REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 185 OF 2013

PATRICK MANDIRA LUSAMOYWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in

Criminal Case No. 3873 of 2011 Republic v Patrick Lusamoywa

in the Principal Magistrates Court at Eldoret by D. Alego,

Principal Magistrate dated 27th September 2013)

JUDGMENT

1. The appellant was convicted on a count of defilement of a girl aged five years contrary to sections 8(1) and 8(2) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to life imprisonment. The particulars were that on 18th October 2011 at Kipkaren Estate, Wareng District within Rift Valley Province, he caused his penis to penetrate the vagina of *L. P. [name withheld]*, a girl aged five.

2. The appellant has appealed against his conviction and sentence. The petition of appeal was filed on 18th October 2013. It raises eight grounds. They can be condensed into five. First, that the charge was not proved beyond reasonable doubt; secondly, that the age of the complainant was not ascertained; thirdly, that there was insufficient medical evidence to found the charge; fourthly, that the defence tendered by the appellant including his *alibi* was not taken into account; and, fifthly, that the sentence handed down was harsh and excessive.

3. At the hearing of the petition, the appellant's learned counsel relied entirely on the written submissions filed on 19th November 2015.

4. The appeal is contested by the State. The case for the Republic is that the prosecution proved the charge beyond any reasonable doubt. It was submitted that the age of the complainant; and, penetration were established. It was submitted further that the appellant was positively identified; and, that his *alibi* was discounted. The Republic submitted that the appellant was not remorseful; and, that the sentence handed down was mandatory. I was implored to dismiss the appeal.

5. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my

own conclusions. In doing so, I have been very careful because I have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190. *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR, *Paul Ekwam Oreng v Republic* Eldoret High Court Criminal appeal 36 of 2011 [2013] eKLR, *David Khisa v Republic* Eldoret High Court Criminal appeal 142 of 2011 [2013] eKLR.

6. PW1 was the victim. I have studied page 12 of the record. The trial court conducted a detailed *voire dire* examination. The minor said she was aged five; and, that she was a pupil at Apostolic School. She attended church regularly and knew the perils of telling lies. The learned trial magistrate formed the opinion that she was intelligent. The minor was affirmed.

7. The true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445. The Children Act defines a child of tender years to be one of ten years or below. I find that the trial court adopted the right procedure of taking the minor's evidence.

8. The complainant told the court that on her way from school, she met the appellant. She knew him. It was daytime. He told her he would buy her some *mandazi*. It was a ruse. He instead led her to a maize plantation and into a house under construction, removed her panties and defiled her. PW1 was graphic: she said-

> *"He removed his penis like someone who wanted to pee. His penis is like a stick. He put his penis into my vagina. I felt pain. He told me not to cry. He then left me and went. I went home alone. I told my mum (PW2) that someone had held me and slept with me"*

9. That narrative was largely confirmed by her mother, PW2. She testified that the complainant was born on 18th August 2006. She produced her clinic card (exhibit 1). On 18th October 2011 her daughter was at her (PW2's) sister's place in Kipkaren. PW2 went there at about 1:00 p.m. the same day. Her daughter complained of pain in her private parts. She inspected and found that her vagina was bruised. The complainant told her that she knew the person who defiled her. She took her to Moi Teaching and Referral Hospital for treatment. On 20th October 2011, PW2 went back to her sister's place in Kipkaren where the complainant identified the appellant. She was issued with a P3 form that was filled out the next day (exhibit 2).

10. The complainant was examined by Dr. Cynthia Kibet (PW4) of Moi Teaching and Referral Hospital. She testified that the labia minora was bruised; there was a tear on the upper aspect of the left labia minora; and, a hymenal tear. There was no vaginal discharge. HIV was negative. Urinalysis revealed pus cells. There were no spermatozoa. She filled out the P3 form (exhibit 2)

11. The appellant was arrested by PW3, an Administration Police Constable at AP Camp, Pioneer. PW1 was taken to the police station on 18th October 2011 by her mother. The mother led the police officer to the appellant's house. PW5 was the investigating officer. He visited the *locus in quo*. On cross-examination, he said the scene was an incomplete house located 250 metres from where the complainant was staying. He said the complainant identified the appellant at the station. He knew him. She used to call him "Uncle".

12. I have then considered the defence proffered by the appellant in the trial court. He denied committing the offence. He lives in Kipkaren. On 19th October 2011, he said he finished his work in the morning and went home. He stayed there until 2:00 p.m. He then returned to the *shamba* until 4:00 p.m. He was then confronted and arrested by three people who claimed he had defiled the complainant. He said he did not know the complainant. The appellant called one witness (DW2). DW2 said he is a mason; and, that he was in the company of the appellant for two days on 18th and 19th October 2011.

