REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.205 OF 2013

STEPHEN KIBIRU KIMANI…….....……..APPELLANT

VERSUS

REPUBLIC.....…….…….....…RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case No. 2572 of 2013 in the Chief Magistrate's Court at Kiambu delivered on 18th October, 2013 by C.C. Oluoch (MRS) PM).

JUDGMENT

The Appellant was charged with the offence of defilement of a girl contrary to Section 8(2) of the Sexual Offences Act of No.3 of 2006. The particulars were that on the 4th day of September, 2012 at [particulars withheld] Kiambu County committed an act with his genital organ namely penis which caused penetration into the genital organ namely vagina of S N a child aged 3 ½ years. He was in the alternative charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual offences Act No. 3 of 2006. The particulars were that on the 4th day of September, 2012 at at [particulars withheld] within Kiambu County intentionally touched the vagina of S N a child aged 3 ½ years with his penis. He was convicted in the main count and sentenced to life imprisonment.

Being dissatisfied with the conviction and sentence the Appellant preferred to appeal on grounds that; the evidence of the complainant was not credible since it was unsworn and uncorroborated; that he was denied an opportunity to cross examine the complainant; that the learned trial magistrate relied on speculative evidence and finally, that the learned trial magistrate's decision was against the weight of the evidence.

He filed a Supplementary Memorandum of Appeal dated 25th June, 2015 in which he stated that he was a minor at the time the alleged offence was committed; that the prosecution failed to call crucial witnesses who they considered would give unfavorable evidence against their case; that from the onset to the conclusion of the case, the trial process and procedure was not adhered to; that medical tests were not conducted to prove that the semen deposits found on the complainant's legs were from him.

His written submissions were dated 13th November, 2015. He relied on both the Memorandum of Appeal and the Supplementary Memorandum of Appeal. He submitted that he was denied a fair trial since the

trial court did not inquire into the language which he understood during the trial. He submitted that a key witness who was the first person to see the complainant after the alleged defilement was not called to testify. This gave the inference that had the witness been called, his evidence would have been prejudicial to the prosecution's case. He submitted that the medical evidence which indicated that the complainant was repeatedly defiled contradicted the evidence of the complainant who testified that no other person ever defiled her except the Appellant. He submitted that he voluntarily went to the Administrative Police Camp and also sought to accompany the complainant to hospital in order that he could also be examined to prove his innocence, which examination was never carried out. He submitted that he was framed up out of malice and the existing differences between his family and that of the complainant. Finally, he submitted that his defence was not considered and that the prosecution did not prove its case beyond all doubts.

The Respondent's submissions were dated 16th November, 2015. Learned counsel for the Respondent, Miss Kule Wario submitted that the prosecution's case was proved beyond reasonable doubt since all the three ingredients for the offence of defilement were proved. On the age of the complainant, learned counsel submitted that the same was proved by the complainant's health card which indicated that she was born on 24/3/09. The card was produced by PW1. PW4 who was the investigating officer also confirmed the complainant's age.

On proof of penetration, learned counsel submitted that the same was proved by the evidence of two key witnesses, namely PW1 and PW2 which evidence was corroborated by the medical evidence produced in court by PW4. PW2 testified that it was the Appellant who did bad things to her and that he urinated on her private parts. PW1 saw white mucus on PW2's thighs which confirmed PW2's testimony.

On whether the Appellant was positively identified, learned counsel submitted that identification was by recognition. PW2 knew the Appellant's name and called him "Kibiru".

Further, on the age of the Appellant, learned counsel submitted that the Appellant's annotation that he was a minor at the time of committing the offence is an afterthought and a ploy to defeat justice since he did not raise this issue during trial. Counsel went on to state that as evidenced by the Appellant's defence, the Appellant testified that he was 18 years old. She then referred to a decision by this court in the case of **Francis Maingi Mwangi Vs Republic (Criminal Appeal No.299 of 2012**) which canvassed the issue of the age of an Appellant who claims to be a minor during the sentencing. In that case, the High Court held that where it is proved that an accused had attained the age of majority at the time of sentencing, he should be sentence as an adult.

On the contention that the Appellant was never accorded a fair trial, learned counsel submitted that the court noted that he was very conversant with the Swahili Language as noted on page 1 of the proceedings. He submitted that the contradictions in the evidence of PW1, 2 and 4 were not material as to affect the conviction since the prosecution tendered sufficient and overwhelming evidence against the Appellant. Finally, learned counsel submitted that the trial magistrate considered the defence of the Appellant although she did not give reasons for dismissing it. She submitted that this could be cured by Section 382 of the Criminal Procedure Code. She urged the court to dismiss the appeal in its entirety.

