REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA A NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.326 OF 2012

BENSON MUHIA MUIGAI…….....…….APPELLANT

VERSUS

REPUBLIC…….……..…….RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Limuru Criminal Case No. 1023 of 2011delivered on 20/12/2012 by G. H. Oduor, SPM)

JUDGEMENT

The Appellant was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006. The particulars were that on the 15th day of December, 2011 [particulars withheld] within Kiambu County intentionally and unlawfully caused his male organ namely penis to penetrate E W W's vagina a girl under the age of 11 years. In the alternative, he was charged with indecent assault to a female person contrary to Section 11(A) of the Sexual Offences Act No.3 of 2006. The particulars were that on the 15th day of December, 2011 [particulars withheld] within Kiambu County did commit an indecent act with E W W by causing his penis to touch her vagina.

He was convicted in the main charge and sentenced to life imprisonment. He was aggrieved by the conviction and sentence and appealed on grounds that;

1. **The learned trial magistrate relied on insufficient evidence.**
2. **The case was not proved beyond reasonable doubt.**
3. **His defence was rejected without justification.**

Further grounds were set out in his submissions dated 7/12/2015. He submitted that the trial proceeded on a defective charge since he ought to have been charged with the offence of attempted defilement and not defilement; that the age of the victim was not ascertained as no documentary evidence was adduced; that Section 169(1) of the Criminal Procedure Code was not complied with in relation to his defence and that the medical evidence adduced did not support the offence of defilement as provided for under Section 8(1) and (2) of the Sexual Offences Act no.3 of 2006. He emphasized that the evidence adduced proved the offence of attempted defilement. In the alternative he would have been charged with incest contrary to Section 20(1) of the Sexual Offences Act because the complainant was his nephew. For that reason, the

charge was defective. He submitted that the learned trial magistrate did not consider the medical expert's opinion but rather relied on his own theories. He submitted that he was framed by the complainant's mother who was once his lover but with whom he differed and married another woman. He submitted that had the learned trial magistrate properly appraised the medical evidence he would have come up with a different finding.

Counsel for the Respondent, Ms Njuguna opposed the appeal on the basis that the offence of defilement was proved. She referred to the testimony of PW1who testified that her daughter, PW2 felt pain when she was being washed. She examined her vagina and noticed a big wound. PW2 then disclosed to her that the Appellant lured her to a tunnel and defiled her. She submitted that PW2 corroborated the evidence of PW1. Further, PW3, a Clinical Officer testified that when she first saw PW2 she was walking with difficulty and on examination found that the genitalia was bruised, red and had pus cells. She submitted that PW2 positively identified the Appellant who she called him a relative. This was confirmed by PW1. On the age of the PW1, learned counsel submitted that the same was proved by PW2 who testified that PW1 was 7 years old. PW3 and the learned trial magistrate also assessed her age at seven years. She referred the court to the case of Richard **Wahome Chege Vs Republic, Criminal Appeal no. 61 of 2014** in which the Court of Appeal held that the age of a minor must not be primarily proved by a document. She prayed that the appeal be dismissed.

This being a first appeal, it is the duty of this court to re-evaluate the evidence and come up with its own independent conclusions. See **OKENO VS REPUBLIC (1972) EA, 32.**

A brief background to the appeal is that on 15/12/2013 the complainant, E W who testified as **PW2** was on her way to Toma's place when he met the Appellant. He asked her to follow him to the trench and when they got there, he asked her to remove her trousers and defiled her. As stated in her testimony, the Appellant inserted his "Kanyunyu" into her private parts. She felt paint while this was being done to her. She did not tell anyone immediately but reported to her mother on Sunday. Her mother took her to hospital where she was treated and thereafter to Kagwi Police Post where a formal report was made to the police.

PW2's mother B W K testified as **PW1**.She recalled that on 18/12/2011 while she was washing PW2, the latter complained of pain in her genitalia. She examined her and noticed a big wound on her vagina. It was after she threatened PW2 that she would beat her that PW2 disclosed that the Appellant had defiled her on 15/11/2012 which according to her was a Thursday. She took PW2 to Kagwi Dispensary where she was treated. She later took her to Githunguri Health Centre for further treatment. Her P3 form was filled on 19/12/2011. She returned to Kagwi Police Post where she met the Appellant who was thereafter transferred to Uplands Police Station.

PW3, Sabina Njeri Thunguru, a Clinical Officer at Githunguri Health Centre examined PW2 on 20/12/12. She assessed the age of PW2 to be 7 years and noticed that she had slight difficulty in walking. She had a bruised genitalia especially the labia majora and more above the clitoris and around the vaginal introitus. There was redness but the hymen was intact. She concluded that there was attempted defilement.

PW4, PC Ndaru Hamisi Nuru attached Kagwe Police Patrol Base recalled that on 19/12/2011 when he went to the office he met a lady who reported that her daughter had been defiled by Benson Muhia on 15/12/2011. He went together with Police Constable Timothy to the scene of crime. He observed the scene was isolated with scant human traffic. He was told by the complainant that she did not scream during the commission of the offence. He issued the complainant a P3 form and referred her to Githunguri Health Centre. He compiled the report and thereafter took the Appellant to Lari Police Station where he was charged. PW4 told the court that the Appellant was identified at the Police Station by the complainant.

