REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 312 OF 2013

ALEX MWANIKI KAMUKU …....APPELLANT

VERSUS

REPUBLIC …….. PROSECUTOR

(Appeal from the Judgment of the Senior Principal Magistrate's Court at Nyahururu Hon. D. K. Mikoyan – Senior Principal Magistrate delivered on the 17th October, 2013 CR Case No. 1254 of 2012)

JUDGMENT

The appellant **ALEX MWANIKI KAMUKU** challenging his conviction and sentence by the learned Principal Magistrate sitting at the Nyahururu Law Courts. The appellant was first brought to court on 25/7/2012 on a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(1) as read with SECTION 8(2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"On the 22nd day of July within Nyandarua county, unlawfully and intentionally caused his genital organs namely the penis to penetrate the vagina lf LW a girl aged 6 years"***

In addition the appellant faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant pleaded **'Not guilty'** to both charges. His trial commenced on 3/8/2012 before the lower court. The prosecution led by **INSPECTOR OMWERI** called a total of five (5) witnesses in support of their case.

PW1 LW was the complainant. She was a minor aged 7 years. She told the court that on the material day the appellant called her and led her to his house. There he put her on his bed lay on top of her and defiled her. When the child returned home she revealed to her mother what had happened. The matter was reported to police. The complainant was taken to Olkalau Hospital where she was examined and treated. Upon conclusion of police investigations the appellant was arrested, arraigned in court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant gave an unsworn statement in which he categorically denied having defiled the child on 17/10/2013. The learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of Defilement and thereafter sentenced him to life imprisonment. Being aggrieved by both his conviction and sentence, the appellant filed this present appeal.

The appellant who was not represented during the hearing of this appeal relied upon his written submissions which had been duly filed. **MS RUGUT** learned State Counsel made oral submissions in which she opposed the appeal and urged the court to uphold both the conviction and sentence on the appellant. Being a court of first appeal this court is obliged to re-examine and re-evaluate the prosecution evidence and to draw its own conclusions on the same (see **AJODE Vs REPUBLIC [2002] KLR.**

In the case of **MWANGI Vs REPUBLIC [2004] KLR 28** the Court of Appeal held as follows:

> ***"1. 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 to have the appellate court's own decision on the evidence.***
>
> ***2.The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.***
>
> ***3. It is not the function of the first appellate court itself to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions. It must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported. In doing so it would make allowances for the fact that the trial court had the advantage of hearing and seeing the witnesses".***

In the appeal two main questions need to be answered

> **(1) Was the complainant in fact defiled as is alleged**
>
> **(2) Has there been a proper identification of the appellant as the man who defiled the complainant.**

On the first question the primary evidence available was that of the child herself. The complainant testified in court and stated that her assailant put her on the bed

> ***"and then he lied on top of me then did bad things to me. Then I felt pain (pointing at her private parts)"***

The child due to her young age did not have the vocabulary with which to describe the human anatomy. All she could state was that the man did **'bad things'** to her *ie* actions which very unpleasant and those actions caused her to feel pain in her private parts. As a court I take judicial notice of the fact that many young children are unable to describe the sexual act. They invariably refer to it as '**bad manners'** or ***'tabia mbaya'*.**

Corroboration of the complainant's evidence is provided by her mother **AWW** who testified as **PW2**. She told the court that on the material day when the complainant returned home she checked her. **PW2** stated at page 12 line 12 that

> ***"LW had watery discharge on her private parts. Her private parts appeared swollen and I believe the discharge was sperms"***

Certainly it would not be normal for a child of 8 years to have watery discharge from her private parts **PW2** also stated that the child was wearing a yellow biker which was torn at the centre. The said biker was produced in court as an exhibit **P. Exb 2**.

Further corroboration of the testimony of the complainant is provided by the evidence of **PW5 DR. PETER NGINYO**, a clinical officer attached to O K District Hospital. **PW5** stated that he examined the complainant on 24th July, 2012 before she had bathed. His findings at page 18 line 10 were that

"Her under pant was torn and she appeared mentally challenged. I saw no other physical injuries. Hymen was perforated but old. No spermatozoa or infection registered on lab test"

PW5 filled and signed the P3 form which was produced in court as an exhibit **P. Exb 3**. **PW5** also produced the complainant's initial treatment card which was issued on 22/7/2012 the day the incident occurred. A look at the treatment card indicates that the complainant had torn panties and a **"clear discharge on the external genitalia".**

All this provides sufficient corroboration of the complainant's evidence. The torn hymen is proof that actual penetration did occur.

The age of the complainant which is a crucial issue in a defilement charge was proved by her birth certificate produced by her mother **PW2**. The birth certificate indicates that the child was born on 10th January, 2004. Therefore in July 2012 when this incident occurred she was about 8½ years old. The appellant submitted that there was doubt regarding the child's age as she herself stated that she was 4 years old. I find that the birth certificate provides incontrovertible proof of the age of the complainant. I am mindful of the fact that the complainant was found by the doctor to suffer a slight mental problem. There is every possibility that she may not have known her true age. On its part this court harbors no doubts regarding the age of the child. From the evidence on record I find that the complainant was indeed 8 years old when she was defiled.

The next question is the identity of the defiler. In her testimony the child stated that **'Mwaniki'** took her to his house and defiled her. She pointed out the appellant in court. The incident occurred at 2.00 pm. It was broad daylight and visibility was good. The child spent ample time in the company of her assailant since he walked with her to his house.

PW3 E W K alias **'Mama N'** stated that on the material day as she came from church she met accused with the child. She saw the accused pick the child and pass her over the fence to his house **PW3** told the court that she found this to be very odd since the compound had a gate. I do agree that the action of hoisting the child over the fence is very odd and reveals some clandestine motive.

PW2 the complainant's mother told the court that she was alerted by **PW3** that the appellant had been seen with her child and she states that she herself later met appellant with the child. **PW2** states at page 12 line 9

"I took LW from his hands. I started asking LW where they were and LW said accused did something bad…"

Again **PW2** met the appellant in broad daylight. The child immediately reported the incident to her. **PW2** knew the appellant as **'Mwaniki'** and identified him in court. It cannot be a mere coincidence that the man whom the child identified as her defiler is seen leading the child by **PW3** and is later found with the same child by the child's mother. I am satisfied that there has been a clear positive and reliable identification of the appellant as the man who defiled the complainant.

The appellant in his defence merely spoke about his arrest. His defence amounted to a mere denial which did not in any way weaken the prosecution case. I am satisfied that this charge of defilement was proved beyond reasonable doubt. The appellant's conviction was sound and I do confirm the same.

The appellant was allowed an opportunity to mitigate after which he was sentenced to a term of life imprisonment. Section 8(2) of the Sexual Offences Act, 2006 provides

"(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life"

The use of the word **'shall'** makes this a mandatory minimum sentence. As I have found earlier the child was aged 8½ years old when she was defiled. She was under 11 years. As such the sentence which was

imposed was lawful and is therefore upheld. Finally this appeal fails in its entirety and is hereby dismissed.

Dated at Nakuru this 29th day of July 2016

Appellant in person

Ms Rugut for DPP

Maureen Odero

Judge

29/7/2016