REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 334 OF 2009

ROBERT KIPKEMOI TANUI ..... APPELLANT

VERSUS

REPUBLIC .....STATE

(Appeal from the Sentence of the Chief Magistrate's Court at Nakuru Hon. Kituyi. - Resident Magistrate delivered on the 2nd December, 2009 in CMCR Case No. 148 of 2009)

JUDGEMENT

The Appellant **ROBERT TANUI KIPKEMOI** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts. The appellant was arraigned in the lower court on 15/7/2009 facing two counts of **DEFEILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charges on each of the two counts were as follows:-

Count No. 1

"***On the 6th day of July, 2009 in Nakuru District within the Rift Valley Province unlawfully caused penetration with his genital organ namely, penis into the genital organ namely vagina of J N K aged 14 years"***

Count No. 2

"On the 6th day of July 2009 in Nakuru District within the Rift Valley Province unlawfully caused penetration with his genital organ namely penis into the genital organ namely vagina of J M aged 14 years"

Additionally the appellant faced an alternative charge to each of the main charges of **COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**

The appellant pleaded **'Not guilty'** to all the charges he faced. His trial commenced on 15/9/2009. The prosecution led by **INSPECTOR MARIA** called a total of eight (8) witnesses in support of their case.

The complainants in both counts testified as **PW1** and **PW2** respectively. They told the court that on 6/7/2009 at about 2.00pm they were together at **'Soko Mjinga'** Market selling vegetables. The appellant

whom the children knew came and asked them to go to his house to sell vegetables for him. The two girls followed the appellant to his house. Upon arrival the appellant first called **'*J M*' PW2** into the curtained area of his house. **PW2** told the court that the appellant promised to give her Ksh 2,500/= if she would sleep with him. He then pulled her to the mattress and proceeded to defile her.

After finishing with **PW2** the appellant then called **'*J N K*' PW1** to his **'bedroom'**. **PW2** in her evidence stated that appellant promised to give her Ksh 1,500/=. He pushed her onto the bed, removed her panties and defiled her.

The two children told their mothers what had transpired. Both were taken for medical treatment. They identified the appellant as the perpetrator. He was then 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 having defiled any of the two children. The appellant insisted that he had committed no offence at all.

On 2/12/2009 the learned trial magistrate delivered his judgment in which he convicted the appellant on both counts of defilement. Thereafter the appellant was sentenced to serve twenty (20) years imprisonment on each count. It was further ordered that the sentences would run concurrently. Being aggrieved by his convictions and sentence the appellant filed this appeal.

This being a first appeal I am obliged to re-examine and re-evaluate the evidence adduced during the trial and to draw my own conclusions on the same. In the case of **MWANGI Vs REPUBLIC [2004] KLR 28**. It was held as follows:

> ***"Any 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 appellate courts own decision on the evidence"***

MR. CHIRCHIR learned counsel argued the appeal on behalf of the appellant. **MS OUNDO** Assistant Director of Public Prosecution opposed the appeal.

The first ground of appeal raised by counsel was that the charge sheet was fatally defective since the particulars of the charge omitted the word **"intentionally"** I have perused the charge sheet and I do note that the appellant was charged thus

> ***"..... unlawfully caused penetration....."***

Indeed the word intentionally has not been used in the particulars. This indeed is an omission but in my view it is not an omission which renders the whole charge fatally defective. The use of the work **'unlawful'** in my view denotes that the act was done intentionally. For an act to be deemed unlawful, it must have been committed deliberately or **'intentionally'**. The appellant was under no illusion about the charges he faced. The omission of the word **'intentionally'** did not serve to obscure or cloud the nature of the charge. I do agree with **'Ms Oundo'** that this is a curable defect. I therefore reject this ground of the appeal.

The next question to be considered is whether the evidence on record sufficed to prove the fact of defilement as against each child. As stated earlier both complainant's testified in court on their own behalf's.

PW1 ***J N K*** told the court that both she and her companion ***J M*** had been despatched by their mothers to sell vegetables. Whist they were there the appellant came to their stall and lured them to his house on the pretext that he wished to purchase vegetables from them. The two girls then followed the appellant to his house. Upon arrival the appellant first called **PW2** into the private area (sleeping area) of his room partitioned by a curtain.

In her evidence **PW2** state as follows

> ***"Then he (appellant) said I don't tell my mother. He took me to a mattress first, then he raped me. He removed his trouser and under pants. I removed my dress and pant. He used his 'mutura' (Kikuyu) I have a 3 year old brother who has a mutura also he uses it to urinate. That is the thing I saw accused put inside me here (points to her private parts) I use that to urinate ....."***

After finishing with **PW2** the appellant released her and she left. He then called **PW1** into his **'bedroom'. PW1** stated at Page 5 line 23.

