REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 100 OF 2005

BETWEEN

D O ……..…..…….. APPELLANT

AND

REPUBLIC …….……..……. RESPONDENT

(Being an appeal from original conviction and sentence of the CM's court at KISII in criminal case No.739 OF 2005 – by Hon. L. Arika (RM) dated 22nd August 2005)

JUDGMENT

1. The appellant herein DO was the accused in Kisii Resident Magistrate's Court Criminal case No.739 of 2005. He was charged with defilement of a girl contrary to **section 145 (1)** of the **Penal Code**. The particulars of the offence were that on the 5th May 2005 at [particulars withheld] Kisii Central District within Nyanza Province had unlawful carnal knowledge of S O a girl under the age of sixteen years.

2. He pleaded not guilty to the charges and his trial ensued. The prosecution called 4 witnesses. PW1 was R K , the complainant's mother and sister to the appellant. She told the court that on 5th May 2005 at around 4 p.m. she had gone to the shop to buy some soap and upon her return she found that the appellant had put the complainant on his bed and was defiling her. She also noted that the complainant had no clothes on while the appellant, who had no trousers on wore but only a T-shirt.

3. PW1 wailed at the top of her voice, as a result of which many women responded to her wails. The appellant in turn attempted to flee but he was unable to do so as he was cornered by the many women who answered to PW1's screams. One of the appellant's cousins by the name G rescued the appellant and took him to the police station.

4. PW1 also recounted that on arrival home from the shop, she noticed that the appellant had tied her lesso around the complainant's mouth in a bid to stop her from screaming. PW1 then took the complainant to Kisii District Hospital for a checkup when it appeared to her that the appellant had had sex with her. Thereafter PW1 proceeded to Kisii police station in the company of a policeman. While at the police station, PW1 recorded her statement with the police.

5. PW2 was G M O, the appellant's cousin. He told the court that on the material day at 4 p.m. while he was in his house he heard the appellant screaming. On reaching the scene, PW2 found many women beating the appellant for allegedly defiling PW1's daughter. On sensing that the women could probably kill him as they were armed with stones and sticks, PW2 took the appellant to Gesonso police station

where he also recorded his statement.

6. PW3 was No.24166 PC Florence Mokua based at Gesonso police station. She told the court that on the material day at around 5 p.m. while manning a road block along Kisii-Migori road at Gesonso, her colleague Corporal Hassan came to the road block and informed her that she was required at the station. After arrival at the station, she accompanied the complainant to hospital for examination. After the complainant was examined, she issued her with a P3 form. PW3 identified the P3 form she had issued as **PMF-1-1**.

7. PW4 was Jackson Murauni a registered clinical officer based at Kisii District Hospital. He told the court hat on 6th May 2005 while on duty at Kisii District Hospital he examined the complainant in this case and filled P3 form for complainant who was aged about $4^1/_2$ years. On general examination she was an innocent looking minor. However, her labia majora was swollen, the birth canal was inflamed, tender and reddish. PW1 assessed age of the injuries to be about 1 day old.

8. On further examination of the complainant by conducting a vaginal swab, PW4 saw pus cells which indicated that she was infected with a sexually transmitted disease. She was therefore put on antibiotics. Based on the above findings PW4 concluded that penetration took place. He produced the P3 form as **Exhibit 1**. He also produced treatment notes for complainant as **Exhibit No.2**.

9. Apart from examining the complainant, PW4 also examined the appellant who was taken to the hospital on 6th May 2005. A urine test was done, and the result showed that the appellant had a sexually transmitted disease. He was also put on treatment. He produced appellant's treatment notes serial No.B42210 as **Exhibit No.3**.

10. On re-examination, PW4 clarified that another clinical officer had infact examined the appellant and treated him and that PW4 was only producing the appellant's treatment notes on behalf of his colleague with whom he had worked for 10 years and was therefore acquainted with his handwriting and signature.

11. At the close of the prosecution's case, the appellant was put on his defence. The appellant gave sworn defence by which he denied ever committing the offence he was charged with. The appellant's side of the story was that on 5th May 2005 at about 4.00 p.m., after he came back from work, he went to his parents' home, namely the home of J O and M K. Upon arrival at his parents' home, the appellant found PW2 engaged in a serious quarrel with the parents and threatening to beat up the mother, M K. Apparently, the cause of the quarrel was PW1's desire to marry G M O, PW2 who was a cousin to both the appellant and PW1. The appellant testified that he did approve of PW1's plan to marry PW2.

12. The appellant also stated that he felt saddened by the manner in which PW1 was quarrelling her parents. The appellant stated that PW1 was asking for money so she could take her child to the hospital, but after the appellant gave the money, PW1 went to drink instead.

