REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 54 OF 2012.

JOHN WAINGWE :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(Being an appeal from the conviction and sentence of S.N. Abuya – SRM in The Butali Principal Magistrate's Court Criminal Case No. 159 of 2010 delivered on 27th June, 2011.)

J U D G M E N T.

1. On 22nd February, 2010, ESN (name withheld) was walking home from school when she entered into a sugarcane plantation to urinate. After she was through, she was accosted by a man who defiled her. Once he was through with the said act, he removed the headscarf (kilemba) he had inserted in her mouth which gave her the opportunity to scream. Members of the public went to her rescue. PW1 gave a description of her assailant who was arrested by members of the public.

2. The assailant who was the appellant herein, John Waingwe, was handed over to the police who rearrested him and charged him with the offence of defilement. The particulars of the main charge were that on the 22nd day of February, 2010 at[particulars withheld] village, Central Kabras location in Kakamega North District within the Western Province unlawfully and willingly (sic) inserted his genital organ namely a penis to the genital organ of a girl aged 12 years old namely virgina (sic) of ESN (name withheld).

3. The appellant was also charged with the alternative charge of indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 22nd day of February, 2010 at [particulars withheld] village Central Kabras location in Kakamega North District within the Western Province unlawfully contacted his genital organ namely a penis (sic) to the genital organ namely virgina (sic) and thighs of ESN (name withheld) a child aged 12 years. The appellant pleaded not guilty to the charge. The hearing of the case commenced on 23rd June, 2010.

4. The learned trial magistrate found the appellant guilty of the charge of defilement and convicted him of the same. He sentenced him to serve 20 years imprisonment.

The appeal

5. The appellant being dissatisfied with the conviction and sentence meted out to him filed a petition of appeal on 14th December, 2011. He thereafter filed an amended petition of appeal which this court allowed him to rely on at the hearing of the appeal. In his amended grounds of appeal, the appellant contends that he was convicted on a defective charge, the age of PW1 was not ascertained or proved, the

evidence on record was stage managed by PW1, the evidence was uncorroborated, fabricated, inconsistent, malicious, far fetched and lacked probative value. The appellant also contends that he was not medically tested to confirm the allegations of PW1, his defence and that of his defence witness was not considered and that the sentence meted out to him was very harsh in the circumstances. The appellant prayed for his appeal to be allowed.

The appellant's and the Respondent's submissions

6. The appellant filed written submissions which he relied on. He submitted that he was convicted on the strength of a defective charge since PW1, the complainant, was 12 years old, yet he was charged under the provisions of section 8 (1) as read with 8 (2) of the Sexual Offences Act, 2006. The appellant submitted that he was convicted on the strength of a single eye witness, PW1 who could have been mistaken about the appellant's identity as the alleged offence took place in a sugar plantation which could have been dark. The appellant also submitted that PW1 did not state the nature of the light used to identify him or the age of the sugar cane. The appellant further submitted that the age of PW1 was not ascertained. The appellant also added that PW1 did not disclose the name of the appellant to members of the public and that he was not medically examined to establish if he had gonorrhea like PW1.

7. Mr. Oroni, learned prosecuting counsel supported the conviction and sentence. He submitted that the appellant defiled a minor aged 12 years. Her evidence was corroborated by that of PW2 and PW3. PW4, the Clinical Officer who examined PW1 came to the conclusion that PW1 had been defiled. Mr. Oroni submitted that the prosecution proved its case beyond reasonable doubt and therefore the sentence of 20 years imprisonment imposed on the appellant was well merited.

8. In response to Mr. Oroni's submissions, the appellant stated that PW1 said that she did not know who defiled her and that although she said that he was medically examined, his was not the case and it could not be established if he was sick like PW1.

The duty of the first appellate

9. It has been said time and again that the duty of the first appellate court is to analyze and re-examine the evidence adduced before the trial court with a fresh eye and for the first appellate court to come to its own conclusion and finding on the evidence that was adduced before the trial court.

10. In the case of **Okeno vs. Republic [1972] EA 32**, the court had this to say:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

This court will now embark on its duty as stated in the above case.

Analysis of the evidence

The prosecution's case

11. PW1, ESN, the complainant, after undergoing voir dire examination, adduced evidence that she was 12 years old and was in class 6 in primary school. On 22nd February, 2010 at 5.00 p.m. as she was going home from school, she recalled that she had left her new geometry set at school. Fearing that her Dad would beat her for not going home with it, she went back to school to collect the same.

12. On her way from school, she entered into a sugar plantation to urinate. When through, she was kicked

on the buttocks and she fell down. She looked at the person who had attacked her and wanted to scream. Her assailant removed his headscarf (kilemba) which he inserted in her mouth. He carried her inside the sugar cane plantation and put her down. He stepped on her hands and legs. He removed his trousers and her panty and ordered her to put his penis in her mouth but she refused and wanted to scream for help. Her assailant took mud as it had rained and put it inside her mouth. He opened her legs wide and slept on her. He put his two fingers inside her vagina. He later removed his headscarf (kilemba) from her mouth.

