REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 81 OF 2014

BETWEEN

JAMES KAMAU MUCHERU ……..……..... APPELLANT

AND

REPUBLIC ……..... RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 568 of 2013 at Principal Magistrate's Court at Kehancha, Hon. C.M.Kamau, Ag SRM dated on 7th August 2014)

JUDGMENT

1. The appellant was charged with defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act, 2006***. The particulars of the charge were that on 30th September 2013 at [Particulars Withheld] Village in Kuria West District within Migori County, he intentionally caused his penis to penetrate the vagina of SMN, a child aged 15 years. He also faced an alternative charged of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** grounded on the same facts. He was convicted and sentenced to 20 years imprisonment. He now appeals against the conviction and sentence.

2. The case against the appellant was as follows. After being sworn, PW 1, testified that she was 14 years old and in Standard 5. She recalled that on 30th September 2013, she was walking to school alone at about 6 am when she felt sick and decided to rest on the road side whereupon a motorcyclist came and took her to the appellant's shop. She knew the appellant as *"Mundu"* as she had bought book covers from him before. She testified that the appellant welcomed her to his home. She gave a graphic account of how the appellant proceeded to have sexual intercourse with her twice on that day. She even cooked lunch and they ate. Later that afternoon she went home and met her father (PW 2) who chased her. She sought the help of friend. Thereafter she was taken to hospital and the incident reported to the police.

3. The complainant's father, PW 2, testified that PW 1 was 14 years old. He recalled that on 30th September 2013 at about 3 pm he received a call from a friend that his daughter had been locked in the appellant's shop at Nyamaharaga. He went there and verified that it was his daughter. The community policing officials and the Assistant chief were called. He testified that it is the appellant who opened the door and PW 1 was there. PW 4, the Chairman of the community policing, was present at the appellant's shop on the material day having been called by the Assistant Chief to go there as there was a crowd which wanted to raze the shop on the ground that the owner had a girl in his shop. He heard the appellant being referred to as *"Mundu"*. He testified that he was in the company of the Assistant Chief when they went to the shop and persuaded the appellant to open the door. The appellant opened the door whereupon they found PW 1 seated on the bed. They escorted PW 1 and the appellant to the police station where they were received by PW 5, a police constable.

4. PW 5 testified that after receiving the appellant and PW 1 at the police station, she commenced investigations, recorded statements and issued the P3 form. PW 3, a clinical officer at Isebania Sub-district Hospital testified that he examined PW 1 on 1st October 2014 and that she looked anxious and frightened. She complained of pain on her private parts. He observed tenderness on her genitalia and although there was no bleeding or discharge, a high vaginal swab revealed the presence of spermatozoa. He concluded that she had been sexually assaulted.

5. When put on his defence, the accused elected to give sworn testimony. He testified that the complainant's father had left a cell phone and laptop in his shop on Friday. The shop was broken into and the items stolen hence he was unable to return them. On the following Sunday, PW 2 came and demanded the items from him but he sought time to return the same. He further testified that on the following week, the community policing chairman came and requested him to go to the police station and record an agreement on how the items would be repaid. He was surprised that he was arrested and he denied all the charges against him.

6. On the basis of the evidence I have outlined, the learned magistrate was satisfied that the prosecution had proved its case and proceeded to convict the appellant. He now appeals against the conviction and sentence on the grounds set out in petition of appeal filed on 28th January 2014 as follows;

1. *The learned magistrate erred in both law and in fact by relying on inconsistent evidence adduced by the prosecution witnesses.*
2. *The learned magistrate erred in both law and in fact for not appreciating the sworn statement of the appellant.*
3. *The learned magistrate erred in both law and fact by convicting the appellant for the offence of defilement while the evidence of PW 3 confirmed that no spermatozoa was taken from the appellant so as to be compared with that found in the victim.*
4. *The learned magistrate erred in both law and fact for passing a sentence of 20 years which was excessive in the circumstances.*

7. In his oral submissions, the appellant emphasized that the learned magistrate failed to consider his defence that he was framed as a result of a grudge between him and the complainant's father. He also asked the court to reduce the sentence imposed on him.

8. Ms Owenga, learned counsel for the respondent, supported the conviction on the ground that there was overwhelming evidence to support the prosecution case. She submitted that the appellant's defence was considered by the learned magistrate and properly dismissed and that sentence imposed was within the law.