13. The appellant then left for Gesonso and upon his return home, he found PW1 screaming and there were many people in the home. PW1 was alleging that the appellant had defiled the complainant. He denied having done so but all the same he was arrested and taken to Gesonso police post while the complainant was taken to hospital. The appellant wondered aloud how the complainant could be taken to hospital alone without him. He read malice and corruption in such an arrangement and alleged that PW1 had bribed the doctor who examined the complainant to say that the complainant had been defiled. The appellant also told the court that when he was examined, he was found not to have any infection.

14. During cross examination, the appellant stated that prior to the incident, he and PW1 had quarreled over PW1's habit of selling changaa in the home and also over her habit of bringing and sleeping with men in the appellant's house. He also stated that on the day and at the time of the alleged offence, the complainant was in school and not at home to be defiled by him, and secondly that he was also not at home, though he later stated that he returned home from Gesonso at about 4.00 p.m. on 5th May 2005 whereupon he was arrested.

15. The appellant also stated that he had a grudge with PW2 after he, PW2, impregnated PW1 after cheating her that he would marry her. He also stated that he was taken to hospital on 6th May 2005 where he was treated but told nothing.

16. After carefully evaluating all the evidence adduced before court, the trial court convicted the appellant of the charge facing him and sentenced him to life imprisonment with hard labour after observing that the appellant was not remorseful for his actions. The trial court also noted that the appellant not only defiled the minor but also infected her with a venereal disease.

17. The appellant being dissatisfied with both conviction and sentence, has come to this court on appeal. In his supplementary grounds of appeal filed on 10th October 2013 the appellant has set out the following grounds of appeal:-

1. That the trial court erred in law in failing to appreciate that an unexplained failure by the prosecution to have the complainant who was the main witness testify in her own case was fatal to the case.

2. That the trial court further erred in law in failing to observe that the age

assessment report of the complainant was very vital since it is the age of the complainant that dictates the section of the law under which any accused person charged with and found guilty of a sexual offence is sentenced.

3. That failure by the prosecution to avail the medical expert who medically examined the appellant to present the document he authored was prejudicial to the appellant's defence.

18. At the hearing of the appeal, the appellant put in his homemade written submissions wherein he submitted that since the complainant did not testify in her own case he was denied the chance to cross-examine her; there was no evidence presented in court to confirm that the complainant was 4 years old because the complainant never came to court and neither was a voire dire examination conducted; no exact document was ever produced in court to prove the complainant's age such as birth certificates; the complainant's alleged defilement was not corroborated by any material evidence such as her pant; no damage to her hymen was ever mentioned, nor was there any evidence of the presence of spermatozoa in the complainant's vagina.

19. In addition, the appellant contended in his submission that the P3 form was inadequately filled as it did not show the degree of injury sustained by the complainant owing to her age; the medical officer who examined the appellant did not come to court to testify and finally that the prosecution did shoddy investigations into the case as they did not visit the scene to ascertain the truth of the matter.

20. The appeal was opposed by Mr. Majale learned counsel for the

State. Firstly he submitted that PW1's evidence that the complainant had been defiled by the appellant was corroborated by PW4, the clinical officer whose testimony in the lower court showed that after observing the complainant's private parts, he reached the conclusion that penetration had taken place.

21. Secondly counsel submitted that according to PW4, the presence of pus cells on complainant's genitalia indicated she had a sexually transmitted disease, and that the appellant was also found with pus cells which indicated a sexually transmitted disease. That this in itself was evidence that the appellant had infected the complainant with a sexually transmitted disease.

22. Thirdly, counsel contended that the fact that the appellant's parents refused to turn up to testify could be an indication that the act in dispute was indeed committed by their son (appellant) hence their reluctance to attend court and testify in his defence. Counsel urged court to dismiss this appeal.

23. This appeal before me is a first appeal, and in that regard, I am under a duty to reconsider and

evaluate the evidence afresh. In this duty I am guided by precedent in such cases as **Pandya –vs- R[1957] EA 336**; **Okeno –vs- Republic [1972] EA 32** and **Abdul Hamed Saif –vs- Ali Mohammed Sholan [1955] 22 EACA 270**.

24. In evaluating the evidence afresh however, am mindful of the fact that unlike the trial court I can neither see nor hear the witnesses to benefit from observing their demeanour. The appellant however expects this court to give an exhaustive examination of the whole

evidence and make its own findings and draw its own conclusions.

25. It is an undisputed fact that the complainant in this case did not adduce any evidence. In her judgment, the trial magistrate stated that she tried to interrogate the complainant during a session in chambers but she was unable to utter a single word even in Kisii language. Thus the trial court reached the conclusion that no meaningful evidence could be adduced by the complainant.

