REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 154 OF 2013

J N O……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence in Mavoko Principal Magistrate's Court, Criminal Case No. 614 of 2012 by Hon. T.A. Odera Principal Magistrate on 17th May, 2013)

J U D G M E N T

The appellant **JNO** was charged with two counts of Defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006.**

On the first count the facts are that on the 30th day of August, 2012 at about 11.00pm at Kitengela township within Kajiado county did cause his male genital organ *(penis)* to penetrate into the female genital organ *(vagina)* of **S K** a child aged 11 years.

On the second count the facts are that on the 12th day of September, 2012 at about 11.00p.m at Kitengela township within Kajiado county did cause his male genital organ*(penis)* to penetrate into the female genital organ *(vagina)* of **S K** a child aged 11 years.

The appellant also faced two alternative charges of Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.**

The particulars of the first alternative, charge are that on the 30th day of August, 2012 at about 11.00p.m at Kitengela township within Kajiado county did intentionally and unlawfully cause his male genital organ *(penis)* to come into contact with the female genital organ*(vagina)* of **S K** a child aged 11 years.

The particulars of the second alternative charge are that on the 12th day of September, 2012 at about 11.30p.m at Kitengela township within Kajiado county did intentionally and unlawfully cause his male genital organ*(penis)* to come into contact with the female genital organ*(vagina)* of **S K** a child aged 11 years.

The appellant denied the charges and the case was subjected to a full trial after which the trial magistrate found the offence proven and sentenced the appellant to serve 20 years imprisonment.

The appellant was aggrieved by this conviction and sentence and has preferred the appeal. The appellant filed his petition of appeal on the 10th day of June, 2013 and sets forth seven (7) grounds of appeal and later presented to the court during the hearing of the appeal, amended grounds of appeal and written

submissions. In this judgment, I have captured both sets of grounds of appeal which I have understood as follows;

a. ***The trial magistrate erred in law and in fact in convicting the appellant on a defective charge.***

b. ***The magistrate erred in law and in fact in convicting the appellant on contradictory evidence.***

c. ***The trial magistrate erred in law and in fact in convicting the appellant without considering that the prosecution failed to avail vital witnesses to testify.***

d. ***The trial magistrate erred in law and in fact in convicting the appellant when he was not taken for medical examination.***

e. ***The trial magistrate erred in law and in fact in convicting the appellant without availing the doctor who assessed the age of the complainant (PW1).***

f. ***The trial magistrate erred in law and in fact in convicting the appellant when there was no evidence to prove the case beyond any reasonable doubt.***

g. ***The trial magistrate failed to consider the defence of the appellant without giving good reasons for its rejection.***

h. ***The trial magistrate convicted the appellant without proper investigations.***

In support of the case the prosecution called five (5) witnesses.

The complainant gave evidence as PW1. She told the court she was aged 13 years old at the time the offence was committed although she could not recall when she was born. In August, 2012 she was living in Kitengela with her parents **J N** (*the appellant)*, her mother **E W** and her two brothers.

That sometimes in August, 2013 her mother went upcountry and left her at Kitengela with her father (*the appellant)* as she wanted to go for tuition. She told the court how her father came home drunk one evening and while she was asleep, her father went to where she was sleeping and removed his long trouser and his underwear, then lay on her after he had removed her panty. The complainant tried to scream but the appellant covered her mouth with his hand and then he did to her tabia mbaya. *(she pointed at her vagina)* and told the court that the appellant did tabia mbaya with the thing that he uses for urinating and went back to bed after the incident.

The complainant reported the incident to a neighbour by name **K** who later reported the case to the complainant's aunt by name **L** who in turn reported the case to the caretaker who testified as PW3.

On the 12th September, 2012 at 11.30p.m the appellant again went home drunk and went to where the complainant was sleeping and removed her panty and did tabia mbaya to her again. He covered her mouth and warned her if she told anyone about what he used to do to her, he would chase her from the house. The complainant reported this second incident to L who reported to the caretaker *(H M M)* (PW3).

