REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 198 OF 2015

GEOFFREY CHERUIYOT NGENO.....ACCUSED

VERUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Senior Principal Magistrate's

Court at Molo, Hon. A. Towett–Resident Magistrate delivered on

the 7th August, 2015 in SPMCR Case No. 3030 of 2015)

JUDGMENT

The appellant herein **GEOFFREY CHERUIYOT NGENO** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at Molo Law Courts.

The appellant was arraigned before the trial court on 24/11/2014 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) (2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"On the 16th day of November, 2014 at [Particulars withheld] Village, Mau Summit in Molo District of the Nakuru County caused his penis to penetrate the vagina of D C a child aged 6 years"***

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

The appellant entered a plea of **'Not guilty'** to both charges. His trial commenced on 3/3/2015 at which trial the prosecution led by **CHIEF INSPECTOR TANUI** called a total of five (5) witnesses in support of their case.

The complainant who was a child aged 6 years was taken through a *voire dire* examination. Upon finding that the child was intelligent enough to understand the nature of an oath she was sworn. The complainant testified that on the date in question she and her three siblings went to church with the rest of the family. Whilst playing at the church fence the appellant whom the child knew as her uncle approached her. He sent her to go and fetch green maize from their farm for him. **PW1** obliged and went to the farm to get the maize.

The appellant followed her into the maize plantation. He forced the child to the ground, removed her panty and his own trouser and proceeded to defile her. After the act the appellant gave the complainant Ksh 10/=. He warned her not to reveal to anyone what had happened.

Three days later the complainant was feeling pain in her private parts and she informed her aunty who alerted the child's mother. **PW2 G W** the complainant's mother examined her and noted that she had bruises and discharge from her private parts. She questioned the child who revealed that the appellant had defiled her.

The matter was reported to police. The complainant was taken to hospital for examination. The appellant was eventually arrested and arraigned in court where he was 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 opted to make a sworn statement in which he denied having defiled the complainant.

On 21/8/2015 the learned trial magistrate delivered her judgment in which she convicted the appellant on the main charge of Defilement and thereafter sentenced him to life imprisonment. Being aggrieved by both the conviction and sentence the appellant filed this present appeal.

The appellant who was not represented by counsel during the hearing of his appeal chose to rely entirely upon his written submissions which had been duly filed in court. **MR. CHIRCHIR** learned State Counsel appearing for the Respondent State made oral submissions opposing the appeal

This being a first appeal this court is obliged to re-examined and re-evaluate the prosecution case and to draw its own conclusions on the same. In the case of **MWANGI Vs REPUBLIC [2004] KLR 28**, it was held 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 and to have the appellant courts own decision on the evidence"***

In this appeal the following are main issues arising for determination

1. Was the complainant defiled as alleged?

2. Was the appellant the person who defiled the complainant?

3. Was the complainant a minor at the time?

4. Is the charge of Defilement proved beyond reasonable doubt?

In his written submissions the appellant raises as a first ground the fact that the charges as framed were defective. The charge sheet reads that the offence is Defilement contrary to Section 8(1) (2) of the Sexual Offences Act. The appellant terms these provisions as **'imaginary'**. I do agree that the charge as framed is defective. The correct charge ought to have read Section 8(1) **as read with** Section 8(2) of the Sexual Offences Act. However this error does not render the charge incurably defective. No prejudice was suffered by the appellant due to this misquoting of the sections he was charged with. I have no doubt that the appellant was fully aware of the charges which he faced. I therefore dismiss this ground of the appeal.

The complainant alleged that she was defiled in a maize plantation. She told the court in her evidence at page 7 line 16

> ***"After I entered our maize plantation, I realized accused had followed me. Accused then forced me to lie down inside the maize plantation. He then removed my underpants. He also removed his trousers and underpants. He then took out his penis and inserted inside my private parts. I felt very painful in my private parts. I cried……."***

The complainant a child aged only 6 years has here given a clear and graphic account of what happened to her. It is unlikely that she was making up this story. Indeed the child had nothing to gain by claiming to have been defiled if no such incident had actually occurred.

Like most sexual offences this was an act committed in secrecy. The perpetrator lured the child into a maize plantation in order to carry out his nefarious intentions. As such the only witness to the incident was the child herself.

