REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 199 OF 2011

NATHAN KHAEMBA MAKOKHA..…………………….…...……………..APPELLANT

VERSUS

REPUBLIC………………………………………………………….RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 4158 of 2010 Republic v Nathan Khaemba Makokha in the Senior Principal Magistrates Court at Eldoret by A. Onginjo, Senior Principal Magistrate dated 7th October 2011)

JUDGMENT

1. The appellant was convicted of defilement of a girl aged nine years contrary to sections 8(1) and 8(2) of the Sexual Offences Act. He was sentenced to *thirty years* imprisonment.
2. The particulars were that on 23rd July 2010 in Wareng District within Rift Valley Province, he caused his penis to penetrate the vagina of *E.M.G [name withheld]*, a girl aged nine.
3. The appellant has appealed against his conviction and sentence. The original petition of appeal was filed on 13th October 2011. On 20th September 2012, the appellant was granted leave to amend the grounds of appeal. The amended grounds of appeal were filed on 18th September 2012. There are four *amended* grounds. First, that the investigation into the offence was shoddy; secondly that the learned trial magistrate erred by relying on inconsistent and contradictory evidence; thirdly, that the learned trial magistrate displayed open bias against the appellant; and, fourthly, that the appellant's *alibi* was disregarded. In addition, the appellant contends that there was a plot by his employer and the complainant's parents to thwart his entry into university. In a nutshell the appellant submitted that the charge was not proved beyond reasonable doubt.
4. At the hearing of the petition, the appellant relied on his detailed written submissions filed on 7th October 2015. He added that when he presented an application for bail pending appeal, the learned State Counsel, Mr. Kabaka, did not oppose it. Mr. Kabaka was *then* of the opinion that the trial court had shifted the burden of proof to the appellant; and, that the appeal had a high chance of success.
5. The appeal is *now* 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 evidence of the complainant and her mother was consistent; and, was corroborated by medical evidence. The learned Prosecution Counsel, Ms. Oduor, submitted that penetration was proved. It was submitted further that the appellant was positively identified; and, that his *alibi* was discounted. Regarding the claims of bias, counsel submitted that it was an afterthought as the issue was never raised in the trial court.
6. The Republic submitted that the sentence handed down was illegal. On 8th October 2015, the court had warned the appellant about the matter but the appellant opted to proceed with the appeal. The Republic prayed that the sentence be enhanced to life imprisonment.

7. 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.
8. PW2 was the complainant. I have studied page 22 of the record (page 6 of the typed proceedings). The trial court conducted a detailed *voire dire* examination. The minor said she was aged nine; and, that she was a class 3 pupil at [particulars withheld] Academy. 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 sworn.

9. 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.
10. The complainant told the court that her mother had sent her to return a cock to Mama Abdul. On her way back, she met the appellant. She knew him. He was her teacher. She knew him as *Mwalimu Nathan Khaemba*. It was about 6:00 p.m. He asked her to accompany him to his house to collect a book he had been given by her mother. It was a ruse. When they got to the house, he placed her on a table; pushed her panties to one side; and, inserted two fingers into her *"chuchu"*. The appellant then unzipped his trousers and inserted his penis into her genitals. The complainant felt pain and cried. The appellant was then distracted by some noise at the gate and released the complainant.
11. When the complainant got home, she informed her mother who in turn reported to her husband. The latter took the complainant to Jasho Administration Police Post who referred them to Kiambaa Police Station. She was issued with a P3 form. The following day, she was taken to hospital for treatment. Her soiled underpants were also given to the doctor, Cynthia Chemtai (PW1).
12. When cross-examined by the appellant, the complainant stated that the appellant was her science teacher. She denied fabricating the claim. She said the appellant's wife was not in the house when the incident occurred. She said the wife had gone to visit Mama Caro; a distance of 200 metres from the appellant's house. She said she did not raise an alarm. She said the appellant used to visit their house and talk to her father.
13. That narrative was largely confirmed by her mother, PW3. She said PW1 returned home at 7:00 p.m. on the material day. She opened up to her about the incident. The complainant told her that the appellant had defiled her. She inspected the complainant. She found that her underpants were wet. The stained garment was presented in court (exhibit 2). A complaint was first made at Jasho Administration Police Post and later at Kiambaa Police Station. The complainant was taken to hospital the next day. She said the complainant was born on 7th July 2001. She produced her birth certificate (exhibit 3). She also referred to the complainant's treatment notes and Ampath Clinic card (exhibits 4 [a] and [b]).
14. Upon cross-examination, she conceded that she had given the appellant a spiritual book prior to the incident. She denied that she had asked the complainant to collect the book from the appellant's house. She also said that the complainant was not bleeding; her panties were however wet. She confirmed the appellant used to visit their home.
15. PW4 was the complainant's father. He testified that on 23rd July 2010 at about 7:00 p.m., the complainant followed her mother into the kitchen. She informed her of the incident. His wife came holding the complainant and asked her to tell him what had happened. He then lodged the complaint with the police. He took the complainant to Moi Teaching and Referral Hospital the next day.
16. Like I have stated, PW1 was Dr. Cynthia Chemtai. She examined the complainant at Moi Teaching and Referral Hospital. The doctor found that her hymen was torn; and, the genitalia were

inflamed. There was no vaginal discharge. HIV was negative. Urinalysis was also negative. There were no spermatozoa. She filled out the P3 form. It is dated 26th July 2010 (exhibit 1). She said her findings were consistent with history of defilement.

