REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL APPEAL NO. 6 OF 2015

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

Court at Naivasha Criminal Case No. 2877 of 2013 - S. Mwinzi, SRM)

ROBERT NAKITARE SITATI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was tried and convicted for the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. In that on the 25th day of November, 2013 at [particulars withheld] Trading Centre in Kongoni area of Naivasha Municipality within Nakuru County, he unlawfully and intentionally did cause his genital organ namely penis to penetrate the vagina of **J.W.** a girl aged 6 years.

2. He was sentenced to life imprisonment. Aggrieved with the decision, he has now lodged an appeal, relying on four amended grounds of appeal as follows:-

> **"1. THAT the pundit trial magistrate erred both in law and fact when he convicted me in the present case yet failed to find that investigations were shoddy.**
>
> **2. THAT the learned trial magistrate erred both in law and fact when he convicted in the instant case yet failed to find that crucial witnesses were withheld from testifying.**
>
> **3. THAT the pundit trial magistrate erred in law and fact when he convicted me in the present case yet failed to find that the medical evidence does not incriminate but exonerates me from the crime's commission, vital exhibits were not procured and produced in evidence.**
>
> **4. THAT the learned trial magistrate erred both in law and fact when he dismissed my plausible defence that illustrated a grudge between me and the complainant's parents." (sic)**

3. At the hearing of the appeal, the Appellant placed reliance on his written submissions. The submissions highlight the alleged poor investigations by police; the practical impossibility that the victim after being allegedly defiled on 25/11/2013 could have carried on normally for several days, without notifying her mother, or the latter noticing anything untoward and the alleged inadequacy of medical evidence tendered. Finally he complained that a vital witness **G E** was not called a witness, and that he

put forth a good defence which did not receive adequate consideration at the trial.

4. The Director of Public Prosecutions opposed the appeal, pointing out that the key ingredients of the offence, namely the age of the victim, penetration and identification of the Appellant as the culprit had been established beyond reasonable doubt.

5. On a first appeal, the court's duty is to re-evaluate the trial evidence and to draw its own conclusions (**See Okeno -Vs- Republic [1973] EA 32).** The prosecution case was as follows. The Appellant was a resident of [particulars withheld], Naivasha. He and the family of the complainant , **J.W.** who was aged 6 years (PW2) were neighbours. The complainant knew him by the honorific "**Baba N.**". On 25/11/2013 the complainant was home with a younger brother while her parents were away at work.

6. The Appellant summoned the complainant. He gave her some money and dispatched her to a local shop to purchase cigarettes, lollipops and mandazi. She returned with the items with her brother in tow. The Appellant asked the latter to leave. He then lifted PW2 onto a bed and undressed himself before undressing the Complainant and proceeding to penetrate her. He warned her not to report to anyone, promising to bring her a gift on the next day.

7. The matter did not come to light until a few days later on 30th November, 2013, when **PW2's** mother **N.N.N.** (PW1) was summoned by a neighbor who informed her that PW2 was unwell. Apparently, the neighbour heard **PW2** crying while trying to relieve herself. The minor related to her mother the events of 25th November, 2013. The matter was reported to police as the minor was taken for treatment. **PW1** rejected the Appellant's overture to solve the matter "**at home**" and the Appellant was arrested when he presented himself to the police.

8. In his sworn defence statement, the Appellant stated that while on duty on 30/11/2013 he was notified that he was required at Kongoni Police Station, and upon presenting himself was arrested. He denied the charges stating that the witnesses were his neighbours. That the charges were fabricated against him because the husband to PW1 had assigned him the role of assisting **PW1** in her chores.

9. I have considered the evidence, grounds of appeal and the respective submissions. In my view, there was no dispute that the Appellant, the Complainant and her family were neighbours, well known to each other. That arising from allegations made by the Complainant the Appellant was summoned to the Kongoni Police Station on 30th November 2013 where he was placed under arrest. The issue of penetration and the perpetrator of the offence was disputed.

10. On the question of penetration, **PW2** described to the trial court the incident of 25/11/2013 in detail. She said that the Appellant lured her into his house by sending her to the shops to buy cigarettes, a lollipop (presumably for PW2) and mandazi (given to her younger brother by the Appellant who was asked him to leave). **PW2** stated that the Appellant lifted her onto a bed and after undressing her, penetrated her, later relasing her with a promise of a gift.

11. In cross-examination **PW2** was not shaken. She stated:

> **"When you called me I was outside. You used to send me to the shop before. You sent me for cigarettes, sweet lollipop and mandazi. No one was home in your house. I did not scream. I had never had sex before. You told me not to tell anyone so I never told mum."**

12. The Appellant has taken issue with the Complainant's delayed report to the mother (**PW1**) and the possibility of an adult penetrating a minor, without causing bleeding or immediately noticeable injuries. Thus in his view it was incredulous that **PW1** did not realize that **PW2** had a problem until a neighbor informed her on 3th November, 2013.