On the 19th September, 2012, PW3 found the complainant with other children in the compound who on seeing him started laughing and upon him enquiring why they were laughing one of the children namely **L,** told him they were laughing at Sheila *(the complainant)* because her father disturbs her. He took the initiative to call the complainant who confided in him how her father *(the appellant)* used to defile her. PW3 knew the complainant's father.

The caretaker (PW3) informed the complainant's grandmother who testified as PW2 what the complainant told him how the appellant had defiled her. PW2 came and picked the complainant and took her to Nairobi Women Hospital for medical examination. The child was examined at the hospital and the doctor confirmed that she had been defiled and he advised PW2 to report the case to the police. She

reported at Kitengela police station who referred her to Kitengela health centre. The police issued her with a P3 form which she took to Kitengela health centre and it was filled.

The said P3 form was produced by PW4 one **Geoffrey Magoma** a clinical officer at [particularsd withheld] health centre. The P3 had been filled on 20th September, 2012 after the complainant was seen at the said health centre under escort of a police officer. The complainant gave a history of how her step father whom she was staying with had defiled her on 30th August, 2012 and on 12th September, 2012. He examined her and noted a rugged hymen with scalar tissue, no fresh lacerations were seen on the vagina. The hymen was intact but there was creamy sticky smelling discharge on her vagina and vulva. Urinalysis did not show anything. He found there was sexual intercourse in the recent times and that healing had started to take place. He signed the P3 and produced it as exhibit 2. On cross-examination he said he found no spermatozoa on the child.

The complainant in the company of her grandmother PW2 reported the matter at Kitengela police station where they found Corporal **Margaret Chepchumba** who testified as PW5. The complainant reported a case of defilement against her father *(the appellant).* PW5 sent the complainant to [particulars withheld] health centre for treatment where the doctor confirmed that she had been defiled. He sent the complainant for age assessment and the doctor approximated her age to be 13 years which report was produced in evidence. The suspect was arrested at [particulars withheld] area by administration police officers and he was charged with the offence of defilement.

After considering the evidence of the prosecution witnesses, the trial magistrate put the appellant on his defence, he gave a sworn statement and denied having committed the offence. He narrated how on the 19th September, 2012 he reported to work at his place of work called **Caniber Plalts Limited** and while there he received a call from a strange number and on making enquiry, it was PW3 who was the caretaker of the plot where he was living. He told him to go back, as there was a problem but before he could go home he was arrested at his place of work by an administration police officer.

After the arrest, he was taking to administration police post where he found her daughter *(the complainant)* and another man who had been arrested.

He asked why he had been arrested but he was not told. He told the court how the complainant had been found in the house of the man that he found at the station and how the complainant was found locked up with that man in the house by a neighbour called **L**. They were both released to go home.

On the 20th September, 2012 he was again arrested and taken to Administration police post and later to Kitengela police station. He said at the station his mother-in-law PW2 who is the complainant's grandmother demanded two cows to withdraw the case, he said he was not taken for medical examination and he did not know why he was arrested.

After carefully considering the evidence that was placed before him, the learned trial magistrate was satisfied that the prosecution had proved its case beyond any reasonable doubt. The court proceeded to find the appellant guilty as charged and convicted him accordingly and he was sentenced to serve 20 years imprisonment.

As pointed out earlier, the appellant appealed to this court and set out the grounds that the court had summarized earlier in this judgment.

At the hearing of the appeal, the appellant relied on written submissions that were adopted by the court and which were annexed to his amended grounds of appeal. **Mr. Machagu** for the state made his submissions in opposition to the appeal.

In his written submissions, the appellant contends that the complainant was coached what to say by other people who among them are PW3 who was the caretaker of the plot where the appellant and the complainant were living at the time the offence was committed.