17. PW5 was Police Corporal James Mulama. On 23rd July 2010, he was on duty at at Kiambaa Police Station. At about 8:00 p.m., he received the complaint from the parents of the complainant; issued them with the P3 form; and, referred them to Moi Teaching and Referral Hospital. He saw the complainant's stained underpants (exhibit 3) the same night. He said the appellant was arrested on 27th July 2010 by Administration Police officers. PW5 and his colleagues re-arrested him.
18. I have then considered the defence proffered by the appellant in the trial court. He made an unsworn statement. He denied committing the offence. He lives at Jasho Farm. On the day he is alleged to have defiled the complainant, he said he left school with a friend, Dennis (DW1). They went to see the Chairman of the church. They returned home at 5:00 p.m. He said he was training Dennis to play a keyboard. At 6:30 p.m., the complainant came to his house to pick a book. She said she had been sent by her mother. Appellant said his wife and Dennis were present. She gave her the book and she left.
19. Dennis, DW1, said that on *23rd August 2010*, at 4:00 p.m., he went to the appellant's house to train on the key board. He stayed with the appellant until 9:00 p.m. He went home with the key board. The following day was a Saturday. They trained until 2:00 p.m. The next, day, Sunday, an Administration Police officer arrested the appellant. When cross-examined about the events of *23rd July 2010*, which is the material date, he said he was not with the appellant.
20. The wife of the appellant (DW2) also testified in his defence. She said that on 23rd July 2010 at 6:00 p.m., a girl came into the house asking for a book. She said she had been sent by her mother. The appellant asked his wife to fetch the book. She gave the book to the girl and she left. On the Sunday following, her husband was arrested. On cross-examination, she denied any knowledge of a woman called Mama Caro.
21. A number of matters arise from that evidence. I will start with some discrepancies in the dates. The doctor said she complainant was brought to the hospital on 26th July 2010. That is the date on the P3 form (exhibit 1). But from the prescription form and Ampath Card (exhibits 4 [a] and [b]), it is clear the complainant was first taken to the hospital on *24th July 2010*, the day after the incident. The P3 form was issued by the police on *25th July 2010* and was signed by the doctor on *26th July 2010*. That tallies well with the evidence of the complainant and her parents. When re-examined, the doctor confirmed that she was awaiting some results before filling in the P3 form. I find that the discrepancies in those dates were not material to the charge; and, were well explained.
22. I will now turn to the investigations. I agree with the appellant that the investigating officer, PW5, could have been more diligent. He never visited the *locus in quo*; and, he did *not* submit the *appellant* to a medical examination. The complainant's soiled undergarment (exhibit 2) was not submitted to chemical analysis. PW5 said he formed an opinion an offence had been committed after taking the complaint from PW2, PW3, PW4 and *looking* at the undergarment. Nevertheless, I find that there was sufficient evidence from PW1, PW2, PW3 and PW4 to found the charge.
23. The next key evidence relates to *identification*. The appellant and complainant were not complete strangers. The appellant was her science teacher. She knew him as *Mwalimu Nathan Khaemba*. None other than the appellant confirmed that on the material day at about 6:00 p.m., the complainant came to *his* house to pick a book. Her mother, PW3, confirmed she had given the spiritual book to the appellant. Of course there are competing versions on what took place in that house. The complainant said there was no one else in the house; and, that the appellant defiled her. The appellant claims he was in the company of his wife and Dennis; and, that after the girl was given the book, she left.
24. The offence took place at 6:00 p.m. The complainant gave graphic testimony on oath. She did not waver upon cross-examination. She was consistent. I thus find that the complainant positively identified the appellant as the person who hoodwinked her that he would give her a book to deliver to her mother. It was subterfuge: He led her to his house and defiled her. That to me is evidence of *recognition*; stronger evidence than that of identification. See <u>Wamunga v Republic</u> [1989] KLR 424, <u>Republic v Turnbull & others</u> [1976] 3 All ER 549, <u>Obwana & Others v Uganda</u> [2009] 2 EA 333.