26. I have now carefully reconsidered and evaluated the evidence afresh. From the said analysis, the following issues arise for determination:-

1) Whether the age of the complainant was established beyond any reasonable doubt by the prosecution;

2) Whether there was credible evidence placed before the trial court that there was penetration which is a major ingredient of the offence of defilement;

3) Whether failure to call the complainant as a witness is fatal to the prosecution's case;

4) Whether on the basis of (1) and (2) above, the prosecution proved its case beyond any reasonable doubt against the appellant.

27. With regard to the first issue the evidence concerning the complainant's age comes from the testimonies of PW1 and PW4. PW1's evidence on this issue is as follows:-

"S is my eldest daughter. She is 4 years."

On the other hand, PW4's testimony touching on the age of the complainant is as follows:-

"I examined and filled P3 form for S O aged about $4^1/_2$ years."

28. PW4 then proceeded to produce the P3 form containing the results of the examination he carried out on the complainant. A close look at the P3 form does not say how PW4 was able to establish that the complainant in this case was $4^1/_2$ years old at the time of the alleged offence. Nor does PW4, in his testimony say how he was able to arrive at the conclusion that the complainant was $4^1/_2$ years old. This fact needed to be clearly established because even PW1 simply stated that her daughter the complainant was 4 years old. She did not give the year and/or date when the complainant was born. So, was the complainant 4 years or $4^1/_2$ years old as at 5th May 2005? Or could she have been 6 or 7 years?

29. As rightly pointed out by the appellant, proof of age in this case is vital ingredient of the charge facing the appellant. Under the **Sexual Offences Act, Section 8** thereof, which replaced **Section 145** of the **Penal Code**, the sentence for defilement is clearly set out dependant on the age of the victim. So that the younger the victim, the harsher the sentence. In this case, the appellant was sentenced to life imprisonment because the complainant was said to be 4 or $4^1/_2$ years old.

30. With regard to the second issue, PW1 stated first that she found the appellant "sleeping next to my daughter **"and"** the accused was defiling my daughter" and in her further testimony in chief, PW1 stated, "my daughter's private parts looked as if the accused person had had sex with her." On the other hand,

PW4 in his evidence in chief stated:- "On examination, labia major was swollen, the birth canal was inflamed tender and reddish. …. the vaginal swab that was done on the

minor on 5th May 2005 revealed:-

- *pus cells seen;*

- *no spermatozoa seen*

From my physical examination, the labia majora was tender and swollen and I concluded that penetration took place…. and the minor was infected with a sexually transmitted disease."

31. The Sexual Offences Act defines penetration as "--- the partial or complete insertion of the genital organs of a person into the genital organs of another person." The pertinent question in this regard is whether there is evidence on record to show that the appellant herein either partially or completely inserted his male organ into the complainant's female genital organ. In my humble view, that evidence is lacking. The complainant did not testify and PW1 did not assist the court in this regard because her testimony was to the effect that it appeared as if the appellant had had sex with the complainant. If it is indeed true, and it may very well have been the case, that the appellant was found in the act as PW1 wanted the court to believe, it would not have been difficult for PW1 to say what observation she made of the appellant's male organ after he had been subdued by the many women who answered to her screams and also PW3 who came to the scene. Or could it be true as alleged by the appellant that PW1 framed him? If there is such a doubt, the same must be for the benefit of the appellant; to the extent that the evidence as to whether or not there was penetration is on shaky ground. If the complainant had testified she would have perhaps pointed to her private parts into which the appellant put his thing, but in the absence of such evidence the medical evidence by PW4 is left hanging.

32. It follows from the above that the failure of the complainant to testify was fatal to the prosecution's case as PW1 did not adequately fill the complainant's shoes.

33. The final question is whether from the above, it can be said that the prosecution proved its case against the appellant herein beyond any reasonable doubt. In my humble view, the evidence fell short of the required standard. The evidence on the age of the child was not proved and the question as to whether or not the appellant had sex with the complainant and whether or not penetration occurred was not settled by the evidence on record.

34. In the premises and for the above stated reasons, I have reached the conclusion that this appeal ought to be allowed. The appeal is therefore allowed, the conviction quashed and the sentence of life imprisonment meted out to the appellant is set aside.

35. Unless he is otherwise lawfully held, the appellant shall be released from prison custody forthwith.

36. Orders accordingly.

Dated and delivered at Kisii this 23rd day of January, 2014

R. N. SITATI

JUDGE.

In the presence of:

Present in person for Appellant

Miss Cheruiyot for Respondent

Mr. Bibu - Court Clerk