> ***"So when J M (PW2) came out I also went in and I found him (the appellant) covered in a blanket..... He pushed me inside the bed and covered me with a blanket. He didn't have his clothes on. Then he put his penis inside my thing (point to her vagina and private parts). I have a 5 year old brother who has a thing that he uses to urinate, that is the one the accused also had and he puts it in my thing for urinating. I felt pain....."***

Each complainant has given a graphic and detailed account of what happened to her. Their evidence is mutually corroborative. The evidence of **PW1** and **PW2** is further corroborated by that of their friend **C A PW3** who was with them at the market **PW3** confirms that they all went to the house of the appellant. She states that she remained outside while **PW1** and **PW2** went into the house **PW3** stated that the accused did nothing to her. They both gave clear and consistent testimony. Both remained unshaken under cross examination by the appellant.

The children later revealed what had happened to their guardians. They were both taken to hospital. **PW7 TABITHA NGUGI** is a Clinical Officer based at Lare Health Centre. She examined both girls on 11/7/2014 a day after the incident occurred. In respect to ***J N K*** **PW1**, the doctor stated the following at Page 14 line 20

> ***"On examination of genitals I found a perforated hymen. I find whitish vaginal discharge....."***

In respect of ***J M*** **PW2** doctor stated

> ***"On examination she had a perforated hymen and whitish vaginal discharge ....."***

The evidence of the doctor is expert medical opinion evidence. It was neither challenged nor controverted by the appellant. This evidence more so the evidence of a perforated hymen in each girl is proof that sexual intercourse *ie* penetration did occur. I am satisfied that the fact of penetration of both girls has been sufficiently proved.

The next issue is whether the accused has been properly identified by both complainants. The incident occurred at about 2.30pm. It was broad daylight. Both complainants spent several hours in the company of the appellant. He went to where they were selling vegetables at the market and walked with them to his house. They each had ample time and opportunity to see and identify the accused. Both of them positively identified the appellant in court. **PW3** corroborates this identification of the appellant. She told the court that in fact the appellant told the girls that he would give her **[PW3]** the money which he had promised to the two complainants for the act.

In his defence the appellant claimed that the charges were fabricated by the mother of **PW2** who was his lover and was out to get back at him when they disagreed over money **PW5 M L** was the mother of **PW2** she testified in court. At no time did the appellant suggest to her in cross-examination that they were lovers who had disagreed. The appellant did not put these allegations to **PW5** at the first instance. This is clearly an afterthought and the court rejects it as such.

In any event even if **PW5** had reason to fix appellant what reason did the three children or **PW4** have to fame him. The children are not shown to have had any grudge against the appellant and had no reason to

testify against him. I reject this defence in its entirety.

Based on the evidence available I am satisfied that there has been a proper clear and reliable identification of the appellant as the man who defiled both **PW1** and **PW2**. There exists no possibility of a mistaken identity.

The final ingredient requiring proof in a charge of defilement is the age of the victims. It has severally been held that age is a critical factor as the age of the victim will determine the nature of the sentence to be imposed upon conviction.

In this case **PW1** stated that she was 15 years old while **PW2** gave her age as 14 years. No documents eg birth certificate, immunization card, Baptism card or School report were tendered as evidence to prove that these were their true ages. Both children's mother's testified in court. **PW4 M W** was the mother of **PW1** and **PW5** was the mother of **PW2**. Neither mother testified regarding the age of her child. Neither told the court the date or year when their children were born. In the absence of proof of age a charge of Defilement remains unproven due to absence of proof of a crucial ingredient of the offence. For this reason I fault the trial court's conviction of the appellant on the two counts of Defilement. Those convictions cannot stand and I hereby quash the appellant's conviction on Counts Nos 1 and 2.

Having said that I am satisfied that the evidence proves that the appellant did sexually molest the two girls. By inviting them to his bed, removing his own clothes and theirs and making contact between his penis and the children's private parts the offence of Indecent Act with a child is sufficiently proved. I therefore convict the appellant on the two (2) alternative charges contrary to Section 11(1) of the Sexual Offences Act.

The twenty (20) year sentence for each count imposed by the trial court cannot in the circumstances stand are hereby set aside. In their place I substitute a sentence of ten (10) years imprisonment for each of the two alternative counts. The sentences will be served concurrently and will run from the date of the appellant's first conviction in the trial court. It is so ordered.

Dated in Nakuru this 16th day of December, 2016

Mr Cheche for appellant

Maureen A. Odero

Judge