However, various other factors serve to corroborate the complainant's allegation. Firstly the complainant, having initially failed to disclose the incident to anyone due to fear, did later complain to an aunt of feeling pain in her private parts. The matter was brought to the attention of her mother.

PW2 was the child's mother. She testified that when alerted of her daughter's complaint she decided to examine her. **PW2** said she removed the complainant under pants. In her own words **PW2** stated at Page 8 line 10

> ***"I was shocked to see bruises and discharge on her private parts"***

Obviously it is quite unusual for a 6 year old girl to have bruises and discharge from her private parts. This is evidence that there was some interference with the child's genitalia.

The complainant was also examined medically. **PW4 DR. KURIA** of Molo Hospital produced the P3 form as **P.Exb 1** as well as the Post Rape Care Form, **P. Exb 2** outpatient card **P. Exb 3** and lab test request forms relating to the complainant. Upon examination the doctor found there to be **'tender labia minora and majora - The hymen was torn. Vulva was inflamed'**. The conclusion of the doctor was that there had been forceful vagina penetration. This was expert medical evidence. It was neither challenged nor controverted by the accused. This doctor provides conclusive evidence that the child had indeed been defiled and I so find.

The complainant has identified the appellant as the man who raped her. The complainant was her uncle (her father's brother). The incidence occurred during the daylight hours while the family were attending church service. The complainant was alone with the appellant in the maize plantation. She had ample time as well as opportunity to see him well.

As stated earlier such offences usually occur in secret and there is unlikely to have been an eye witnesses. The child was the only witness. Section 124 Evidence Act requires that there be corroboration to evidence adduced in court. However, the provision to Section 124 provides that:-

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings. The court is satisfied that the alleged victim is telling the truth"***

Thus in a sexual offence, the court may act upon the evidence of the victim alone so long as such evidence is found to be credible.

It is pertinent that upon being questioned after the incident the complainant named the appellant her uncle as the man who defiled her. At no time did she ever waver on this point. As stated earlier the child knew the appellant very well. In his defence the appellant confirms that the child was his niece and confirms that he lived with the family. Thus there exists evidence of recognition as opposed to mere visual identification.

In her judgment at Page 19 line 16 the learned trial magistrate observed as follows:

> ***"PW1 though a child of tender years gave sworn evidence and described in detail on what had transpired on the fateful day. Despite her age, she was very consistent whilst giving her***

testimony……."

This was the observation of the trial magistrate who saw and heard the complainant testify I do concur that the child gave clear, detailed and cogent evidence. She remained unshaken under cross-examination by accused.

In his defence the appellant denied having defiled the complainant. He claims that the charge was fabricated due to a feud he had with the child's mother. The appellant suggest that a stick may have penetrated and injured the child. There is no reason why a 6 year old child who herself had no problem with the appellant would seek to implicate him. Indeed the fact that the complainant respected her uncle is evidenced by the fact that when he instructed her to go and get him green maize from the shamba she readily obliged.

Secondly I find this defence to be a mere afterthought in view of the fact that the appellant never raised the issue of this alleged feud when he was cross-examining the child's mother **PW2**. I therefore dismiss this defence.

On the whole I find there has been a clear, positive and reliable identification of the appellant as the man who defiled the complainant. I find no possibility of a mistaken identity.

The final issue for determination is the age of the victim. The offence of Defilement requires that evidence adduced to prove that the victim was under 18 years. In this case **PW5 INSPECTOR STEPHEN KANGETHE** produced in court the complainant's birth certificate. The documents clearly indicates that the child was born on 15th July, 2008. Therefore in November, 2014 when this incident occurred the complainant was a 6 years old. I find that the age of the victim has been satisfactorily proved.

Based upon the foregoing I am satisfied that that the charge of Defilement was proved beyond reasonable doubt. The appellant's conviction on this charge was sound and I do confirm the same. The sentence of life imprisonment being the mandatory minimum sentence for the defilement of a child below the age of eleven (11) years is lawful. I uphold that sentence. Finally this appeal fails in its entirety and is hereby dismissed.

Dated in Nakuru this 14th day of October, 2016

M. Odero

Judge

Appellant in person

Mr. Motende for State

M. Odero

Judge

14/10/2016