I have considered the rival submissions of both parties. The key issues to be determined is whether the prosecution proved its case beyond all reasonable doubt, whether the Appellant was properly sentenced and whether his right to a fair trial was violated. On the first issue for determination, the prosecution needed to prove firstly, whether the complainant was a child, secondly, that there was penetration, and thirdly, that the Appellant was positively identified as the culprit. In so determining, this court is minded that it is duty bound to re-evaluate all the evidence and come up with its own independent conclusion. See the case of **OKENO VS REPUBLIC (1972) EA, 32.**

The complainant S N testified as **PW2.** She testified that the Appellant who she referred to as "Kibiru" did bad things to her while at his house. That he took her to his bed and urinated on her private parts with his "thing" and told her not to tell anybody. Thereafter she went to her grandmother's house and told her that the Appellant had done bad things to her. Her grandmother took her to hospital where she was

examined.

The grandmother J N testified as **PW1**. Her account was that on 4/9/12 his son M M saw PW2 coming from the Appellant's house and noticed there was something on her thighs which she believed to be white mucus. When she asked PW2 what was on her thighs she disclosed that the Appellant had done bad things to her. She went and confronted the Appellant who denied having done anything to PW2. PW1 took a second look and realized that what appeared to be white mucus on PW2's legs were actually sperms and that they were also all over PW2's vagina. Because she did not want to cause an alarm as she feared the neighbours would kill the Appellant, she called a taxi and took PW2 to the Chief's office from where they were referred to Kiambu Police Station. They were thereafter referred to Kiambu District Hospital where she was examined.

PW3, Linda Nguu from Kiambu District Hospital produced the P3 form on behalf of Doctor Maingi who at that time had been transferred and could not be traced. She confirmed that the signature on the P3 form was Doctor Maingi's. The P3 form indicated that PW2 was 3 ½ years old and had visited the hospital on 4/9/12. She was found to have white deposits on her leg and her hymen was broken. There was no active bleeding or laceration. The final diagnosis was defilement. The child was considered for review by a child psychologist.

PW4, PC Juan Mang'ayo was the investigating officer. She corroborated the testimonies of PW1 and PW2. In addition to summing up the evidence of the prosecution witnesses, testified that he visited the scene. He confirmed that the complainant and the Appellant were cousins and neighbours. He identified PW1's P3 Form. He also confirmed that PW2 was born on 24/3/09.

The Appellant testified as **DW1**. He gave a sworn statement of defence. He denied having committed the offence. He testified that on the material date, PW1 found him at his house together with his sister and brother who were playing outside the house and asked him what he had done to PW2. She showed him PW2's legs and alleged that he had defiled her. The Appellant testified that he offered to go to hospital with PW1 and 2 but PW1 refused. The Appellant then called his parents and informed them about what was going on. When his parents arrived, they argued with PW1. The Appellant was then arrested and taken to Kiambu Police Station.

The Appellant's sister J M testified as **DW2.** She stated that PW2 went to their house to play. She left after being called by PW1. Shortly after she heard PW1 screaming and thereafter alleged that PW2 had been defiled. The Appellant's brother, J N testified as **DW3.** He stated that he was aware that the Appellant was accused of defiling PW2 but had nothing to add. **DW4,** J M's testimony was that the Appellant was framed up and that on the material date he was outside doing Maths with DW2 and3.

From a summary of the entire evidence, it is clear that PW2's age was proved. Her birth date was indicated on her Immunization Card as 24/3/09. It was produced by her grandmother, PW1. This placed her at 3 ½ years as at the time the offence was committed.

On identification, PW2 knew the Appellant well as she often went to his house to play and they were in fact related. In her testimony she referred to him by his name. By all means he was positively identified.

The medical evidence presented by PW3 indicated that PW2's hymen was broken. This was ample proof that there was penetration.

The Appellant's submission that PW2's evidence was not credible because it was uncorroborated was rebutted by the clear corroboration by the evidence of PW1 and PW3. When PW2 left the Appellant's house PW1noticed that there was a whitish substance on her legs which she identified as sperms. She took her to hospital where it was found that her hymen was broken. This was indicated in the P3form which was presented by PW3. Also, during the medical examination at the hospital, PW2 said that it was not the first time she was sexually assaulted by the Appellant. During cross examination, she was very consistent. She clearly narrated how the act was done. She stated that the Appellant called her from outside where she was playing with N, M and M. He took her inside the house and told her to be quiet.

She remembered that the Appellant slept behind her and that there was nobody inside the house. That is when he did bad things to her. The said N, M and M were defence witnesses 2, 3 and 4. Their testimonies were mere statements that did not exonerate the Appellant. DW2 confirmed that on the material day, PW2 was called by PW1 from their house from where they were playing. This vindicated PW2's testimony that she was called by the Appellant from outside where she was playing with DW2, 3 and 4 into his house. DW3 did not know anything about the allegations. DW4 testified that on the material date, he was doing his Maths with DW2 and 3, which ultimately implied that he could not confirm what transpired inside the Appellant's house.

