**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL 7 OF 2015**

**DANIEL MUTINDA MUNYILU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the conviction and sentence by Hon. T.A. Odera. PM delivered on 25th September 2014 in Sexual Offences Case No. 12 of 2013 in the Chief Magistrate's Court at Mavoko)**

**JUDGMENT**

The Appellant was convicted of, and sentenced to serve twenty (20) years imprisonment for the offence of defilement of a child, contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The particulars of the offence were that on 18th September 2013 at [particulars withheld] within Kajiado County, the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate into the female genital organ (vagina) of T M, a child aged 14 years.

The Appellant was also charged with the alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2016. The particulars of the offence were that on 18th September 2013 at [particulars withheld] ship within Kajiado County, he intentionally and unlawfully caused his genital organ (penis) to come into contact with the female genital organ (vagina) of T M, a child aged 14 years.

The Appellant pleaded not guilty to the main and alternative charge on 23rd September 2013. The hearing commenced before the trial magistrate who heard four prosecution witnesses, and put the Appellant on his defence. PW1 was T M, the complainant, who narrated the events of 18th September 2013, when she alleged the Appellant took her to a lodging and raped her by inserting his penis in her vagina. She stated that she knew the Appellant who owned a butchery , and stayed in the same plot with her.

PW2 was A N T, the complainant's mother who testified that on 18th September 2013, she got a report from her husband that the complainant was seen going to a lodging with a man, and after interrogating the complainant and examining her panty which had blood stains, she reported the matter to Kitengela Police Station.

PW3 was Geoffrey Wagura, a clinical officer at Kitengela Sub-County Hospital who testified that he examined both the complainant and the Appellant and filled their respective P3 forms. He stated that there was pain on the complainant's vagina, which was freshly broken and lacerated. Further, that the tests on the Appellant for HIV and syphilis were negative.

The last witness (PW4) was Margeret Chepchumba, who was attached to the Kitengela Police station and testified as to receiving the report of the defilement from the complainant and PW2 on 19th September 2013, and that she thereafter took the complainant to the Kitengela health centre for medical examination. PW4 testified that the Appellant was arrested by members of the public and brought to the police station the next day.

The Appellant gave unsworn testimony and did not call any witnesses. According to the Appellant he was arrested for being a *mungiki* (an outlawed sect) member and not because of defilement, and because PW1's father, who is a leader of *mungiki*, feared that he would reveal the secrets of the *mungiki*. According to the Appellant, the complainant is also a *mungiki* member and collects money on behalf of the *mungiki*.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Petition and Memorandum of Appeal filed in Court on 26th January 2015, as well as the Amended Grounds of Appeal and two sets submissions dated 28th July 2016 and 25th September 2016 that he availed to this Court.

In summary, the Appellant alleges that the trial magistrate erred in law and facts by convicting the Appellant without incomplete evidence as essential witnesses were not produced; by admitting hearsay evidence; and by failing to appreciate that PW1's evidence was coerced. It was urged in this respect that the complainant claimed that there were various witnesses who saw her being led to the lodging by the Appellant but who were not called to testify. Reliance in this respect was placed on various decisions including **Juma Ngodia vs Republic, (1982-88) KAR 454** and **Paul Kanja Gitari vs R, (2016) e KLR**.

It was also alleged that PW2 referred to what she was told by her husband who had in turn got the information by one Baba D about the complainant going to a lodging with the Appellant, which was hearsay evidence and which the trial Court relied upon to find that the prosecution had proved its case beyond reasonable doubt. Further, that PW1'S evidence was not freely obtained as she was coerced by PW2 who was also under intense pressure from her husband to implicate the Appellant.

Further, that the trial magistrate erred in applying section 124 of the Evidence Act and relying on the complainant's uncorroborated evidence; as there was no basis for the trial magistrates finding that the demeanour of PW1 was satisfactory. Lastly, that the age of the complainant was not adequately proved.

Ms Rita Rono, the learned prosecution counsel, also filed written submissions on 1st September 2016 of the same date. It was urged therein that the prosecution through the testimony of its witnesses had proved the charges against the Appellant beyond reasonable doubt, and proceeded to analyse the evidence in light of the ingredients for the offence of defilement. Further, that the testimony of the complainant was enough to convict the Appellant without any corroboration.

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

In this regard after going through the grounds of appeal, the arguments made and evidence of the prosecution witnesses and that of the Defence, I note that the two issues raised by the Appellant are whether he was convicted for the offence of defilement on the basis of sufficient and satisfactory evidence, and secondly whether the age of the complainant was proved

On the first issue the ingredients of defilement were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

> "**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

From the evidence as summarized in the foregoing, the evidence of PW1 was the only evidence adduced as regards penetration and identification of the Appellant, as she was the only eyewitness to the alleged defilement. She in this regard testified that she knew the Appellant from before, and that as she was going to fetch water at [particulars withheld]'s place, the Appellant who operated a butchery on the way followed her, took her hand and took her to a lodging. That when they entered a room in the lodging, the Appellant threw her on the bed, and although she struggled and shouted at him to stop, he inserted his penis into her vagina and raped her for a short time.

The evidence by PW1 therefore addresses the requirement as to penetration and identification of the Appellant. As to whether the said evidence required to be corroborated under section 124 of the Evidence Act, I agree with the Appellant that in light of the evidence by PW1 that her father did kick her and beat her when he asked her where she was coming from, and thereafter locked her in the house; and that her mother did threaten to take her to the chief if she did not tell her what happened, it is my finding that this evidence affected PW1's credibility as a witness, and her evidence as to the defilement required to be corroborated. PW2 in this regard also testified that PW1 was hesitant to tell her what had happened.

Section 124 of the Evidence Act in this regard provides as follows:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**
>
> **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."**

The element of penetration was in my view sufficiently corroborated by the evidence of PW3 who examined the complainant and filled a P3 form that was produced as an exhibit, and which showed that the complainant's hymen was broken and that her labia minor and labia major were lacerated.

As regards the positive identification of the Appellant as the person who committed the said offence, the Court i*n* ***Maitanyi vs Republic*** **,** ***(1986) KLR 196*** **the** Court set out what constitutes favourable conditions for a correct identification by a sole testifying witness as follows:

> **"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".**

In the circumstances of the present appeal, PW1 testified that the Appellant led her from [particulars withheld] place where she had gone to collect water, to a room in a lodging during the day at 6.00 pm; and that he was known to her, as he was staying in the same plot with PW1 and her family. The circumstances of the identification were therefore not difficult, and PW1 spent sufficient time with the Appellant to be able to positively identify him. In addition, the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

Lastly, as regards proof of the age of the complainant, both PW1 and PW2 testified that the complainant was born on 31st December 1998 and was in class seven. However they did not produce any birth records

to proof this assertion. PW4 on the other hand did testify that she took the complainant for age assessment as she had no birth certificate, and she produced an age assessment report dated 20th September 2013 as the Prosecution Exhibit 3 which showed that the complainant was 14 years.

The Court notes in this regard that the Appellant was charged with, and convicted of the offence of defilement under section 8(3) of the Sexual Offences Act, which provides as follows:

> **"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.."**

The sentence imposed on the Appellant of twenty years imprisonment is therefore a minimum sentence under the law, and was legal.

I accordingly uphold and affirm the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (3) of the Sexual Offences Act, as well as the sentence imposed upon the Appellant of a term of imprisonment of twenty years for the foregoing reasons.

This Appeal is accordingly dismissed.

It is so ordered.

**DATED AT MACHAKOS THIS 30TH DAY OF NOVEMBER 2016.**

**P. NYAMWEYA**

**JUDGE**