REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

NYERI HIGH COURT CRIMINAL APPEAL NO. 23 OF 2013

JACKSON MUGIO WAITE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence in original Mukuruweini PMCR 177/2012

delivered on 27/2/2013 by Wendy K Micheni – Senior Principal Magistrate)

JUDGMENT

The appellant **Jackson Mugo Waite** was charged in the magistrate's court with the offence of defilement contrary to section **8(1) (2)** of the sexual offences Act. The particulars of the offence are that on the 18th day of March, 2012 at ***[particulars withheld]*** sub-location in Nyeri County, intentionally caused his penis to penetrate the vagina of J M N a child aged 6 years.

The appellant also faced an alternative charge of indecent act with a child contrary to section 11 (1) of the sexual offences Act Act No.3 of 2006. The particulars of the offence are that on the 18th day of April, 2012 at ***[particulars withheld]*** sub-location in Nyeri County unlawfully and intentionally touched the vagina of J M N a girl aged 6 years an indecent Act which she would not have allowed.

Briefly the evidence in the magistrate's court was that on 18/3/2012 PW1 J M a child aged 6 years and 7 at time of offence and in Standard 2 at ***[particulars withheld]*** primary school was sent by M her grandfather to a shop to buy tea leaves. On the way she met the appellant whom she knew well. He asked her and they went to his house where he removed her clothes and did bad manners to her. He then gave her a hard cake called 'Ngumu" to eat and told her not to inform anybody. She however informed her grandmother L M who informed the chief and reported to police and appellant was arrested and charged with present offence.

The appellant gave unsworn evidence when put on his defence. He denied defiling the complainant. He recalled how he had met the complainant and her grandmother who told him that the complainant had been assaulted by another child and wanted to report to police. He assisted them in calling for an administration police officer who later arrested him. He blames the present predicament to his refusal for sexual advances made by the complainant's grandmother L M.

This is the evidence upon which the appellant was found guilty and conviction on the main charge of defilement and sentenced to twenty five years imprisonment.

Dissatisfied with the conviction and sentence the appellant in the petition filed by Wahome Gikonyo advocates raises five grounds.

That the magistrate erred in law and fact in finding that the appellant defiled the complainant when the charge was not proved; that the learned trial magistrate shifted the burden of proof from the prosecution to the appellant; that the complainant's evidence was corroborated by a minor; that the trial magistrate failed by finding that there was sufficient evidence to convict the appellant and that the sentence of 25 years imprisonment was manifestly excessive in the circumstances.

Mr. Wahome who appeared for the appellant collapsed the grounds of appeal into two main grounds upon which he submitted first that there was no section 8(11) (2) of the sexual offences Act under which the appellant was charged according to charge sheet. He submitted that that is a section unknown in law and referred this court to the decisions in ***Achoki – VS – Republic 2002 EALR Kamuya – VS – Republic 2000 EALR and Joseph tiro Mwangi – VS – Republic Nyeri H.C CR APP No.206B/2010.***

The second ground was that no defilement charge was proved. He submitted that the complainant in her evidence testified that the appellant did not insert anything into her vagina," that the medical examination showed the genitalia intact and the injury was classified as psychological harm; and that even the production of the P3 form by another person other what the maker did not comply with the provisions of section 77 of the evidence act and was not admissible.

Mr. Njue prosecuting counsel for the respondent concludes to the appeal on two grounds – first that the appellant was charged under section 8 (1) (2) while the proper provision was to be section 8(1) as read with section 8(2) of the sexual offences Act. Secondly Mr. Njue concedes to the appeal because there is no evidence of penetration which is an essential ingredient of the offence of defilement.

This is a first appeal. The duties of the first appellate court were well stated in **Ekeno – VS – Republic 1972 EA** where the court is enjoins to submit the evidence before the subordinate to a first and exhaustive examination and make its own decision in the same. It must weigh conflicting evidence and draw its conclusion but at all times bearing in mind that the court did not see or hear the witnesses. Court will therefore re-evaluate the whole evidence even where as in this case the Respondent has conceded to the appeal.

Was the charge sheet defective? The appellant was charged with the offence of defilement contrary to section 8(1) (2) of the sexual offences Act. It provides

> **8 (1) A person who commits an ac which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) A person who commits an offence of defilement with a child eleven years or less shall upon conviction be sentenced to imprisonment for life"**

Mr. Wahome submitted that there was no such section known in the sexual offences Act and therefore the appellant pleaded to a non-existent charge. Mr. Njue supported this ……..stating that the proper charge was to be section 8(1) as read together with section 8(2) of the sexual offences act.

I have reproduced section 8(1) and 8(2) of the sexual offences act. Section 8(1) creates the offence and section 8(2) imposes the sentence. It is true that in the draft the two sections should have been separated to indicate the offence and the other the sentence. However in my view such drafty did not make the charge defective as it stated the offence for which the appellant faced, if there was any defect it must be such that it caused prejudice to the appellant. Section 382 of the criminal procedure code provides

> ***382 subject to the provision herein before contained, no finding sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision of an account of an error, omission or irregularity in the complainant summons, warrant charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry***

or other proceedings under this code unless the error or irregularity has occasioned a failure or justice"

In my view the appellant has not demonstrated that he was prejudiced by the way the section was ……jointly it rather than separating the sections. I do not find that the faulty of the charge occasioned a failure of justice. The appellant knew the charge he was facing and defended himself appropriately.

The second ground Mr.Wahome submits on is with the offence of defilement was not proved as there was no evidence of penetration. The offence of defilement has two main ingredients; that there must be penetration which is defined in section 2 of the Act to mean a partial or complete insertion of the genital organ of a person into the genital organ of another person.

The second ingredient of the offence is that penetration is done to a child which means any person under the age of 18 years. The prosecution must therefore in a charge of defilement prove penetration and the age of the child.

While giving evidence, PW1 the complainant was cross-examined by the appellant the witness stated,

> **"I do not know why I did not say what happened to my mum, you did not insert anything in to my private parts …… I was not feeling pain in my private parts."**

The doctor who examined her and filled the P3 form which was produced by PW4 David Kabuga indicated in the form

> **"She was in good general condition. On examination the genitalia was normal. No bruises or lacerations. There was also no discharge. She was examined 1month. No treatment was given to the child. Injury was classified as psychological harm.**

The learned trial magistrate in addressing herself to this evidence stated,

> **"The P3 form does not help much since it was filled 3 weeks down the line bar weeks down the line bar it shows that PW1's hymen was pebbly torn".**

With due respect on perusal of the evidence there is no reference by the doctor to the hymen being torn. Even if there was, the final assessment was not sexual assault or defilement but psychological trauma. No evidence was tendered to prove penetration of the genital organ of the complainant. In the premises therefore I am satisfied that the prosecution did not establish the offence of defilement against the appellant. That being my finding then the conviction of the appellant in my view is not supported by evidence and is therefore unsafe.

I therefore allow the appeal set aside the conviction and sentence of 25 years imprisonment. I order the appellant be released forthwith unless otherwise lawfully held.

Dated at Nyeri this 30th day of March, 2016.

S RIECHI

JUDGE

31/3/2016

Before – S RIECHI Judge

Catherine – Court Clerk

Njue for state

Appellant – present

Court – judgment read over and delivered in open court in presence of appellant and Mr. Njue for state this 31st day of March, 2016.

S RIECHI

JUDGE