No. 596/2015

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 17 OF 2012

GEORGE KIOKO NZIOKA……...……..……. APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(Being an appeal from the original conviction and sentence in ***Machakos Chief Magistrate's Court Criminal Case (S.O.) No. 21 of 2009*** *by* ***Hon. S. Gacheru, SRM on 26/10/11)***

JUDGMENT

1. **George Kioko Nzioka**, the Appellant was charged with the offence of **Defilement** contrary to **Section 8(3)** of the **Sexual Offences Act, No. 3** of **2006.** Particulars of the offence being that on the **5th** day of **July, 2009** at [Particulars Withheld] Sublocation in Machakos District within Eastern Province, unlawfully and intentionally committed an act which causes penetration with the genital organ of **R M M** a girl aged 15 years.
2. In the alternative, the Appellant was charged with **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 **5th** day of **July, 2009** in [Particulars Withheld] Sublocation in Machakos District within Eastern Province indecently assaulted **R M M** by touching her private parts namely vagina using his penis.
3. He was tried, convicted and sentenced to serve **25 years imprisonment.**
4. Being dissatisfied by the conviction and sentence he appealed on grounds that:

- ***The case was not proved beyond any reasonable doubt.***
- ***Evidence adduced was contradictory and uncorroborated.***
- ***The trial was conducted contrary to the provisions of Section 88 of the Criminal Procedure Code.***
- ***The burden of proof was shifted to the Appellant.***

5. The facts of the case were that PW1 **R M,** a child aged 15 years old had been sent to Kaseve Market to purchase soap. On her way back she was followed by the Appellant who caught up with her and requested her to sit where there was grass. She complied. He removed his pair of trousers and inserted his penis into her vagina. On completion of the act he stood, wore his clothes and left. The Complainant dressed up and took the soap. In the meantime PW4 **B M M** had seen them in the act of coitus. He followed the Appellant and confronted him seeking to know what he had done to his sister but he did not respond. He informed his parents who arrested the Appellant and took him to the police station. The Complainant was subjected to medical

examination where it was found that her hymen was broken but there were no tears around the genitalia. There was no spermatozoa found by the Doctor. The Doctor opined that there was defilement although the perpetrator could have been interrupted hence failing to ejaculate. The Appellant was charged.

6. When put on his defence the Appellant stated that on the material date he was at his place of work within Machakos. He worked until evening. While at Kaseve stage he was arrested and taken to the police station. He denied having committed the offence.
7. The appeal was canvassed by way of written submissions.
8. This being the first appeal my duty is to re-evaluate evidence adduced in the lower court as a whole and re-submit it to a fresh and exhaustive examination. I then come up with my own conclusions bearing in mind that I neither saw nor heard witnesses who testified**. (See Okenno V. R (1972) EA 32).**
9. It is argued that **Section 88** of the **Criminal Procedure Code** was not complied with. In particular the Appellant contended that **P C Muyei** who prosecuted the case was not of the rank of Inspector therefore not qualified to prosecute. The learned counsel for the State **Mr. Shijenje** pointed out that the Prosecution was conducted by several officers and the trial magistrate having allowed the Prosecutor to conduct the case trial he was duly authorized.
10. **Section 88** of the **Criminal Procedure Code** provides thus:

"(1) A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission.

(2) Any such person or officer shall have the same power of withdrawing from the prosecution as is provided by section 87, and the provisions of that section shall apply to withdrawal by that person or officer.

(3) Any person conducting the prosecution may do so personally or by an advocate."

11. Following the **Statute Law (Miscellaneous Amendments) Act No. 7 of 2007,** under **Section 85(2)** of the **Criminal Procedure Code**, the Director of Public Prosecution may appoint a police officer of any rank to be a public prosecutor. In the case of **Laban Nyaga Njue vs. Republic (2015) eKLR,** the Court of Appeal stated thus:

"Act No. 7 of 2007, which came after that line of cases invalidating prosecutions by junior police officers addressed the incongruity by deleting the qualification. In Section 85(2) that only police officers of the rank of Assistant Inspector and above could be appointed Prosecutors. That amendment stands to reason and accords with the reasoning that we have set out herein."

That ground of Appeal must, therefore, fail.

12. This brings us to the issue whether the case was riddled with inconsistencies and if it was proved beyond doubt. The age of the girl was proved by evidence of the Child Health Card that was produced in evidence. She was born on **12th October, 1994.** At the time of the alleged offence, she was 14 years and 9 months (approximately 15 years old). The evidence of PW1 that the Appellant inserted his genital organ into her vagina while lying on her was corroborated by the evidence of PW4 who saw them in the act. it is argued by the Appellant that medical evidence adduced was unsatisfactory and could not justify that there was penetration as there were no spermatozoa seen.
13. Medical evidence adduced established the fact that the Complainant's hymen was broken. This was evidence of some penetration into her genital organ. It is true the Doctor did not find evidence of spermatozoa in the vagina. According to PW1, the Appellant did not reach a stage of ejaculation. He penetrated her but she did not scream. He then rose and wore his pair of trousers. PW4 having seen the Appellant committing an act with his sister following him and sought to establish why he did so but he did not respond.
14. It is contended that the blood stained pad should have been produced in court to prove the fact of

bleeding; and that the fact of the vagina having had no tears ruled out the possibility of the hymen having been broken. All the Prosecution was required to do was to establish the age of the child and the fact of penetration into her genital organ. It was not mandatory for the Prosecution to prove that the blood stain that was on the pad at the time of being examined by the Doctor necessarily resulted from the broken hymen. In any case, medical evidence is corroborative fact of the fact of defilement. Failure to adduce such evidence may not be fatal to the Prosecution's case.

15. This therefore brings us to the question whether the burden of proof was shifted to the defence. The Appellant contended that in the judgment the trial magistrate stated thus:

"The accused did not call anyone to witness to corroborated his evidence that he was at Machakos town at 12.00 noon on the material day and not at the scene. On that I don't believe the accused's evidence and I premised to dismiss the same as false hoods."

These were sentiments of the learned trial magistrate in his judgment. This is a criminal case where the burden of proof lies with the Prosecution, which had a duty of establishing the existence of the alleged facts. The duty was discharged by the Prosecution. In his defence the Appellant came up with an *alibi* defence that the court dismissed as falsehood. The court was justified in rejecting the *alibi* defence but it was erroneous on its part to state that the Appellant had not called witnesses to corroborate his allegation. The duty was on the Prosecution to adduce evidence to dislodge the Appellant's *alibi* **(See Ssentale V. Uganda (1968) EA 365).**

16. That notwithstanding, the evidence adduced by the Prosecution was sufficient to prove the charge. The conviction was proper in the circumstances. The appeal on the same is dismissed and conviction upheld.
17. With regard to sentence, **Section 8(3)** of the **Sexual Offences Act** provides thus:

"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

18. In the **Supreme Court of Kiwalabye Bernard Vs. Uganda, Criminal Appeal No. 143 of 2001 (SC)** the court held that:

"The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion in such that its results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence, or if the sentence imposed is wrong in principle."

19. In his mitigating factors the Appellant told the court that he was 20 years old and remorseful. The court should have considered his age and the fact that he was a first offender. In the circumstances I hereby reduce the sentence to **twenty (20) years imprisonment.**
20. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **25TH** day of **JUNE,** 20**15.**

L. N. MUTENDE

JUDGE