13. Her assailant offered her two oranges and two sweets which she refused to eat. He ordered her not to make noise so that they could start well again the second time. PW1 started screaming and her assailant ran away. Members of the public went to her rescue. They took her to the main road. She gave a description of her assailant as having a headscarf (kilemba), blue T-shirt and black trouser. PW1 informed the court that her assailant, who was the appellant herein, was found near a river where he had bathed and that she knew him by name as Waingwe. PW1 testified that the appellant inserted "his thing" inside hers where she urinates from and she got injured.

14. Members of the public arrested two men wearing headscarves. PW1 identified the appellant as the one who had defiled her. He was wearing a blue T-shirt, a black trouser and a headscarf (kilemba) at the time of his arrest. The other man was wearing a green trouser. PW1 was treated at Malava hospital and a P3 form which she identified in court as PMF -1 was filled. PW1 informed the court that she was told that she had gonorrhea (kisonono) and so did the appellant. She also testified that she used to know the appellant before the incident. The appellant's place was in Shipala which is near their (PW1's) place and that he used to sell hens to her uncle.

15. On cross-examination, PW1 was categorical that it was the appellant who "fell on her". She informed the court that she had described the appellant as a short and fat person. The other person who was arrested was Amuoka Babu who is tall.

16. It was the evidence of PW2, Patrick Makunda, that on 22nd February, 2010 at 5.30 p.m. while inside his house, he heard a kid (child) crying in a cane plantation 100 metres away. PW2 left to find out what was happening. On entering the maize plantation, he found a girl in uniform lying facing upwards. She said that someone took her to the cane plantation and forced her legs apart and defiled her. She said she knew the person by face but not by name. PW2 and his sister-in-law, PW3, carried PW1 out of the cane plantation as she could not walk. She did not have an underwear on. She described the person who defiled her as having worn a white cap and a cloth stitched with the insignia of a cross. PW2 informed the court that it was drizzling when they went to rescue PW1.

17. PW3, Rebecca Sitati corroborated PW2's evidence in material particulars, in that she heard a person crying in a cane plantation. She went there and PW2 carried PW1 out of the cane plantation. PW3 observed that the child, PW1 was weak and had some mud inside her nose. She told them that the person who defiled her put mud in her nose. She also informed them that she had been raped. Her school uniform was muddy. She said if she sees the person who defiled her she can identify him. PW3 informed the court that PW1 did not give them a description of her assailant.

18. PW4, Sylvance Osinda, a Clinical Officer at Malava District Hospital produced the P3 form for PW1. He informed the court that the child was 12 years of age. She complained of pain in her private parts and neck. She was walking with difficulties. She looked sick and was very worried. PW4 noted that PW1's hymen was torn. Her urine was analyzed in a laboratory and it was confirmed that she was infected and sperms were present in her vagina. She was treated. PW4 produced the P3 form as Pexh. 1.

On cross-examination, PW4 informed the court that he did not examine the appellant.

The defence case.

19. The appellant gave an unsworn statement and called one witness. The appellant informed the court that on a Monday whose date he did not disclose, he was riding a bike on his way home when he came across a group of people armed with pangas and rungus. They ordered him off his bike and was made to

walk with the said people for 1 ½ kms. He was not told the reason for his arrest. On the way they met a kid (child) on a motor bike whom the members of the public talked to but the kid (child) said nothing. The father of the kid said he wanted to kill him but members of the public took the appellant to the police station. He was then charged with the charges he is facing. The appellant alleged that it was PW1's father who defiled his child and disappeared.

20. DW2, Anthony Komut Unai, informed the court that on a Monday whose date he did not disclose, he was heading home in the company of the appellant when he was stopped by a crowd of people who were armed with pangas and rungus. DW2 heard them tell the appellant that he had defiled a kid (child). DW2 followed them a bit but left them at Samitsi Malava road when he saw that the appellant was in danger. DW2 went to the appellant's home to report what he had seen.

21. The learned trial magistrate considered the evidence tendered by both the prosecution and the defence and found that the prosecution had proved its case beyond reasonable doubt.

Determination of the appeal

22. The appellant in his grounds of appeal contends that PW1's age was not ascertained. This court notes that although no birth certificate or birth notification card was produced in court to show PW1's age, in her evidence, PW1 testified that she was 12 years old and in primary class 6. The P3 form produced in court as Pexh 1 gave the estimated age of PW1 as 12 years. The court has no reason to disbelieve the age of PW1 as depicted in the P3 form or in PW1's testimony that she was 12 years old. I therefore believe the evidence on record that PW1 was 12 years old as at the time the offence took place. There was no contradiction pertaining to her age that would lead this court to be of a different view. It is unfortunate that neither her mother nor her father attended court to adduce evidence in that aspect. Failure to do so on their part does not vitiate the fact that PW1 was 12 years old.