25. I have carefully considered the defence set up by the appellant. For starters, he never raised the matter of a grudge; or, that he was being framed to bar him from proceeding for further studies at the university. He only made a mention of that matter in his *mitigation* after he was convicted. Those matters have been given prominence in his *written submissions*. He never cross-examined the parents of the complainant on those matters. I find they are an afterthought and foreign to this appeal.
26. The appellant claimed he was in the company of Dennis, DW1. The trouble is that Dennis spoke of events of *27th August 2010*. When cross-examined about the events of *23rd July 2010*, which is the material date, he said he was *not* with the appellant. The more material evidence was from the wife of the appellant (DW2). She claimed that on 23rd July 2010 at 6:00 p.m., a girl came into the house asking for a book. She said she had been sent by her mother. The appellant asked his wife to fetch the book. She gave the book to the girl and she left.
27. I have to weigh DW1's and DW2's version of events against that of the complainant. Like I said, the complainant was steadfast in her evidence; and, never dithered on cross-examination. She said that her mother had sent her to return a cock to Mama Abdul. On her way back, she met the appellant. It was at 6:00 p.m. He asked her to accompany him to his house to collect a book he had been given by her mother. Although the appellant claimed he was accompanied by Dennis on the way to his house, the latter told the court that on 23rd August 2010, at 4:00 p.m., he *went* to the appellant's house to train on the key board. Never mind the date was not the one on which the complainant was defiled. The point to be made is that he never said they were together on the way to the house. Fundamentally, he said that on the material day, he was not together with the appellant.
28. The complainant was emphatic that there was no one in the house; and, that the appellant's wife (DW2) had gone to Mama Caro's house 200 metres away. I am prepared to accept that the appellant's wife does not know Mama Caro. But the complainant was defiled between 6:00 p.m. and before 7:00 p.m. when she narrated the incident to her mother. She mentioned the name of the complainant immediately. She knew him. Her panties (exhibit 3) were wet. True, she was not bleeding. PW1, Dr. Chemtai, *confirmed* she had been defiled. That discounts the evidence of Dennis and the wife of the appellant. I am fortified because, like I stated, there was no evidence of a grudge between the two families; and, the evidence of the complainant was strong and consistent. I see no reason why she would frame up the appellant.
29. PW2 narrated her ordeal to her mother at 7:00 p.m. the same evening. When her mother examined her panties were soiled. She disclosed that the appellant was the culprit. The doctor, PW1, *corroborated* the evidence of PW2 on *penetration*. She found that her hymen was torn; and, the genitalia were inflamed. There was no vaginal discharge. HIV was negative. Urinalysis was also negative. There were no spermatozoa. 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".*

30. The next key question is whether the appellant *is* the person who *penetrated* the complainant. From the unchallenged evidence of PW2, I am satisfied that the appellant is the person who penetrated her. I am alive of the defence by the appellant. He was not truly setting up an *alibi*. He confirmed he was at the *locus in quo* and saw the complainant in his house at 6:00 p.m. What the appellant was saying is that he could not have defiled the complainant because his wife (DW2); and, Dennis (DW1) were in the house. I have already found that when the evidence of Dennis and the appellant's wife is weighed against that of the complainant, it is unbelievable. This defence was considered by the learned trial magistrate. I agree with her fully that it was a red herring. I am unable to hold that the burden of proof was shifted to the appellant at any stage.
31. The appellant claimed that the learned trial magistrate displayed bias towards her. I have carefully studied the record. Nowhere in that record did the appellant raise such a matter; or, apply to be heard by another court. From the record, the appellant was given an opportunity to cross-examine all the witnesses. He also called two witnesses in defence. True, his advocate withdrew in the early stages of the trial. I take judicial notice that the nature of the charge facing the appellant did not mandate the State to provide him with legal counsel. The appellant did not seek an adjournment to

instruct counsel or intimate to the court he needed to do so. True, the trial court convicted the appellant. But that is not the same thing as bias of a judicial officer. I find that the trial was fair.

32. 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 PW3, and the birth certificate (exhibit 3) I am satisfied that the complainant was born on 7th July 2001; and, that she was aged *nine years* at the time of the offence.
33. I am alive that the legal burden of proof lay throughout with the prosecution. See _Woolmington v DPP_ [1935] AC 462, _Bhatt v Republic_ [1957] E.A. 332, _Abdalla Bin Wendo and another v Republic_ (1953) EACA 166. But 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 not taken into account; or, that the evidence of his two witnesses was disregarded. The truth of the matter is that the defence was self-serving, feeble and a sham. It follows as a corollary that the conviction was *safe*.
34. 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 *nine years*. The trial court sentenced the appellant to serve *thirty years* imprisonment. That sentence was *illegal*. On 8th October 2015, the court warned the appellant about the matter but the appellant opted to proceed with the appeal. The Republic prayed that the sentence be enhanced to life imprisonment.
35. Having found the conviction was *safe*; and, that the sentence handed down was *illegal*, this court is entitled to *enhance* the sentence. See _Stanley Nkunja v Republic,_ Nyeri, Court of Appeal, Criminal appeal 280 of 2012 [2013] eKLR, _Hewett Kisusa & another v Republic_, Eldoret, High Court Criminal Appeal 180 & 181 of 2011 [2014] eKLR.
36. The upshot is that the appeal against conviction is devoid of merit. It is hereby *dismissed*. I *set aside* the sentence handed down by the lower court of *thirty years*. I substitute it with a sentence of *life imprisonment*.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 17th day of May 2016

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant (in person).

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.