REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 60 OF 2014

SIMON NDUN'GU WANGURU.....APELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable B. KIPTOO in Kapsabet Criminal case No. 16 of 2014 dated 12th March, 2014)

JUDGMENT

1. The appellant was tried and convicted of the offence of defilement contrary to ***Section 8(1)*** as read with ***Section 8(2)*** of the *Sexual Offences Act*. It was alleged that on the 1st day of January, 2014 at Nandi Hills township in Nandi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of *H.A.O (Name withheld)* a child aged 10 years old.
2. Following his conviction, the appellant was sentenced to life imprisonment. And being aggrieved by his conviction and sentence, he proffered an appeal to this court vide a petition of Appeal filed on his behalf by his advocates *Ms. Adambi & Company Advocates.*
3. In his petition of appeal, the appellant relied on the following grounds of appeal;

i. ***That the learned trial magistrate erred in law and in fact by failing to appreciate the fact that, the names used by the prosecutor to charge the appellant as well as during proceedings and used in the judgment did not belong to the appellant.***
ii. ***That the learned trial magistrate erred in law and in fact, by failing to appreciate the fact that, a child of tender age like the complainant, could not have been able to walk comfortably if she had been just defiled.***
iii. ***That the learned trail magistrate erred in law and in fact, by believing the evidence of family members, who never witnessed the act of defilement and who were not present yet the act is said to have been committed during the day in an area which has many people and an independent witness should have been brought by the police.***
iv. ***That, the learned trial magistrate erred in law and in fact, by failing to note that the alleged discharge from the complainant private part was not described to be spermatozoa and it could be from any other ailment.***
v. ***That, the learned trial magistrate erred in law and in fact, in failing to note that, the clothes the complainant was wearing, were not produced yet she is alleged to have left with them.***

vi. ***That, the learned trial magistrate failed to appreciate that, no medical evidence was given to link the discharge from the complainant private part with the appellant's semen.***
vii. ***That, the learned trial magistrate erred in law and in fact by sentencing the appellant to life yet***

the evidence of the prosecution was not water tight enough.

4. The appeal was prosecuted by way of oral submissions. Learned counsel *Mr. Adambi* argued the appeal on behalf of the appellant while the state was represented by learned prosecuting counsel *Ms. Mokua*.

   The gist of *Mr. Adambi's* submission was that the appellant was wrongly convicted as in his view, the charge of defilement was not proved beyond any reasonable doubt; that no forensic evidence was adduced by the prosecution to link the appellant with the commission of the offence and that the learned trial magistrate relied heavily on the evidence of the complainant's family members who were not eye witnesses to the commission of the offence. In addition, counsel submitted that the appellant could not have possibly committed the offence because if he had, given the complainant's tender age, she would not have been able to walk properly after the ordeal.

5. The state contests the appeal. In her submissions, *Ms. Mokua* urged the court to dismiss the appeal for lack of merit as in her view, the prosecution had proved every element of the offence beyond any reasonable doubt; that the appellant was positively identified as the person who had defiled the complainant; that the fact that some of the prosecution witnesses were the complainant's relatives did not mean that they were not competent witnesses and finally that the offence of defilement or rape can be proved by other evidence other than forensic evidence.
6. This is a first appeal to the High Court. I am alive to the duty of the first appellate court which is to revisit and re-evaluate the evidence presented to the lower court to draw its own conclusions while bearing in mind that unlike the trial court, it did not have the benefit of hearing or seeing the witnesses and give due allowance for that disadvantage; See: ***Okeno V Republic (1972) EA 32; Kinyanjui V Republic (2004) 2 KLR 364.***
7. Briefly, the prosecution case is that on 1st January, 2014 at around 3 p.m., the complainant (*H.A.O*) a girl aged 10 years was playing with her sister (PW2) who was 11 years old. The appellant, who they knew previously by appearance and by his trade of hawking sweets at a certain junction called them to his house after giving them Kshs.50 to buy sweets and soda. While in the house, the appellant went behind a curtain which separated his bed from the rest of the room. He called PW2 but PW2 ran away leaving PW1 behind. According to PW1, the appellant approached her, grabbed her by the neck and pulled her to his bed. She could not scream as the appellant had covered her mouth with his hand. He then laid her on his bed, removed her underpant as well as his trousers and underwear and then proceeded to do bad manners to her. The bad manners referred to was having sexual intercourse with PW1.
8. In the meantime, after PW2 ran out of the house, she called her elder sister (PW3) and together they went back to the appellant's house. According to PW3, she pushed the door open and as they stood at the door, PW1 came out from behind the curtain crying and ran out of the house. PW2 recalled seeing blood stains on PW1's skirt and 'T' Shirt but PW3 only claimed to have noted that PW1's skirt's lining was out. They all went home and when their mother (PW4) returned home at around 5.45 p.m, PW1 reported to her what had happened. She immediately examined her private parts and besides noting that she did not have her underwear, she noted a whitish discharge on PW1's vagina. PW1 in addition recalled that she left her underpant in the appellant's house.
9. On the following morning, PW4 met with the appellant and on her request; he agreed to accompany her to Nandi Hills police station. On arrival, the appellant was handed over to PW6 who together with PW4 accompanied him back to his house to search for the complainant's underpant. The same was not recovered. PW6 on the same day escorted PW1 and the appellant to Nandi Hills District Hospital where they were examined by PW5, a clinical officer in the hospital. PW5 completed their respective P3 forms which he produced as PExhibit 1 and Pexhibit 4.
10. When put to his defence, the appellant elected to give a sworn statement. He did not call witnesses. In his sworn statement, he denied having committed the offence as alleged. He claimed that on the material day, he was at his place of work from morning until 5 p.m. He recalled that PW4 asked him that evening and on the following morning whether he had slept with PW1 which he denied but at her request, he agreed to accompany her to Nandi Hills Police station where he was arrested; that he was subsequently charged with an offence which he knew nothing about.
11. I have carefully considered the grounds of appeal, the rival submissions by the appellant and the

