REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 156 OF 2014

ISMAEL M'RUTERE ..... APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in criminal case No.3932 of 2013 of the Chief Magistrate's Court at Maua by C. Kemei– Resident Magistrate)

JUDGMENT

The appellant, **ISMAEL M'RUTERE**, was charged with an offence of defilement of a girl contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on diverse dates between January 2013 and 19th day of October 2013 at **[particulars withheld] location**, in Igembe South District of Meru County intentionally attempted to cause his penis to penetrate the vagina of **K.K** a child aged 5 years.

The appellant was tried and was convicted. He was sentenced to life imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Haron Gitonga, learned counsel. he raised eight grounds of appeal which can be summarized as follows:

1. That the learned trial magistrate failed to make a finding that there was no evidence to implicate the appellant.

2.That the learned trial magistrate erred in law and in fact by convicting him without medical evidence to connect him to the offence.

3.That the learned trial magistrate meted out a very harsh sentence.

The state opposed the appeal and was represented by Mr. Namiti, the learned counsel.

The facts of the case are briefly as follows:

When the complainant's mother returned home with a cake, the complainant was blackmailed by her brother to give him her portion or else he was going to disclose what she had told him. When their mother prodded them further with a promise of a bigger portion to the complainant, she (the complainant) told her that the appellant had defiled her. The matter was reported and the appellant arrested and charged.

On his part the appellant denied any involvement in the offence.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32.**

Other than my summarized grounds two and three, the rest raise an issue of sufficiency of evidence. I will therefore address these grounds together after analyzing grounds two and three in my summary.

It is not a mandatory requirement to have an accused person in a case of defilement medically examined. In some cases however, this may be the best evidence to either connect or exonerate such an accused person. In the instant case such an examination could not have added any value for the period of the alleged offence was quite wide.

The investigating officer did not bother to explain why the alleged offence was said to have been committed between January and October 2013. There was no evidence to support it.

Section 8 (2) of the Sexual Offences act provides as follows:

> ***A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***

In the instant case the complainant was aged 5 years. The only legal sentence available was life imprisonment. This therefore means that the trial magistrate meted out an illegal sentence.

This is another very depressing case. A minor of 5 years alleges to have been defiled not once but severally by an adult and at no time was there evidence that she was uncomfortable. It is common sense that of all sexual offences defilement is usually the easiest to establish penetration in instances where the complainant is of a very tender age and where an adult is involved. Anything short of that raises eyebrows for obvious reasons. In the instant case if we were to believe the complainant a few questions pop up for instance, why did her mother fail to notice that she did not look happy? Sex by an adult with a minor of such a tender age must be very painful. In the case of **BEN MAINA MWANGI VS. REPUBLIC [2006] eKLR** the court observed as follows:

> ***I considered the evidence adduced and nowhere did the Complainant claim that the Appellant did anything that can be construed as defilement. She did not even express being caused any pain during the ordeal. All she said was that the Appellant undressed her by removing her under pant and then removed his before telling the Complainant to lie on the mattress which she did. The Complainant did not talk of an interruption or intrusion during the incident or tell how it ended. Bearing in mind she was a child of tender years being only 4 years at the time, for the offence to be proved there should have been evidence adduced to show that the Appellant used some force on her or something tending to show an assault or infliction of pain. At least some evidence needed to be adduced from which it could be construed that defilement took place. Considering the Complainant's age as compared to the Appellant, if any attempt was made to penetrate the Complainant's private parts it would be expected that the Complainant must have felt pain, if not excruciating pain. There is no way the Complainant would forget the experience or that detail in her evidence.***

Although the complainant in the instant case said she felt pain, in my view this was too casually said. There was no supporting evidence on the same. such as an observation of a child in pain after the act.

I am further disturbed by her contention that she saw something milky come out. First she did not indicate where it came out from and secondly it gives an impression of a very comfortable person who was watching all the happenings. For a 5 years old girl, this sounds like couching.

The medical evidence did not indicate whether the missing hymen was recent or not and the age of the hyperemia observed and the possible cause.

The upshot analysis of evidence on record is that the conviction of the appellant was very unsafe. I therefore quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DATED at Meru 19th day of December 2016

KIARIE WAWERU KIARIE

JUDGE