9. In considering the grounds of appeal outlined above this court is enjoined to follow the principle established in ***Okeno v Republic*** [**1972] EA 32** where the Court of Appeal held that the first appellate court is enjoined to conduct an independent evaluation of all the evidence and reach an independent conclusion as to whether to uphold the conviction taking into account that it neither heard nor saw the witnesses testify.

10. In order to secure a conviction for the offence of defilement under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must establish that the person has committed an act which causes penetration with a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

11. The first issue for consideration whether it is the appellant who perpetrated the felonious act. PW 1 knew the appellant as she had been to his shop previously and she was him the entire day of the incident thus negating any possibility of mistaken identity. Furthermore, the testimony of PW 2, PW 4 and PW 5 confirm that he was at the shop on the material day when he was found with PW 1 and arrested.

12. As regards the act of penetration, PW 1 gave clear and convincing testimony of her ordeal on the material day. Although her testimony did not require any corroboration by virtue of the proviso to

section 147 of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, such corroboration was found in the evidence of PW 3 who examined her on the very next day and confirmed that she had had sexual intercourse. Contrary to the assertions by the appellant that he ought to have been examined to confirm that the spermatozoa was his, it was not necessary to test the spermatozoa and confirm it was his in light of the overwhelming evidence pointing to him as the perpetrator. In ***Andrew Cauri Ndungu v Republic*** **NAI CA Criminal Appeal No. 132 of 2008 [2013]eKLR,** the Court of Appeal pointed out that;

> *We agree that there are instances in which an accused person ought to be medically examined before a court of law can positively connect him to commission of an offence, but we do not think that in this particular case there was dearth of evidence to enable the two courts below reach a conclusion that it was the appellant who defiled the complainant. Even in the absence of a medical examination on the appellant, there was sufficient evidence to enable the trial court reach the finding that it arrived at. We must, therefore, reject the third ground of appeal.*

13. The appellant pointed to inconsistencies in the prosecution case. The learned magistrate noted the testimony of PW 1 in relation to what happened to her after she left the appellant's home was inconsistent with that of PW 2 and PW 4. While she stated that she went home and was chased by her father, PW 2 and PW 4 were clear that she was found in the appellant's home and arrested upon the intervention of members of the public. PW 5 confirmed the events as narrated by PW 2 and PW 4. In resolving these inconsistencies, the learned magistrate observed as follows;

> *Considering this evidence in totality, I am convinced that SNM was telling the truth with regard to the act. The sexual integrity of SNM was violated and this is likely to have resulted in emotional and psychological trauma. Such trauma may be to blame for the inconsistency of her testimony with the other witnesses. Nevertheless, these inconsistencies do not touch on or affect the elements and ingredients of the crime charged and are therefore inconsequential.*

14. I agree with the conclusion of the learned magistrate and I also find the inconsistencies inconsequential in regard to the commission of the sexual offence.

15. The learned magistrate also considered the appellant's defence and dismissed it. The appellant's defence suggested that he was being framed. When the suggestion was put to PW 2, he categorically denied that he dealt with the appellant. Likewise, PW 5, who was accompanied him to the police station, denied knowledge of any attempt to frame him. The appellant's defence did not deal with the fact he was found with PW 1 in his house and that he had sexual intercourse with her. It was thus properly dismissed.

16. Finally on the issue of age, I hold that proof of age is a question of fact. In sexual offences proof of age is necessary for two reasons. First, to establish the offence of defilement which is committed if the victim is below the age of 18 years. Second, to establish the penalty applicable in the event of conviction. In this instance, there is no doubt that PW 1 was a child. In her *voire dire* and testimony, PW 1 stated that she was 14 years old. PW 2, her father stated that she was 14 years old. In addition to the testimony, the prosecution produced an age assessment report under **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which showed that PW 1 was between the age of 14 and 15 years old. I therefore find and hold that PW 1's age was proved to be 14 years old.

17. For purposes of the sentence prescribed by **section 8(3)** of the ***Sexual Offence Act,*** the appellant fell within the bracket which attracts a minimum sentence of 20 years imprisonment. In the circumstances, there was no error in the sentence and the sentence being a mandatory sentence it was lawful.

18. The conviction and sentence are affirmed. The appellant is dismissed.

DATED and **DELIVERED** at **MIGORI** this day of 13th April 2015.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.