13. Firstly, the Complainant gave what in my view is a rational answer from a six year old; because the Appellant warned her against it, she did not tell anyone about the incident until 5 days later. The Appellant was after all an adult whom she not only knew well but also regarded as Baba N. – a respectful

title meaning "father of N." Secondly, it is not accurate to assert that the victim had no serious injuries soon after the assault while it is true that there is no evidence of immediate bleeding. That cannot detract from the evidence by **PW2**, which, is also supported by the P3 from (Exhibit 1).

14. Although the PRC forms were not tendered in the trial, as the Appellant has correctly observed, the Appellant did not raise this issue with **Messa Sylvester** the Clinical Officer (**PW3**) when he testified. The P3 form was issued by the police on 30/11/2013 at 11.55pm and completed on 3/12/2013. I must say, that the use of Part II of Section B to record the victim's injuries was a careless act by the clinician because the injuries reflected under "*(d) lower limbs*" head are shown to be:

> **"VE – Introitus reddish and hymen broken with tenderness"**

15. Ditto the use of P3 Form Section reserved for "Male Accused of Sexual Offence" to record the victim's injuries which are obviously in respect of a female. However the said injuries are clearly related to female genitals not a male or related to lower limbs. The situation is redeemed because in Part II Section C, the same injuries as recorded in the above sections are reflected. While it is a fact that clinicians and other health professionals in government hospitals ordinarily operate under intense work pressure, the need for care in documenting sexual injuries cannot be overemphasized.

16. There is no requirement however that all treatment notes and related to a victim must be produced together with the P3 form in order to validate the latter. The practice is that the clinician who completes the P3 form also examines the patient. The P3 form in this case is consistent with the testimony of PW2 that she was penetrated. Section 3 of the Sexual Offences Act defines penetration as follows: -

> "**Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

17. In the case of ***Erick Onyango Ondeng' -Vs-Republic*** **NAI CR. Appeal No. 5 of 2013 [2014] eKLR the Court of Appeal** cited **Twehangane Alfred -Vs- Uganda Criminal Appeal No. 139 of 2001, (2003) UGCA 6** where the Court of Appeal of Uganda observed regarding penetration that:

> **"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."**

18. The P3 form indicates that **there** was tenderness in the genitalia of **PW2** and her hymen had been breached. Epithelial cells were noted an observation consistent with the description by her mother that she had a "**discharge looking like soup from dry beans**". The fact that the Appellant was not subjected to medical examination cannot displace the medical evidence on penetration in respect of the Complainant.

19. PW1 explained that she had not noticed anything amiss with **PW2** and that another sibling ordinarily gave **PW2** a bath. **PW1** was working at a flower farm and was called from work on the date the matter was discovered. It is not unusual that such a busy parent would fail to notice for five days that her daughter had been defiled. More so, when the child herself was under pressure to conceal the matter from her mother. Her explanation that an older sibling bathed PW2 is reasonable.

20. The prosecution failure to call **G E** who allegedly heard **PW2** crying in a toilet was not explained. However, her evidence would not have added more value to the testimony by **PW2** who had told her about her pain in the first place. There is no requirement, especially in offences under the Sexual Offences Act to call a certain number of witnesses.

21. Indeed under Section 124 of the Evidence Act a conviction can be founded on the victim's evidence alone. The trial court correctly relied on the evidence of **PW2** and medical evidence to find that penetration had occurred. Similarly, it found that the complainant's age had been proved by the prosecution. The incident occurred during daytime. The Complainant was familiar with the Appellant.

22. The Appellant's defence that the case was fabricated because the husband to **PW1** had assigned him to do some chores for **PW1** was correctly dismissed. That defence, as correctly observed by the trial court, was not canvassed in cross-examination of **PW1** and **PW2**. The relations between the Appellant, **PW1** and **PW2** were good as evidenced by the ease with which they interacted. And the allegation of fabrication cannot withstand medical evidence of actual proof of penetration. PW1 could not have procured such an occurrence to settle some vague score with the Appellant.

23. As made in court, the Appellant's defence did not elaborate regarding the matter of assignment of chores and appears to be hanging. It is only in submissions on this appeal that the Appellant has purported to put more flesh to defence. It is too late in the day.

24. I agree with the trial magistrate's dismissal of the said defence as an afterthought. The Appellant's defence was displaced by the prosecution evidence which was overwhelming. I find no merit in the complaints raised by the Appellant. He was properly convicted on sound evidence. The appeal is dismissed in its entirety.

Delivered and signed at Naivasha, this **17th** day of **November, 2016.**

In the presence of:-

For the DPP : Mr. Koima

C/C : Barasa

Appellant : present

C. MEOLI

JUDGE