REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 240 OF 2014

JAMES SONGA OKONGO .....……...APPELLANT

VERSUS

REPUBLIC ……..…...…….. PROSECUTOR

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. B. Kituyi Resident Magistrate delivered on the 12th Mary 2011 CMCR Case No. 225 of 2010)

JUDGMENT

The Appellant **JAMES SONGA OKONGO** has filed this appeal challenging his conviction by the learned Resident Magistrate sitting at the Nakuru Law Courts. The appellant had been arraigned before the trial court on 16/9/2010 on a charge of **DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(1) as read with SECTION 8(3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"On the 14th day of September, 2010 in Rongai District within Rift Valley Province, unlawfully and intentionally committed an act by inserting your male genital organ (penis) into the female genital organ (vagina) of JN a girl aged 11 years which caused penetration"***

The appellant faced an alternative charge of **INDECENT ACT WITH A GIRL CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006** The appellant entered a plea of **'Not Guilty'** on both counts. His trial commenced on 17/11/2010. The prosecution led by **INSPECTOR OYIER** called a total of six (6) witnesses in support of their case.

JNPW1 the complainant was a child aged 11 years. She told the court that on the material day she went out in the morning to fetch water. As she was returning home she met the appellant. He told the child to follow him to a nearby sisal plantation. Upon arrival there the appellant undressed the complainant and proceeded to defile her. After the incident the complainant returned home.

PW2 D K also a minor aged 15 years testified that on that same day he had gone out to fetch firewood. He saw the appellant talking to the complainant. He saw the two enter the sisal plantation and he followed them. **PW2** hid himself and watched. He saw the appellant lie on top of the child and defile her. After they finished **PW2** confronted the complainant and she began to cry. He later went home and informed his grandmother of what he had seen. In this way matter came to the knowledge of **PW3 F M**, the mother of the complainant. She reported the matter to authorities and took the child to hospital. The appellant was later arrested 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. He gave an unsworn defence in which he denied the charges. On 12th May 2011 the learned trial magistrate delivered his judgment in which he convicted the appellant on the charge of defilement and sentenced him to serve twenty (20) years imprisonment. The appellant being aggrieved by both his conviction and sentence filed this appeal.

This being a first appeal this court is obliged to re-examine and re-evaluate the evidence on record and to draw its own conclusions thereon. The appellant relied upon his written submissions which had been filed in court. **MS RUGUT** learned Stated Counsel made oral submissions opposing the appeal. I have carefully considered the submissions of both parties. In this case three main issues arise from determination

(1) Was the complainant defiled as alleged

(2) Is there a positive identification of the appellant as the one who defile the complainant

(3) Proof of Age of the child

(4) Did the trial court give due consideration to the appellant's defence?

The complainant testified that on the material day the appellant took her into a sisal plantation and defiled her. **PW1** stated in her evidence at page 4 line 22

> ***"On the way from fetching water I met someone on the road. It was Okongo. He was alone. He told me to go with him to the sisal plantation. He then removed my panty and then he lay me down on the sisal plantation. Even him he lay down. He then did bad manners to me here (points her private parts). No blood came out but I felt pain…."***

The complainant who is but a child has given a clear description of what the appellant did to her. Ordinarily such sexual offences would not be witnessed by third parties as they are normally committed in secret. Indeed in this case the incident occurred inside a sisal plantation.

However this one exception to the rule where there was in fact an eyewitness. This was **PW2** a 15 year old boy. He stated that he saw the appellant and the child go into the sisal plantation. As boys are wont to do he followed them and hid to watch what would happen. **PW2** states at page 6 line 21

> ***"…… I turned back and saw PW1 and the accused talking and then I decided to follow them because they entered the sisal plantation. So I went and saw the accused on top of PW1. I just hid there and looked at them…."***

The evidence of **PW2** clearly corroborates the testimony of the complainant that she had been defiled. There is no other explanation for an adult man to be hiding in a sisal plantation lying on top of a young girl other than that he was defiling her.

Further corroboration of the fact of defilement is provided by **PW5 DANIEL MAUCHA** a medical officer who examined the complainant. He found that her hymen had been freshly broken and noted bruises on the vaginal wall. This is clear proof that penetration had occurred. **PW5** filled and signed the complainant's P3 form which he produced in court as an exhibit **P. Exb 1**. From the evidence on record I find as a fact that the complainant was indeed defiled as she has alleged.