He further submitted that there was no medical evidence by way of a medical report of him that was produced before the court to prove that he committed the offence and that no doctor was called from Nairobi Women's hospital to produce the medical report of the complainant after she was treated there before she was taken to [particulars withheld] Health centre.

He also took issue with the prosecution for failure to call the arresting officer and also for their failure to call some witnesses whom he thought should have been called namely one **L** and **K.**

He also submitted that the evidence adduced in the lower court was not water tight and that the case was not proved beyond reasonable doubt.

He concluded his submissions by stating that the trial magistrate failed to consider his defence and that he did not give good reasons for rejecting his defence.

In his submissions, **Mr. Machagu** for the state told the court that the case against the appellant was proved beyond reasonable doubt. He argued that the appeal lacks merit and prayed to the court to dismiss the appeal and uphold the sentence by the lower court.

In summary, he told the court that when PW1 testified she told the court how the appellant defiled her on the 30th August, 2012 and on the 12th September, 2012 when on both nights, the appellant went home drank and defiled the complainant while covering her mouth. The appellant proceeded to threaten the complainant that if she told anyone he would throw her out of the house.

The complainant notwithstanding the threats, reported the two incidents to her neighbour **K** who in turn reported the incidents to the complainant's aunt by name **L**. L finally reported the two incidents to the caretaker (PW3) who took the bull by the horns and talked to the complainant who revealed to him how the appellant who is her step father had defiled her on those two occasions. The caretaker called PW2 who is the grandmother to the complainant who took her to hospital and through the efforts of PW3 the appellant was arrested and charged with the offence of defilement.

The complainant was examined by PW4 one Geoffrey **Magoma** a clinical attendant. On examination he noticed a rugged hymen with scalar tissue, no fresh lacerations were seen on the vagina, the hymen was not intact and there was a creamy sticky smelling discharge on her vagina and vulva. Urinalysis did not show anything. He found there was sexual inter course in the recent times and that healing had started to take place. He signed the P3 form and produced it as an exhibit.

The age of the complainant was assessed at 13 years, the age assessment report was produced by PW5 who was the investigating officer. The report was produced.

Under **Section 77** of the **Evidence Act** and the same was accepted as evidence.

Mr. Machagu submitted that the evidence produced during the trial was consistent, well corroborated since it proved that the complainant had been defiled in reference to the P3 and her personal evidence and the person who defiled her was a person well known to her and for that matter her step father. It was also proved that the complainant was aged 13 years when she was defiled.

In reference to the amended grounds of appeal the state submitted that the appellant did not specify the witnesses that he thought ought to have been called by the state. He urged the court to dismiss the appeal.

The duty of this court is, to determine the appeal and in doing so, it is alive to the fact that while sitting on the first appeal it should examine and analyze all the evidence adduced in the lower court afresh with a view to making its own independent conclusion but it should also be alive to the fact that it did not have the benefit of seeing the witnesses testify and observe their demeanor. The court will deal with the grounds of appeal as set out *(supra).*

In the first ground of appeal that the court erred in convicting the appellant on a defective charge, the two

charges of defilement were brought under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offence Act No. 3 of 2006.**

Neither the appellant nor the state submitted on this ground of appeal. **Section 8(1**) as read with **Section 8(2)** relates to a child who is aged eleven years or less and the sentence provided for is life imprisonment. **Section 8(3)** relates to a child who is aged between twelve and fifteen years and the sentence under this section is a term not less than twenty years imprisonment. Though the appellant was charged under **Section 8(1)** as read with **8(2)** he was sentenced under **Section 8(3)** which did not cause any prejudice to him.

On the second ground of appeal, that the magistrate convicted the appellant on contradictory evidence. On analyzing the evidence, there was no contradiction of the evidence offered by the witnesses in the lower court and if there was, the same was not material evidence which could have affected the outcome of the case and the finding by the lower court. In the case of **Joseph Maina Mwangi vs Republic** *(Criminal Appeal No. 73 of 1993)* the court held;

> ***"in any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence"***

The third ground of appeal is that the learned magistrate erred in convicting the appellant without considering the prosecution failed to call vital witnesses to testify.