state, the evidence on record and the judgment of the learned trial magistrate. I note that the learned trial magistrate convicted the appellant on grounds that he had been positively identified by PW1, PW2 and PW3 and that the medical evidence adduced by PW5 confirmed that the complainant had been defiled as alleged.

12. After my analysis of the evidence on record, I agree with the learned trial magistrate that the prosecution sufficiently managed to prove through the evidence of PW5 that the complainant was indeed defiled on the date alleged but I find myself in doubt whether it is the appellant who actually perpetrated the heinous act. PW1 claimed that she knew the appellant by appearance only as she had seen him selling sweets at a certain junction. No evidence was however led by the prosecution to disclose for how long she had known him. PW2 on her part just claimed that she knew the appellant before by appearance only and PW3 claimed that she did not know him at all prior to the day in question. However, in their evidence on cross examination, PW2 and PW3 both claimed that they knew the appellant as uncle Mary or uncle Millie. The question that begs an answer is this - if PW2 and PW3 did not know the appellant before or knew him by appearance only, how then were they able to describe him as uncle Millie or uncle Mary?
13. Secondly, when reporting the matter to PW4, it is alleged that PW1 described her assailant as "Mzee ya sweets" which description PW4 understood to refer to one Ndungu – the appellant herein as she had also bought sweets

    from him. But the prosecution did not adduce any evidence to prove that the appellant was the only hawker selling sweets at the alleged junction. It is also important to note that PW1, PW2 and PW3 who claimed to have gone to the appellant's house just before or after the defilement which was allegedly committed during the day could not even agree on description of the appellant's house which appears to have been in a row of other houses. PW1 described it as house No.3 while PW2 described it as house No. 1. PW3 was not sure whether it was the first or last house . Given the foregoing, I find that there is a real possibility that due to their young age, the witnesses may have been honest but mistaken about the identity of PW1's assailant.

14. It is also worth noting that according to PW4, she confronted the appellant with PW1's allegation the same evening but he denied the same. On the following morning, she requested him to accompany her to the police station which he voluntarily agreed. In my view, this is not conduct expected of a person who knew he had committed a criminal offence. Having been confronted with PW1's allegations by PW4, if the appellant had committed the offence, one would have reasonably expected him to seek ways of avoiding arrest not to surrender himself to the police with protestations of innocence. Moreover, when his house was searched on the same day, the underpant allegedly left in his house by the complainant the previous day was not recovered.
15. In my opinion, this is a case in which the investigating officer ought to have caused the taking of blood samples from the appellant or any other samples for that matter to have them subjected to forensic analysis together with samples of blood stains on the clothing the complainant had worn on the material date (though only PW2 claimed to have seen such blood stains) or anything else that could have been derived from the complainant in order to check or confirm whether there was any link between the appellant and the commission of the offence. Given the shaky nature of the evidence adduced by the prosecution witnesses on the issue of identification and given the appellant's conduct, forensic evidence was the only evidence which could have proved beyond any doubt that it is the appellant who committed the offence charged in this case and not any other hawker.
16. The learned trial magistrate in her evidence did not thoroughly and carefully interrogate the evidence adduced by the prosecution. She appears to have taken the evidence on its face value which was wrong because being the trial court, she had a legal obligation to properly analyse the evidence adduced before her in its totality including the appellant's defence in order to establish whether the prosecution had proved its case beyond any reasonable doubt. The trial magistrate does not appear to have given the appellant's defence due consideration. She dealt with it in a perfunctory manner which is not what the law required her to do.
17. Before concluding this judgment, I wish to deal with the appellant's complaint that the trial magistrate erred by relying on evidence from members of the complainant's family. As correctly submitted by *Ms. Mokua,* no law barred the trial magistrate from accepting and believing the

evidence of PW1, PW2, PW3 and PW4 simply because they came from the same family. They were competent witnesses for the prosecution and just like in any other case, their evidence should only have been accepted if the court was satisfied that they were credible, truthful and reliable witnesses. As demonstrated earlier, the key witnesses in this case did not fit that description.

18. For all the foregoing reasons, I have come to the inescapable conclusion that the prosecution did not prove the case against the appellant beyond any reasonable doubt. The evidence on the appellant's identification left room for doubt whether he is the one who committed the offence and not any other person who answered to the description of a hawker who traded in sweets. That doubt ought to have been resolved in the appellant's favour.
19. In the result, I find that the appellants' conviction was unsafe. The appeal is thus merited and it is hereby allowed. I accordingly quash the appellant's conviction and set aside the sentence. The appellant is set free unless otherwise lawfully held.
20.

C.W GITHUA

JUDGE

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

In the presence of:

Appellant

Mr. Adambi for the appellant

No appearance for the state

Ms Naomi Chonde – court clerk