The next question would be the identity of the defiler. According to the complainant the incident occurred in the morning hours. It was daylight and visibility was good. The complainant identified her defiler whom she knew very well by name. **PW1** states at Page 5 line 12

> ***"Okongo did to me bad manners (points to the accused). I know him very well because he works in the sisal plantations. He lives near us with his mother"***

The complainant was very categorical that it was Okongo (appellant) who defiled her. She reiterates under re-examination that

> ***"Nobody told me to lie. My mother only told me to come and say what happened"***

The appellant was a man the child knew very well as a neighbor. She positively identified him in court. The incident occurred in broad daylight and the complainant spent enough time with the appellant to enable her see him well. **PW3** the mother of the complainant confirmed to the court that the appellant was a neighbor who was well known to the family.

Corroboration on the identity of the defiler is provided by **PW2** who witnessed the incident. He states at page 7 line 10

> ***"The person I saw that day is the accused (points to the accused). We are related because his mother is my aunt and I call him Baba Okata"***

Again under re-examination **PW2** is adamant and states

> ***"I haven't come to lie I have testified what I witnessed that day"***

Both **PW1** and **PW2** were minors. However they both gave clear concise and cogent evidence. Both remained unshaken under cross-examination by the appellant. It is clear to me that they were truthful witnesses. As children they would have harboured no grudge against the appellant and would have no reason to lie against him.

Both **PW1** and **PW2** knew the appellant before. He was their neighbor and they knew him by name. There is clear evidence of recognition. In the case of **ANJONONI & OTHERS Vs THE REPUBLIC [1980] KLR 59** it was held that

> ***"Recognition of an assailant is more satisfactory more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other…."***

The assailant in this case was a person well known to both the complainant (victim) and the witness. I find there was no possibility of a mistaken identity. I am satisfied that there has been a clear positive and reliable identification of the appellant as the man who defiled the complainant.

The next issue requiring consideration is the **age** of the victim. In cases of defilement age is a crucial factor which requires proof as the sentence to be imposed is entirely dependent upon the age of the child. The question of the manner of proving age has vexed our courts for some time. The Court of Appeal has issued two seemingly contradictory views on this aspect. In the case of **KAINGU ELIAS KASONGO Vs REPUBLIC Cr. Appeal No. 504/2010** it was held that a medical birth certificate age-assessment or official document is required to prove age in defilement cases. However in the case of **RICHARD WAHOME CHEGE Vs REPUBLIC Cr. Appeal No. 61 of 2014** a different Bench of the Court of Appeal took a more liberal approach and held that

> ***"On the contention that the age of the complainant was not established it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant and the complainant herself"***

Based on the doctrine of **'stare decisis'** both decisions are binding on the High Court. Although I have in my previous decisions adopted the narrow approach in the **Kaingu Elias Kasongo Case**, upon further reflection I find that the case of **Richard Wahome Chege** having been decided later in 2014 represents

new and current jurisprudence regarding this issue of age. Jurisprudence is after all dynamic and changes to adapt to the changing needs of society.

The complainant told the court that she was 11 years old. **PW3** who was the child's mother stated that she was born on 9th October, 1998. Who knows better the date of birth of child other than the woman who birthed her? Having been born in October, 1998 the complainant would have been just about to turn twelve in September, 2010 when the incident occurred. Therefore notwithstanding the absence of a birth certificate or other document, I find that the complainant was indeed 11 years old on the date when she was defiled.

The appellant has submitted that the trial court failed to consider his defence. I find this to be an incorrect assertion. The learned trial magistrate did indeed consider the appellant's defence but dismissed the same. I have looked at the appellants defence and find that it amounted to a mere denial. I support the trial court's decision to dismiss the same.

On the whole 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. Section 8(3) of the Sexual Offences Act provides for a mandatory minimum sentence of twenty (20) years for a conviction of defilement of a girl aged 11 years. The sentence imposed was both lawful and appropriate and I do uphold the same. The upshot is that this appeal fails and is dismissed in its entirety.

Dated in Nakuru this 17th day of August 2016

Appellant in person

Mr. Chirchir for State

Maureen Odero

Judge