REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL APPEAL NO. 90 OF 2015

(Formerly Nakuru HC.CR.A No. 222 of 2014)

(Being an appeal from original Conviction and Sentence in the Chief

Magistrate's Court at Narok Criminal Case No. 1435 of 2013 Sitati, SRM)

NICHOLAS KIRUI KIPNGETICH.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was charged with Defilement Contrary to Section 8 (1) 8 (2) (sic) of the Sexual Offences Act. In that on the 13th day of October 2013 at ***[particulars withheld]*** area in Narok North District within Narok County he unlawfully and intentionally caused his penis to penetrate the vagina of **P.M.** a child aged 2 years and ten months.

2. Following a full trial, he was found guilty and convicted. He was sentenced to life imprisonment.

3. Aggrieved by the decision, the Appellant filed an appeal to this court, but amending his grounds of appeal before the hearing. The amended grounds filed on 10/11/2015 are:

> **"1. THAT the pundit trial magistrate erred in law and facts when he convicted me in the instant case yet failed to find that my rights as provided for under Section 214 of the Criminal Procedure Code were not complied with.**
>
> **2) THAT the learned trial magistrate erred in both law and facts when he convicted me in the instant case yet failed to find that the charges were defective.**
>
> **3) THAT the learned trial magistrate erred in law and facts when he convicted me in the instant case yet failed to find that the adduced evidence is contrary and incredible and that section 48 of evidence act was not complied with and Section 77 of the Evidence Act Cap 80 Laws of Kenya.**
>
> **4) THAT the pundit trial magistrate erred in law and fact when he declined to attach weight to the pundit defense."**

4. During the hearing of the appeal, the Appellant relied on the above grounds and his written submissions. Regarding the first ground, the Appellant's complaint is that the trial court failed to comply with the provisions of Section 214 of the Criminal Procedure Code after the charges were amended. In the second ground, he objected to the manner in which the statement of offence was drawn, arguing therefore that the charge was defective.

5. He argued, in connection with the third ground that the **P3 form** completed and produced by a Clinical Officer should not have been admitted as the maker was incompetent, and that besides, he gave contradictory evidence on his findings.

6. Regarding the age assessment form, he complained that its production flouted the requirements of Section 77 of the Evidence Act, and that the evidence on the age of the victim was inconclusive. He further submitted, regarding the fourth ground, that he gave a plausible defence disproving penile penetration of the minor but that his defence did not receive due consideration.

7. The appeal was opposed by the Director of Public Prosecutions through Miss Waweru who, for the most part reiterated the prosecution evidence. She asserted that all the elements of the charge had been proved, and that the Accused's defence was not capable of belief.

8. The duty of the first appellate court as stated in **Ajode -Vs- Republic (1972) EA 32** and restated in **Okeno -Vs- Republic 1973 E.A. 322** is that:-

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's 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 should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424.**"

9. The prosecution case was that the Appellant resided at ***[particulars withheld]***, Narok and was a neighbour of the family of the Complainant, **P.M. (PW2)**. **PW2** lived with an aunt **B.S. (PW1)** and her grandfather **P.O. (PW3)** while her mother **R.K. (PW4)** lived in Kisii. On 13/10/2013 at 3.00pm while **PW1** was in the family house, **PW2** came to her and reported that the Appellant had defiled her. **PW1** reported to **PW3** who called and confirmed from **PW2** concerning the report. **PW3** immediately confronted the Appellant who claimed that the Complainant had rubbed pepper into her genitalia which he had wiped off with a towel, which however he was unable to produce on **PW3's** demand.

10. A crowd that gathered became hostile and the Appellant was escorted to Narok Police Station and later, he and the complainant were examined by **Daniel Cherop (PW5)**. **PW5** confirmed penetration based on the breached hymen and laboratory tests. He completed the P3 form. He also examined the Appellant. He noted no injuries but confirmed infection in his urine sample.

11. In his defence, the Appellant gave a sworn statement. To the effect that, on the material date the complainant and other neighbour's child or children came to his room as he was setting up for his boiled eggs business. They upset his "*Kachumbari*" – a form of salad usually containing peppers and he chased them away. At the door, he was met by **PW3** who confronted him about his treatment of the children before demanding to know what he had done to **PW2** who at the time kept rubbing her eyes and navel area.

12. The Appellant explained that the girl had come into contact with pepper in the room. But PW3 heard nothing of it and proceeded to accuse the Appellant of preying on his wife and family, before leaving briefly only to return and demand that the Appellant gives **PW2** a bath. As he complied under duress,

PW3 said that he was abusing his granddaughter before his eyes as the Appellant was wiping the navel area.

13. **PW3** mobilized for the Appellant and the complainant to go to Narok Hospital for examination and also reported to police. The Appellant stated that his relationship with **PW3** was strained following an earlier incident when PW3 accused him of carrying on an affair with **PW3's** wife. Hence the charges were fabricated to "fix" him even though the girl had applied pepper to her private parts.

14. There was no dispute that the witnesses and the Appellant were known to each other and living in the same place. And that on the material date, the Complainant entered the house of the Appellant, resulting in a complaint that the Appellant had defiled her.

15. On the question of penetration, the evidence of **PW2**, was corroborated by **PW1** and **PW3** to whom the former first reported that the Appellant, called Nicholas, "**had put his thing (penis) in her genitalia (pointing to the vagina)."**

16. Upon immediate examination of **PW2**, **PW1** noted redness and soreness. When **PW3** confronted the Appellant he claimed that the child had rubbed pepper into her vagina and he had wiped it off with a towel. However, in cross-examination of **PW2** the Appellant did not mention this aspect to her. And when the Complainant was examined, on the first day, no obvious tears, discharge or bleeding was seen. However there was redness on the vulva. Urine and high vaginal swab samples were taken for analysis.