Be that as it may, notwithstanding that PW2's evidence was sufficiently corroborated, under Section 124 of the Evidence Act, a court may convict an accused person if it solely believes in the evidence of a minor. From the account of what transpired as narrated by PW2, there was no doubt to believe that she was telling the truth and that the trial magistrate did not therefore misdirect herself in convicting the Appellant.

On the issue of the Appellant's age, he testified that he was a minor at the time the offence was committed. However, he never raised this concern with the trial magistrate at the time of the trial. This court does not also have any evidence of whatsoever kind that it would rely on to make an informed determination that the Appellant was under age as at the time of the trial. Besides, in his sworn defence he testified that he was 18 years old. He testified on 17th September, 2013. Plea was taken on 6th September, 2012 in which case an assumption can be made that the offence was committed when he was 17 years old.

There are two opposing views from decisions of the Court of Appeal regarding persons who attain the age of majority in the course of trial. In some cases, courts have held that since the trial commenced when an accused was a minor, upon conviction, he is ordered detained at the President's pleasure. In other instances, where a child had attained the age of majority as at the time of sentencing, he is treated as an adult. In the case of **Kaziwa Kazungu Mkunzo and Another vs Republic. Cr. Appeal No. 239 of 2004,** the Appellants were convicted and sentenced to death for robbery with violence. The 1st Appellant was 15 years old at the time the offence was committed. He was 21 years at the time the 2nd appeal was heard. The Court of Appeal set aside the death sentence and ordered that he be detained at President's pleasure. A contrary view was taken in the case of **J.K.K vs Republic Nyeri Criminal Appeal No. 11 of 2011** where the court reasoned thus:

> ***"it is now four years later, which means he is now over the age of 18 years, therefore, he is not suitable to be subjected to any of the sentences provided for under the Children Act. The purposes of the sentences provided for under the Children Act are meant to correct and rehabilitate a young offender… while taking into account the overarching objective is the preservation of the life of the child and his best interest… the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence."***

The present case can be distinguished with the above cited case law in that in that case, an age assessment had been done whereas in the present case, no age assessment was done. Court can only assume the age of the Appellant based on what he told the court at the time he gave his defence and from the submission he made before this court. I am however, of a concurrent view with the Court of Appeal in **J.K.K vs Republic (ibid).** I have observed before that under Section 8(7) of the Sexual Offences Act, the age of an accused person as at the time he committed the offence should be taken into account. But the section further provides that the sentencing should be in accordance with the Bostal Institutions Act and the Children's Act. These two statutes deal with sentencing of children offenders, and that means children who are below the age of majority. If follows then that if an accused committed the offence whilst he was a minor, but at the time of sentencing has attained the age of majority, the sentencing cannot be under the two statutes which deal with minors. He ought to be sentenced as an adult. That view aligns itself with the

present case as the Appellant was an adult as at the time of sentencing. He must be brought to bear the weight and responsibility of his commission of the offence. I have held elsewhere that the rationale to this holding, in my view, is that when an accused person commits the offence within the age that he is criminally liable, if at the time of sentencing he had become of age, he must carry the full burden of his responsibility. Furthermore, I do not think that it was the intention of Section 8(7) of Sexual Offences Act to let go unpunished offenders of heinous crimes as defilement who had become of age when the same provision stipulates that the offenders be sentenced in accordance with Bostal Institutions Act and the Children's Act which deal with minors. In that regard, the learned trial magistrate imposed the correct sentence as provided under Section 8(2) of the Sexual Offences Act.

On the issue that a crucial witness was not called, this was not prejudicial since the evidence adduced by the prosecution satisfactorily proved all the ingredients of the offence of defilement. In any case, there no legal requirement that mandates the prosecution to call any particular number of witnesses to prove their case. What is crucial is that they call sufficient evidence that supports of their case.

I also do not find any truth in the Appellant's contention that he was not accorded a fair trial. He submitted that the trial court did not inquire into which language he understood. The record of proceeding shows otherwise. It was recorded on page one of the proceedings that the plea was taken in the Kiswahili language which he understood. Thereafter court proceedings were conducted in the same language which he understood best. Hence, that submission has no merit.

In the end, I find that the prosecution proved their case beyond all reasonable doubts. This appeal lacks merit. It is hereby dismissed.

DATED and DELIVERED this 8TH day of DECEMBER, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Onyango holding brief for Kiarie for the Applicant.

2. M/s Njuguna Respondent.