The appellant argued that some witness ought to have been called in evidence but they were not. The rule with regard to this was stated in the case of **Bukenya & others vs Uganda (1972) EA 549** thus

> ***"the law as it presently stands, is that prosecution is obliged to call all witnesses who are necessary to establish the truth in a case, even though some of those witnesses' evidence may be adverse to the prosecution's case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact where, however the evidence adduced barely establishes the prosecution case and the prosecution withholds a witness, the court, in an appropriate case is entitled to infer that had that witness been called his evidence would have been adverse to the prosecution's case"***

The prosecution is not obliged to call any witness. The appellant was at liberty to call his witnesses when he was put on his defence. An accused person cannot sit back by and not summon witnesses to absorb him and then turn around and make the claim that the prosecution should have called witnesses who would have established his defence and therefore that ground of appeal also fails.

The fourth ground of the appeal is that the appellant was not taken for medical examination and for that reason the court erred in convicting him. He argued that no D.N.A evidence was taken in this case to link him to the defilement.

In my view, such evidence was not necessary and in any event the trial court found that there was sufficient medical evidence in support the evidence of PW1. In the case of **Aml vs Republic (2012) eKLR (Mombasa),** the Court of Appeal held;

> ***"the fact of rape or defilement is not proved by way of DNA test but by way of evidence. This was further affirmed in the case of Kassim Ali vs Republic Criminal Appeal no. 84 of 2005 (Mombasa) where the court stated;***
>
> ***"the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence and so is the offence of defilement (..emphasis made)"***

The evidence of the minor witness placed the appellant as the one who defiled her. It cannot be said that there was no evidence to link him to the crime. This ground is therefore baseless and is accordingly rejected.

The fifth ground of appeal that the doctor who assessed the age of the complainant was not availed is neither here nor there. The assessment report was produced and the same was accepted under **Section 77** of the **Evidence Act.** The appellant did not object to the production of the same in the lower court and he cannot raise it at this stage and in any event, no prejudice was caused to the appellant by production of the report.

The sixth ground is that the trial magistrate convicted the appellant when there was no evidence to prove the case beyond any reasonable doubt. The appellant was charged with the offence of defilement under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offence Act No. 3 of 2006.** A person who commits an act which causes penetration with a child is guilty of an offence termed defilement – **Section 2** of the **Act** defines penetration as ***"the partial or complete insertion of genital organs of a person into genital organs of another. Going by that definition the court needs to determine whether there was penetration of the complainant's genitalia, whether the complainant is a child and whether the penetration was by the appellant. The evidence of the complainant is overwhelming on who defiled how. Her evidence was corroborated by that of PW4 the clinical officer who filled the P3 form and the age assessment report confirms that the complainant was minor when she was defiled. Appellant is the step father to the complainant whom she had lived with for quite sometime and he is a person she knew quite too well. The court finds that the case was proved beyond any reasonable doubt and therefore that ground of appeal fails."***

The appellant in his 7th ground of appeal states that the trial court failed to consider his defence and did not give reason for its rejection.

In his judgment the trial magistrate considered and dismissed the appellant's defence as a mere denial. It is therefore not true that his defence was not considered.

The final ground of appeal is that the magistrate convicted the appellant without proper investigations. The police investigated the offence arrested and charged the appellant with the offence of defilement which was proved beyond any reasonable doubt by way of the evidence adduced by the witnesses who testified in the trial court. The investigations that the police carried out were good enough as they were able to get enough evidence against the appellant which evidence the court used to convict the appellant. This ground of appeal must also fail.

In the upshot, I come to the conclusion that the appellant was properly convicted and sentenced. This appeal lacks merit, it is dismissed with the result that appellant will serve the twenty (20) years sentence ordered by the trial court.

Dated and **Delivered** at **Machakos** this 22nd day of July, 2015

LUCY NJUGUNA

JUDGE