mangoes alone when the Appellant came by and forced her to lie down on her back. He went on to remove his trousers and her panty and put his penis in her vagina. She stated that he did it for a short while and told her to go home. She stated that she was scared of being beaten by her grandmother so she kept quiet when she went home. She said that she was in pain and could not walk properly. Later on 22/2/10 her teacher called her and checked her vagina, and then called another girl and they went home.

PW1 stated that she told her grandmother and her mother, who took her to Masii Police station then to Machakos District Hospital where she was treated. She stated that her dress was red with blood from her vagina. The skirt was produced as exhibit in court. She said that she was later taken for age assessment at Masii Hospital.

PW 2 was N M T, an aunt to the complainant, who testified that on 22/2/10 at 1.18 p.m. she was at home when PW1 came home with another girl who had been sent by her teacher. The girl told her that there was blood coming out of the vagina of the complainant. She examined the complainant and asked her what had transpired. The complainant did not tell her, and that PW2 called her sister's eldest child and PW1 then told them that the Appellant had slept with her while she was collecting mangoes at his farm. She stated that the complainant told them the act happened on 20/2/2010. They then went to Masii Police station and later to Machakos Hospital.

PW3 was N M the grandmother to the complainant. She recounted that on 20/2/2010 at 10.00 am she saw PW1 coming home limping and crying, and when she asked her what had happened she said she had

fallen down a mango tree. She stated that she did not check her clothes at the time. On 22/2/2010 she said that PW1 was brought home by another pupil from her school and they were told to check her properly. She stated that she checked her vagina and found it to be red. When she asked her what had happened she did not say, and she then asked her other grandchild (K) to ask PW1 what happened. PW1 then told them that K had slept with her. They then reported the matter to the police. PW3 testified that K was the accused person (the Appellant), whom she said she knew as he was a distant relative and also their neighbour.

PW4 was the teacher, Beatrice Ndathi , who testified that on 22/2/2010 at 12.30 p.m. she was in school when one of teachers told her that a child had blood on her dress. When she called PW1 and asked her why she was crying, the child was only saying mangoes. She then called the head girl of the school to escort PW1 home.

PW5 was Cpl Sylvester station from Masii Police. He stated that on 22/2/2010 at 4.40 p.m. a woman and a child came to their station to report defilement. The woman was PW2, and that he then gave them a P3 form and sent them to Masii Hospital where the child was treated. He stated that they arrested the Appellant the next day. He went on to produce the P3 form, hospital cards and a blood stained skirt as exhibit.

PW6 was Patrick Litunya who did the age assessment of the complainant. He stated that he filled the report on 26/2/10. He testified that he had assessed the age of PW1 as 11 years by looking at Eruption pattern of her teeth. He produced the age assessment report as an exhibit.

PW7 was Michael Mutisya a clinical officer. He testified that he had filled the P3 form for PW1 who had a history of sexual assault. He stated that she had vaginal bleeding and blood oozing from vagina. He also said that the hymen was broken. He stated that child had been raped by a person known to her. He gave her medication and sent her for further investigations where syphilis was cited. He noted that the child was psychologically affected and he had counselled her. He produced the P3 form as an exhibit.

After the close of the prosecution case the trial court found that the Appellant had a case to answer and put him on his defence. The Appellant gave an unsworn evidence and called two witnesses. The Appellant testified that he has had family disputes with the family of M N for a while, after he erected a fence. He stated they have a case in court. He said that he had been working on a farm and was arrested on 23rd as he went to buy vegetables.

DW2 was James Ndivo Wambua who on his part stated that he came from Kayata village in Wamunyu location, and that the Appellant had come to him on the 14th and had then returned to Masii. DW3, Bernard Sua Kitaka, a neighbour to the Appellant, stated that there was a land dispute between the Appellant and the complainant's family.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that grounds 1 to 11 of the Appellant's Grounds of Appeal can be collapsed to one issue which is whether the Appellant's conviction for the offence of defilement was based on consistent, sufficient and satisfactory evidence. The second issue is whether there was positive identification of the Appellant, and the last issue is whether the Appellant's *defence was considered.*

On the first issue as to whether the conviction of the Appellant was based on sufficient and satisfactory evidence, the Appellant questioned the consistency of the complainant's evidence, the insufficient medical evidence relied upon by the trial court and stated that no birth certificate was produced as proof of the complainant's age. This Court in determining this issue is mindful of the ingredients of defilement which were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

> "**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

As regards the requirement of penetration, section 8 (1) of the Sexual Offences Act states that:-

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".**

"Penetration" under section 2 of the Act is defined to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

The evidence by PW1 in this regard was as follows:

> **"On 20/2/10 at 10.00 a.m., I was picking mangoes and eating. I was alone, K came where I was. K is accused (Points at accused in dock). He forced me to lie down. I had (*sic)* down. K told me to lie down he forced me to lie down on my back he removed his trouser and removed my panty he put his penis in my vagina. I was in pain. I was quiet he did it for a short while he told me to go home. I was scared in case my grandmother beat me so I was quiet. I could not walk properly. I was in pain. I did not tell my grandmother."**

The said evidence is in my view clear and consistent and was corroborated by PW2 and PW3. The said evidence also explains why PW1 was hesitant to tell PW2 and PW3 what happened as she was afraid she would be beaten, but she did eventually do so in their presence when she talked to PW3's other grandchild. The attempt by the Appellant to shake her testimony during cross-examination was also not successful as the complainant insisted on what she had told the Court. I find the evidence by PW1 to have been clear not only on the identification of the Appellant but also on the element of penetration. The issue of identification is addressed in greater detail later on in this judgment. I therefore see no reason to depart from the learned trial magistrate finding that the complainant's evidence was clear and consistent.

