REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 218 OF 2013

MKN ……..…….... APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(Being an appeal from the original conviction and sentence in Tawa Senior Resident Magistrate's Court Criminal Case No. 411 of 2011 by Hon. J.W. Gichimu, SRM , on 26/6/12

JUDGMENT

1. **MKN,** the appellant was charged was with the offence of **defilement** of a child **contrary** to **Section 8(1)** a read with **sub-section (3)** of the **Sexual Offences Act No. 3** of **2006.** Particulars of the offence being that on 20th day of December, 2011 a location in **Mbooni East District** within **Makueni County,** intentionally and unlawfully caused his penis to penetrate the vagina of **CM** a child aged 13 years.
2. In the alternative he faced a charge of committing an **indecent Act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006.** Particulars of the offence being that on the 20th day of December, 2011 at in **Mbooni East District** within **Makueni** County intentionally and unlawfully did an indecent act to **CM** a child aged 13 years by touching her private parts namely vagina with his penis.
3. Facts of the case were that on the 20th December, 2011, **PW1, CM,** a child, was on her way home carrying water that she had fetched when a person held her from behind, covered her eyes with a piece of cloth (headscarf) that she was using to hold the jerrican and led her into a nearby thicket. He threw her onto the ground and removed her underpants. He had carnal knowledge of her. In the cause of the act, she pushed the cloth off the eyes and was able to see her assailant. She was also able to note that the person had a panga. On completion of the act she was bleeding from her private parts and the person washed her underpants and her private parts and then he ran away. The complainant seized the opportunity to wear her underpants, she went home and washed the underpants and reported the incident to her grandmother.
4. **PW2, JMM** her grandmother and guardian on receiving the information examined her private parts and observed that she was in pain. They reported the matter to the chief and Administration Police.
5. The following day PW1, led PW3, **DMM** her grandfather to the scene of the incident. As they were there searching for the appellant they encountered him as he drove a donkey towards the river. PW1 identified him as the person who defiled her. He declined to accompany them to the Administration Police Camp. They took PW1 to hospital. **PW6, George Mutia,** Clinical Officer examined her and found her hymen missing there was whitish discharge from the vagina. There

was a presence of pus cells which was evidence of penetration.

6. In his defence the appellant stated that he went home on the 21st December, 2010 only to be told that some Administration Police Officers were looking for him. He went to the administration Police camp where it was alleged that he had defiled a child. He explained that the previously day he was engaged in duties of cultivating land. He was arrested and taken to **Mbumbuni Police Post.**
7. **DW1, JKK** his mother stated that she was with the appellant throughout the day. On cross-examination she said that the complainant was a relative and she knew the appellant very well.
8. The trial court analyzed evidence adduced and was satisfied that the complainant was truthful. On that basis he convicted the appellant and sentenced him to **25 years** imprisonment.
9. Being dissatisfied by the conviction and sentence the appellant appealed on grounds that:-

i. Evidence adduced by the prosecution contravened **Section 163 (c)** of the **Evidence Act;**
ii. Some crucial witnesses did not testify;
iii. The Clinical Officer was not qualified to tender evidence of the P3 form as he was not a pathologist;
iv. Reliance on evidence of identification by recognition was erroneous;
v. Evidence adduced was insufficient; and
vi. The defence put up was cogent but was disregarded.

10. The appellant canvassed the appeal by way of written submissions and emphasized the fact that identification was not proper.
11. The appeal was opposed by the State Counsel **Ms Kefa** who submitted orally that the incident happened in broad daylight hence identification by the complainant was cogent. The age of the child was proved as she was 13 years old. The defence tendered was found by the court to be unbelievable making the conviction safe.
12. This being the 1st appellate court my duty is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial cou*rt. **(See Okeno versus Republic (1972) E.A. 32).***
13. The learned trial magistrate has been faulted for relying on evidence that was contradictory and in contravention of the provisions of **Section 163 (c)** of the **Criminal Procedure Code.** The alluded to provision of the law provides for tendering of evidence to impeach the credibility of a witness by proof of former statements whether written or oral which could be inconsistent with the evidence adduced. The complainant who was the key witness herein testified-in-chief. No inconsistency in her testimony was pointed out by the appellant. She was not asked to explain or clarify anything in her statement. This was an indication of satisfaction on the part of the defence that what she stated in court is what was recorded in her former statement to the police. The witness' credibility was not questioned. Similarly, evidence adduced by other witnesses was not impeached.
14. The learned trial magistrate has been faulted for failing to make an observation that crucial witnesses did not testify. It is submitted in particular, that the chief was not called as a witness. It was the evidence of PW2 that at the outset they reported the matter to the Chief's Office **Mwembani** and then **Mbumbuni Administration Police Camp. PW5, No. 94018574, A.P. Corporal William Wathome** testified that a report was made at their Camp (Mukuku A.P. Post) and a report was booked. Was it necessary for the chief to testify? **Section 143** of the **Evidence Act (Cap 80) Laws** of **Kenya** is very clear, in the absence of the requirement of the law; no particular number of witnesses shall be required for the proof of fact. The chief may have received the report of defilement. Just like PW5, his evidence would not have added value to the case presented. (Also see ***Erick Onyango Ondenge versus Republic [2014] eKLR).***
15. PW6 who filled the P3 form was a Clinical Officer. He is faulted to have acted yet he was not a pathologist. This issue has been raised severally and it has been held that a Clinical Officer is qualified to fill a P3 form as this is his area of competence. (see ***Raphael Kavoi Kiilu versus Republic – Criminal Appeal No. 198/2008; Fappyton Ngui versus Republic 2004 eKLR; Section 2*** of the ***Clinical Officers Act (Training, Registration and Licencing) Act,*** **Cap 260** (Laws of Kenya).
16. It has been stated that the charge was not proved to the required standard as there was no medical

evidence to prove that the appellant was medically examined. Evidence of the age of the complainant was proved by the production of the Child Health Card that was issued to her at birth. It established the fact that PW1 was born on the 29th November, 1998. At the time of the act of defilement she was aged 13 years.

17. Evidence adduced by the complainant that the act of penetration of her genital organ did happen was corroborated by medical evidence.
18. PW6 examined her. He also relied upon treatment notes issued to her at the outset. On the 21st December, 2011 she was treated at **Kalaka** dispensary. Her vulva had sustained bruises. Pus cells were evident. PW6 found evidence of penetration. The trial magistrate in convicting the appellant complied with the proviso to **Section 124** of the **Evidence Act**. He pointed out that he did observe the demeanor of the complainant, who was intelligent. Her evidence was clear and consistent. The appellant herein was known to the complainant. Their families were aware of that fact. They were relatives. The complainant could not have been mistaken as to his identity.
19. In his defence the appellant denied having committed the offence. His mother DW1 testified that on the material date she was with the appellant throughout the day. The trial magistrate was not convinced by the defence put-up. He considered the defence but made a finding that the evidence tendered by the prosecution was overwhelming. The complainant a child who was deaf and dumb had absolutely no reason to come up with such serious allegations against her relative, the appellant. The trial court in the circumstances reached a correct conclusion. In the premises the appellant was properly convicted and I confirm the same.
20. With regard to sentence, the appellant was a first offender; there was no indication that he was incapable of reforming. In the premises I set aside the sentence meted out and I substitute it with the minimum prescribed sentence of **twenty (20)** years imprisonment.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **22nd** day of **January, 2015.**

L.N. MUTENDE

JUDGE