REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 116 OF 2009

PAUL KARIRU KANGETHE…….....…….....……APPLICANT

VERSUS

REPUBLIC ……...……..……RESPONDENT

(From original conviction and sentence in criminal case number1916 of 2008in the Chief magistrate's court at Kiambu - Mr.K.Muneeni (PM) on 13th March, 2009)

JUDGMENT

The appellant was charged with the offence of defilement of a child contrary to Section 8(1) of the sexual offences Act, no. 3 of 2006. He was also charged with an alternative charge of indecent act with a child contrary to Section 11(1) of the sexual offences Act, No. 3 of 2006.

After a full trial, he was convicted of defilement and sentenced to twenty years imprisonment. This appeal arises from that conviction and sentence.

The evidence was brief. The complainant was then aged eight years, and was in their house with the appellant who lived with them at the time. He put her on her mother's bed and defiled her. She had not worn her undergarments at the time. It was her evidence that the appellant had told her to remove her petticoat before he removed his trousers and defiled her. Further, it was her evidence that he had done this previously on several occasions at night whenever her mother had gone to work. After the ordeal he asked her to leave.

When leaving she met with PW5 alias mama M who was outside her house. She noted her uneasiness and sought to establish why while urging her to speak the truth. PW3 told her that she had been handled in a manner she described as "***bad behavior***". PW5 testified that the complainant told her that Uncle Paul, the appellant, had done something shameful to her. She checked her private parts and found them smeared with oil and sperms. PW5 then went and informed the complainant's mother who unfortunately did not take any action. However, on telling her aunt PW2 and grandmother, she was taken to hospital and the matter reported to the police.

PW6 examined the girl in hospital and found that she had no scars on the hymen. She seemed to have already lost her virginity as she had multiple old hymen tears. He noted that the appellant must have had sex with her occasionally hence the old hymen tears. It was his conclusion that the appellant had defiled the girl as alleged.

PW1 completed the P3 form relating to the complainant on 11th November 2008 and it was his evidence that he found a greenish vaginal discharge on PW3. No blood or spermatozoa were however seen. PW2

testified that she was told by PW3 that she had been defiled the day before. She saw greenish pus in her private parts. PW4 conducted an Identification parade where the appellant was pointed out by the complainant.

In his defense, the appellant gave unsworn evidence. He denied the offence and instead urged that he had, upon arrest, pleaded to a charge of being drunk and disorderly yet he was charged with defilement.

The learned trial magistrate was satisfied that defilement had taken place. He was convinced that the complainant knew the appellant well before the incident. He made the following observation: -

> ***"The complainant knew the accused before the incident. She had already lost her virginity from that she had multiple old hymen tears as noted by Dr. Muhombe in her report."***

Further, he found the complainant credible as she was able to pick out the appellant from the Identification Parade.

I have done an independent evaluation of the evidence on record. PW6 who examined the complainant 7 weeks after the incident on 31st December 2008. In his examination he saw no tears of the hymen, neither did he see any discharge or spermatozoa on the complainant, contrary to the holding by the trial magistrate. However this was after 7 weeks (emphasis) from the date of the alleged offence.

The appellant has questioned the propriety and legality of the Identification parade. I note from the record however that the same was properly and lawfully conducted by PW4. The appellant did not challenge its propriety and legality when cross examining PW4. In any case, the appellant was well known to the complainant.

PW1 completed the P3 form on 11th November 2008. This I note was a period of 5 days after the alleged offence of defilement. PW3 however seems to imply that the P3 form was completed on the same day they had taken the child to the police after taking her to Hospital on 6th November 2008. There is no prejudice that has been occasioned to the appellant in this regard.

On the question of the preferred charge, PW2 testified of the charge of "defilement and disorderly" same as PW7 and I will not belabour myself on that issue as it is quite clear on record.

On the issue of crucial witnesses not being called, the appellant maintains that ***"a child"*** (the complainant's brother) who witnessed the ordeal and had been chased by the appellant, was not called to testify yet he was vital in determining his innocence. He however does not refer to the complainant's mother as a necessary witness who seems to me to be a crucial witness in this case. This selective preference could well be attributed to the fact that from the record they used to stay together and seemed to have a relationship which would work best in his favour. Besides, I also note that the mother was indeed hesitant to take action against the appellant even when she knew he had committed an offence. It is apparent on the face of the record that she was compelled to do so.

The most crucial witness in this case is the complainant. I agree with the trial magistrate who found her evidence to be credible and truthful. The *voir dire* examination administered on the complainant was adequate and indeed established that the complainant understood the meaning of an oath and knew the importance of telling the truth. The court record on the *voir dire* examination was satisfactory.

The trial magistrate remarked: - ***"The witness understands the meaning of the oath and sanctity of the bible. She shall give sworn testimony"***

The examination did achieve the purpose of *voir dire* interview. It is evident that the child appreciated the importance of telling the truth. In fact it is clear that the child was possessed of sufficient intelligence to enable her testify in the first place.

In addition, Section 124 of the Evidence Act, the proviso thereof thereof:

> ***"….where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

The Court of Appeal captured the import of the proviso to Section 124 of the Evidence Act in **MOHAMED v. REPUBLIC (2008) 1 KLR (G&F) 1175** when it stated that:-

> ***"The message, in our view is clear; the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."***

Once the magistrate believed that the complainant was telling the truth, he was entitled to rely on her evidence and arrive at a conviction on the same without the need for corroboration by other witnesses. It is widely established that the evidence of a child can be relied upon even when not corroborated. The learned trial magistrate believed the prosecution case. She had the benefit to see and observe the witness while she testified in court. In this case, however, the evidence of PW3 was supported by PW1, P.W 2, P.W.4, P.W.5 and P.W.6.

Under section 8(2) of the Sexual Offences Act, a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. She was eight years old. This is a grave offence perpetrated against a defenseless child. She is a vulnerable person as defined in Section 2 of the Act and will carry the scars for life.

The sentence handed down to the appellant was below the minimum provided by the law. Regrettably no notice to enhance the same was served upon the appellant.

In the end, I uphold the conviction and sentence and dismiss the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 27TH day of February, 2014

A.MBOGHOLI MSAGHA

JUDGE