The age of the complainant was proved by the age assessment note produced in evidence by PW6, a medical doctor, showing that the complainant was 11 years old. The law in this regard has been stated in various decisions of this Court and the Court of Appeal. ***In Kaingu Elias Kasomo vs R Malindi Cr. App. No. 504 of 2010*** *the Court of Appeal stated that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence.* In the case of **Gilbert Miriti Kanampius -V- Republic (2013) e KLR,** , Gikonyo J. while relying on the case of **Fappyton Mutuku Ngui vs Republic, Machakos H.C.Cr. Appeal No. 296 Of 2010**, noted as follows;

> ***"Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction. But see the decision by Prof. Ngugi J. in MACHAKOS HC. CR. APPEAL NO. 296 OF 2010 FAPPYTON MUTUKU NGUI -VS- REPUBLIC: "... that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."***

In the present appeal the age assessment note qualifies as medical and sufficient evidence as to the age of the complainant which was found to be 11 (eleven) years.

On the lack of additional medical evidence to link the Appellant to the defilement and disease the complainant was infected with, I note that firstly, the medical evidence by PW7 merely corroborated the fact that PW 1 was defiled. This Court is mindful in this regard of the proviso to section 124 of the Evidence Act, which provides that no corroboration is required in cases of sexual offences where the court believes that the complainant it telling the truth as this Court has already found. Secondly, the evidence that the Appellant was infected with the disease the complainant was found with is not required to prove penetration, and is therefore not necessary. The prosecution therefore proved all the elements of the offence of defilement and I find that the Appellant's conviction was safe and on the basis of sufficient evidence.

On the second issue of the Appellant's identification, this Court is guided on by the law as stated in

Mwaura v Republic [1987] KLR 645, where the Court of Appeal held, *inter alia*, that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

Evidence of visual identification may be the basis of sustaining a conviction in a criminal case. In addition, there is a distinction in law between identification and recognition has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566.** It was held therein that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger, because it depends upon some personal knowledge of the assailant in some form or other.

I am also mindful of the need for caution before sustaining the conviction on the basis of identification of a single witness in difficult circumstances. This was explained in **Maitanyi –Vs- Republic [1986] KLR 198 at 200** as follows:

> **"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".**

In the present appeal, the complainant testified that the Appellant, whom she identified by name, came to where she was eating mangoes at 10.00am in the morning and proceeded to defile her. She was therefore able to see the Appellant well as it was during the day, and identified the Appellant whom she knew by name and testified that he was a neighbor. This evidence was corroborated by PW2 and PW3. There were thus no difficult circumstances present so as to cloud the complainant's memory. This Court can accordingly rely on her sole evidence of identification, and there was no need for any description of the Appellant as this was a clear case of recognition.

Lastly, on the issue as to whether the Appellant's defence was considered, the Appellant alleges that the trial magistrate did not consider the evidence that there was a dispute between the Appellant and the complainant's family and that he was not at home on the material day, which I take to be an alibi defence. I have perused the trial magistrate's judgment, and note that this defence was considered and found not to be convincing, as the defence witnesses were not able to prove the allegations of conspiracy against the Appellant or outweigh the prosecution evidence.

I am in agreement with the trial magistrate as the Appellant's evidence was not able to shed any cogent doubt on the Prosecution's case. I am also alive to the principle that an accused person who sets up an alibi defence does not assume any burden to prove the same (See ***Karanja vs Republic** [1983] KLR 501* *and* ***Kiarie vs Republic*** **[1984] KLR 739)**. In the case of **Wangombe v Republic [1976-80] 1 KLR 1683**, the Court of Appeal addressed itself to the treatment of defence of alibi by a court trying a case and held that even where the accused does not call witnesses, it is the duty of the court to weigh the evidence adduced in totality and make a finding on the culpability or otherwise of the accused.

I have evaluated the Appellant's evidence in the trial court, and do not find any assertion of an alibi. He did not in his testimony at any one point indicate that on the material day being 20th February 2010, he was at a specific place other than the place where the offence was alleged to have been committed. None of the defence witnesses also gave any evidence as to alibi, and all DW2 stated was that the Appellant was at his home on the "14th". The Appellant also did not specifically state was he was doing on the material date. Therefore there was no alibi whose veracity was required to be determined by the trial court.

Lastly, the Appellant in his Petition of appeal also appealed against the sentence. This Court notes in this regard that the Appellant was charged with, and convicted of the offence of defilement under section 8(2) of the Sexual Offences Act, which provides as follows:

> **"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."**

It is to be noted from the said provisions that the offence the Appellant was convicted of attracts a minimum sentence of life imprisonment, and while sentencing is in the discretion of the court, where a minimum penalty is provided, the sentencing court cannot deviate from the provisions of the law. See in this regard the decision in **David Kundu Simiyu –Vs- Republic Criminal Appeal No.8 of 2008 at Eldoret.**

I am therefore in the circumstances unable to vary or review the minimum penalty provided by the law. I accordingly uphold the conviction of, and sentence of life imprisonment imposed upon the Appellant for the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 25th DAY OF JANUARY 2016.

P. NYAMWEYA

JUDGE