The Appellant gave a sworn defence and did not call any witnesses. He denied having committed the offence. He testified that on 15/12/2011 he was at Karangi where he had gone to buy cows. On 18/12/2011 he was informed by someone that there were allegations against him that he had defiled PW2. He was arrested on 19/12/2011 when he went to the Police Station to enquire about the matter.

Having considered the rival submissions and gone through the record of proceedings I conclude that the issues for determination are; first, proof of the age of the complainant, second, proof of penetration and third, whether it is the Appellant who committed the offence.

On the issue of the complainant's age, the Appellant submitted that documentary evidence ought to have been produced in court to prove the same. According to him, the assessment of PW2's age by PW3 through oral evidence was not sufficient.

In the instant case, the PW2 who was the complainant told the court both during the *voire dire* examination and in evidence that she was 7 years old. The same age was also indicated on her treatment card from Githunguri Health Centre and her P3form. Although the treatment card from Kagwi Dispensary indicated that she was 6 years old, this did not extinguish the fact that she was still a child and that her age anyway fell below eleven years.

It is trite that penalties for the offence of defilement are determined by the age of the complainant. In the present case whether PW2 was 6 or 7 years old was immaterial as the charge was framed under Section 8(2) of the Sexual Offences Act which provides for defilement of minors under the under of eleven years. It is then clear that no documentary evidence was produced in proof of PW2's age. But as was held in the case of to **Richard Wahome Chege v Republic (2014)@ KLR- Criminal Appeal No. 61 of 2014, Court of Appeal sitting at Nyeri** that;

> ***"it is our considered view that age is not proved primarily by production of a birth certificate. PW2was the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant and the complainant herself".***

Also in the case of **Francis Omuromi Vs Uganda, Criminal Appeal no. of 2000**, the Court of Appeal held that,

> ***"in defilement cases, medical evidence is paramount in determining the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…".***

Guided by the above case law, I have no doubt that by the evidence of PW1, 2 and 3 the age of the complainant was properly proved.

I will determine the second and third issues simultaneously. The Appellant submitted he was charged with the wrong offence and according to him this rendered the charge defective. He submitted that the right offence ought to have been that of attempted defilement under Section 9(1) and (2) of the Sexual Offences Act No. 2of 2006.Under this provision, attempted defilement means an attempt to commit an act which would cause penetration with a child. The medical evidence adduced by the prosecution was contained in the P3 form, the treatment cards from Kagwe Dispensary and Githunguri Health centre respectively. She was first examined on 19/12/2011 at Kagwe Dispensary where it was found that PW2 experienced pain when passing urine and also had a bruised valva. She was thereafter taken to Githunguri Health Centre where it was found that she had difficulty in walking, had a bruised external genitalia at the labia majora above the clitoris and near the introitus. However, her hymen was intact. The same information was indicted on the P3 form only adding that the bruises were associated with redness.PW3, the Clinical Officer from Githunguri Health Centre was in charge of the examination and treatment of PW2. Both in her oral evidence and on the P3 Form, she concluded that there was an attempt to defile PW2. Therefore, the offence committed was that of attempted defilement and not defilement.

On the issue of identification, PW4 testified that the Appellant was identified by PW1 and PW2. PW1 testified that the Appellant was her husband's nephew. The Appellant did not deny this in his defence. He in fact said that PW2 was like a daughter to him. PW2 testified that she knew the Appellant. That he was her uncle. On this note, it can only be concluded that the Appellant was positively identified. His

contention that the PW2 was coached by PW1 was without merit as placed no justification for the same. PW2 referred to the Appellant by his name as she narrated how and from where the defilement was committed. She was consistent in her testimony and also during cross examination. She told the court that the Appellant put his "Kanyunyu" into her private parts and that it was painful. Her evidence was well corroborated by that of PW1, 3 and 4.

On whether the Appellant's defence was considered by the learned trial magistrate, the court had this to say in its judgment;

> ***" the accused alleged that the child was framing him up at the behest of her mother. I had the benefit of observing the demeanor of both PW1 and PW2. The former testified on oath. I believe that PW1 and PW2 were both telling the truth."***

The statement by the learned trial magistrate was sufficient indicator that the Appellant's defence was considered before a verdict was arrived at.

Finally, it is important that I determine whether, by virtue of the relationship existing between the Appellant and the complainant, the court ought to have convicted the Appellant for the offence of incest. According to the Appellant, he was charged with the wrong offence since he was related by blood to the complainant. The offence of incest by male is provided for under **Section 20(1) of the Sexual Offences Act**. The same states as follows;

> ***"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.***
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> ***Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."***

In the present case, PW1, the mother of the complainant testified that the Appellant was her husband's nephew. In cross examination, the Appellant stated that the complainant was like a daughter to her. However, the relationship between the Appellant and the complainant as defined by PW1 does not fall within the elements of the definition of the offence of incest under Section 20(1). Their relationship is distant. As such, the Appellant was properly charged with defilement.

Upon evaluating the evidence on record, I find that the prosecution proved beyond all reasonable doubt that the Appellant committed the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act. Section 9(1) defines the offence of defilement as:

"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement." Whereas Sub-Section (2) thereof provides for the penalty for the offence of attempted defilement in the following words:

"A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."

In the result, the appeal partially succeeds. The same on conviction is dismissed. However, i set aside the life imprisonment sentence. I substitute it with an order that the Appellant be and is hereby sentenced to serve ten years imprisonment effective of the date of sentencing by the trial magistrate. It is so ordered.

DATED and DELIVERED this 15TH day of December, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant present in person

2. Miss Maina for the Respondent.