23. The Court of Appeal in the case of **Alfayo Gombe Okello vs. Republic [2010] eKLR** upheld a conviction on a case of defilement in the absence of any documentation to prove the complainant's age. The court relied on the statement of her mother as to when she was born and the estimation of age made in the P3 form. It is therefore my finding that failure by the prosecution to produce documentation to prove PW1's date of birth was not fatal to the prosecution's case.

24. Contrary to the appellant's submission about the status of lighting in the sugar plantation, it is the finding of this court that PW1 was sexually assaulted at daytime in a sugar plantation. There is no evidence on record that the sugar plantation was dark during the day at 5.00 p.m. PW2 who went to assist PW1 when she screamed did not require any artificial light to enable him to assist PW1 out of the sugar plantation following the defilement.

25. PW1 gave a clear description of the appellant, including the clothes that he wore that assisted members of the public to arrest the appellant. PW1 saw the appellant at close proximity while wearing his headscarf (kilemba) and without it after he removed it from his head and stuffed it in her mouth. Identification was by way of recognition as the appellant was known to PW1 as being the one who used to sell hens to her uncle.

26. The medical evidence adduced by PW4 shows that PW1 was defiled. Her hymen was open when she was examined. PW1 also had injuries on her neck, thorax and abdomen occasioned during the defilement. Her school uniform was soiled. This is notable as PW1 informed the court that at the time the offence was committed, it was muddy as it had rained. PW3 informed the court that PW1's uniform was muddy. PW2 informed the court that it had drizzled.

27. Although the appellant was not medically examined, it is the finding of this court that having been properly identified by PW1 as her assailant, that was adequate to pin him to the commission of the offence.

28. The appellant submitted that he was convicted on the evidence of a single witness, PW1. Section 124

of the Evidence Act provides that corroboration is not mandatory in sexual offences if the trial court is satisfied on the credibility of the complainant. The trial court conducted a voir dire examination of PW1 and found her intelligent enough to give sworn testimony. The learned trial magistrate based the appellant's conviction on PW1's evidence and that of the other witnesses. In addition, section 143 of the Evidence Act provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact.

29. The Court of Appeal in the case of **Julius Kalewa Mutunga vs. Republic, Criminal Appeal No. 31 of 2005** (unreported) held that:-

> ***"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."***

30. In this case, the evidence adduced by the four prosecution witnesses was overwhelming and proved the case of defilement against the appellant beyond reasonable doubt. As the learned trial magistrate held, the defence put forth by the appellant was an afterthought and so was the evidence of his witness DW2. None of the two made reference to the date that they were referring to in their evidence. I find that the defence case casts no doubt on the prosecution evidence.

31. I note that there were discrepancies such as PW1 and PW2 stating that PW1 gave a description of her assailant whereas PW3 said that PW1 did not give a description of the same. PW1 also said that the appellant was medically examined and found to be infected with the same disease she was suffering from, had yet PW4 stated that he did not medically examine the appellant. I have given the above discrepancies utmost consideration and it is my view that based on the strength of the prosecution evidence, the discrepancies cannot go to the benefit of the appellant.

32. In the case of **Joseph Maina Mwangi vs. Republic, Criminal Appeal No. 73 of 1993** the Court of Appeal held that:-

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the CPC viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."***

33. PW1 informed the court that the appellant's place is Shipala and the appellant gave the same information to the court. This thread of evidence corroborates PW1's assertion that she knew the appellant.

34. The appellant submitted that he was convicted on a defective charge as he was charged under the provisions of section 8 (1) as read with section 8 (2) of the Sexual Offences Act, 2006. The said provisions provide as follows:-

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

35. Having made a finding that the age of PW1 was 12 years, the appellant's contention is valid that the charge as framed against him was defective. The appellant should have been charged under the provisions of section 8 (1) as read with 8 (3) of the Sexual Offences Act. Section 8 (3) provides as follows:-

> ***"A person who commits the offence of defilement with a child aged between the age of twelve and fifteen years is liable upon conviction for a term of not less than twenty years."***

36. This court invokes the provisions of section 382 of the Criminal Procedure Code to cure this defect. The provisions state in part:-

> ***"no finding sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal ..... on account of an error, omission or irregularity in the complaint ..... charge or other proceedings ..... unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

37. This court notes that the appellant did not raise an objection to the defect in the charge at the trial court.

38. I hereby substitute a conviction for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act, No. 3 of 2006.

39. The minimum sentence under section 8 (3) of the said Act is 20 years imprisonment. The appellant will therefore serve a sentence of 20 years imprisonment effective from the date of conviction by the magistrate's court. The appeal is hereby dismissed in its entirety. The appellant has 14 days right of appeal.

It is so ordered.

DELIVERED, DATED and **SIGNED** in open court at **KAKAMEGA** on this .....**26TH** ..... day of .....**APRIL,** ....., 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... for the Appellant.

..... for the Respondent .

..... Court Assistant.