17. On 14/10/2013, she was examined by **PW5**. The hymen was found to be breached, an indication of penetration. Laboratory results of the High Vaginal Swab (HVS) indicated pus cells **(**a sign of infection) and red blood cells, an indication of injury to the vaginal walls. The urine samples also showed pus cells indicative of infection.

18. The Appellant has challenged the evidence of **PW5** on grounds that he was not qualified as a medical professional. **PW5** identified himself as a Clinical Officer at Narok District Hospital. A similar objection was raised in the case of **Fappyton Mutuku Ngui -Vs- Republic (2014) eKLR** regarding the competence of a Clinical Officer. The Court of Appeal stated:

> **"PW5 is a clinical officer who testified on behalf of his colleague….. who examined and treated PW2 at Matuu District Hospital. In our opinion, a clinical officer is qualified to fill a P3 form. This is an area of his competence (See Raphael Kavoi Kiilu -Vs- Republic Criminal Application No. 198/2008; Section 2 of the Clinical Officers (Training, Registration and Licencing) Act, Cap 260….."**

19. The redness on the vulva of the Complainant on the date of the offence confirmed her report to **PW1** and **PW3**. She reported the matter soon after she admittedly left the Appellant's house. She did not say that she rubbed pepper on herself, nor did the Appellant suggest this to her in cross-examination. She said that the Appellant inserted **"his thing into her genitalia"** which she pointed at both to **PW1** and **PW3** and also the court.

20. The Appellant's suggestion that the Complainant applied pepper to her vagina while in his house is preposterous. And in any event does not stand in light of the fact that the Complainant's hymen was certified as breached. Also her vaginal walls had injury resulting in red blood and pus cells in her High Vaginal Swab (HVS). The Accused's disputation on this aspect arises from a misunderstanding. **PW5** did not say said that red blood clots was visible in the genitalia of the Complainant, but that they were detected in the High Vaginal Swab (HVS). His evidence is consistent when properly appreciated. These (red blood cells) were evident from samples taken on the same date she was first treated, meaning that the defilement was recent. Even if it were accepted that **PW3** had past grudges against the Appellant, he could not have also invented these injuries.

21. Besides, in cross-examination of **PW3** the Appellant never raised the questions about a suspected love affair between him and **PW3's** wife. Although the trial magistrate did not outline in much detail his

analysis of the evidence, he concluded that:

> ***"This Honourable court finds no difficulty to accept as proven the charges of defilement against Nicholas Kirui. There is medical evidence of a broken hymen. There were blood clots on the vaginal wall coupled with whitish discharge all indicative of injury to the vaginal walls arising from forceful penetration. The nature of injuries were not consistent with pepper being applied mistakenly to the vagina. It came about by penile penetration."***

22. On my part, having reviewed the evidence on penetration and the identity of the offender I agree with the finding that the Appellant had opportunity and did penetrate the minor as she reported on 13/10/2013.

23. Regarding the age of the Complainant, an age assessment was done at the Narok District Hospital on the order of the court. The doctor who conducted the examination was not called to testify and I agree with the Appellant that **PC Kung'u (PW6)** was not the proper witness to produce the said age assessment form.

24. Be that at it may, **PW5** had already assessed the Complainant's age as 2 years and 10 months. This is consistent with the evidence of **R. K. (PW4)** the Complainant's mother, who, though not producing records stated that the child was aged 2 years and 11 months. Ditto **PW1.** The Complainant's age was estimated in the P3 form to be 2 years and 10 months on 14/10/2013.

25. In **Mwalongo Chichoro Mwajembe -Vs- Republic Msa. Cr. App. No. 24 of 2015 (UR)** the Court of Appeal stated in this that:

> **"……..the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof" It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense.** ***(See Denis Kinywa -Vs- Republic Criminal Appeal No. 19 of 2014)*** **and (Omar Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the Court of Appeal of** ***Uganda in Francis Omuroni -Vs- Uganda Criminal Appeal No. 2 of 2000.*** **We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable……."**

26. It is correct as argued in respect of ground 1 that the court did not comply with Section 214 of the Criminal Procedure Code upon the charge particulars being amended on 21/2/2014. However the amendment was made to the particulars to reflect the age of 4 years instead of 2 years. The offence remained the same. I cannot agree that the failure by the court in the circumstances to comply with Section 214 of the Criminal Procedure Code prejudiced the Appellant. The offence remained the same and the punishment thereto.

27. And in light of my findings based on the age assessment evidence, the amendment was unnecessary. There was cogent evidence by **PW5** that he estimated the girl's age to be 2 years and 10 months old, and by Complainants mother. Age assessment forms are not a magic bullet in proof of age as other evidence can be used, so long as it is credible.

28. The Appellant clearly understood the charges facing him as evidenced by the rigorous defence he put up at the trial. The fact that the charge sheet did not correctly lay out the charge as "Defilement Contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act" did not impinge his defence in any way. Thus grounds 1 and 2 of the appeal have no merit.

29. In view of all the foregoing, nothing turns on grounds 3 and 4 of the appeal and I can find no reason to

fault the findings of the trial court, which in my view were based on sound evidence.

30. In the result, upon reviewing the trial evidence, I would quash the conviction based on the amended particulars and substitute therefore a conviction on the charge of Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act, but relating to a girl aged 2 years and 10 months. I confirm the sentence of life imprisonment. The appeal is therefore without merit and is herewith dismissed.

Delivered and signed at Naivasha, this **29th** day of **July, 2016.**

In the presence of:-

For the DPP : Miss Waweru

For the Appellant : N/A

Court Assistant : Barasa

Appellant : Present

C. MEOLI

JUDGE