13. A number of matters arise from that evidence. I will start with the evidence of *identification*. The appellant and complainant were not complete strangers. On cross-examination, she said *"I know you. I was not coerced to say it was you. You came and took me to the maize plantation. You came to our home once"*. The offence took place during broad daylight. The complainant gave graphic testimony on affirmation. She did not waver upon cross-examination. She was consistent.

14. I thus find that the complainant positively identified the appellant as the person who hoodwinked her that he would buy her some *mandazi*. It was subterfuge: He led her to a maize plantation and into a house under construction, removed her panties and defiled her. That to me is evidence of *recognition*; stronger evidence than that of identification. See *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549, *Obwana & Others v Uganda* [2009] 2 EA 333.

15. PW1 narrated her ordeal to her mother the same afternoon. When her mother examined her private parts, she noted they were inflamed. PW4 *corroborated* the evidence of PW1 on *penetration*. He testified that the labia minora was bruised; there was a tear on the upper aspect of the left labia minora; and, a hymenal tear. There was no vaginal discharge. HIV was negative. Urinalysis revealed pus cells. The fact that there were no spermatozoa does *not* absolve the appellant. What is material is *penetration*. Section 2 of the Act defines *penetration* as follows-

> *'"Penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person"*.

16. From the evidence of PW1, PW2 and PW4 there is no doubt about penetration. The medical examination by PW4 was conclusive and corroborative. I find that penetration was proved beyond reasonable doubt.

17. The next key question is whether the appellant *is* the person who *penetrated* the complainant. From the unchallenged evidence of PW1, I am satisfied that the appellant is the person who penetrated her. I am alive of the defence by the appellant. He was setting up an *alibi*. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution's case. It was thus open to the trial court to weigh it against the evidence already tendered. See *Wang'ombe v Republic* [1976-80] KLR 1683, *Karanja v Republic* [1983] KLR 501.

18. The appellant in his defence narrated of events that took place on 19th October 2011. The offence however occurred the *previous* day on 18th October 2011. He did not mention he was in the company of DW2 on 18th October 2011 or 19th October 2011. Although DW2 confirmed they were together on both days, he conceded he could not vouch for all the movements of the appellant. The evidence of PW1 and PW2 was consistent and believable. PW1 did not falter under cross-examination. The *alibi* in this case was a thus a red herring. Furthermore, the appellant was living in the same area with the complainant. He had a clear opportunity to commit the offence. I have no doubt that it is the appellant who defiled the complainant.

19. The age of a complainant is *material* in offences of this nature. See *John Wagner v Republic* [2010] eKLR, *Macharia Kangi v Republic* Nyeri, Court of Appeal, Criminal Appeal 346 of 2006 (unreported), *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported), *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR. The reason is that section 8 of the Sexual Offences Act provides for graduated *minimum* sentences. From the evidence of the complainant, her mother PW2, and the child health card (exhibit 1) I am satisfied that the complainant was aged *five* years.

20. Furthermore, the complainant fell within the bracket of a child of *below* eleven years. There was never a suggestion by the defence that she was *past* that age. I draw strength in that conclusion from the recent decision of the Court of Appeal in *Martin Wanyonyi Nyongesa v Republic*, Eldoret, Criminal Appeal 661 of 2010 (unreported). The learned judges delivered themselves as follows-

"From the evidence, besides the evidence of PC Paul Mwangi, who we consider was incompetent to ascertain the child's age, all other evidence indicated that ZN was either 12, 13 or 15 years. When this is considered against the backdrop of the charge sheet which specified the complainant's age as 12 years, it is evident that the ages indicated, all fell within the age bracket specified under Section 8 (1) and (3) of the Act, and concerned the defilement of a child within the particular age bracket. As such, we find that, the charge and the sentence preferred were sound, and no prejudice could be held to have been suffered by the appellant. At any rate, we consider that the discrepancies are not material and curable under Section 382 of the Criminal Procedure Code."

21. From my analysis and re-evaluation of all the evidence, I am satisfied that the charge and all its elements were proved beyond reasonable doubt. I cannot say that the burden of proof was shifted to the appellant at any point. It is also not true that the defence proffered by the appellant was disregarded. The truth of the matter is that the *alibi* was feeble and a sham. It follows as a corollary that the conviction was *safe*.

22. Under section 8(2) of the Sexual Offences Act, defilement of a child of eleven years or *below* attracts imprisonment for *life*. The sentence is *mandatory*. The complainant was *five years*. The appellant was a first offender. He *declined* to offer any mitigation. The trial court properly concluded that he was *not* repentant. This was a grave offence perpetrated against a helpless child. The complainant is a *vulnerable* person as defined by section 2 of the Act. She will carry the scars for life. I cannot say in this case that the learned trial magistrate applied wrong principles in sentencing. Where the statute has set a minimum sentence, it would be a misnomer to say the sentence is too harsh or oppressive. I am thus unable to disturb the sentence.

23. The upshot is that the entire appeal is devoid of merit. It is hereby dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 19th day of April 2016

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.