REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 112 OF 2012

N K ……..…..…… APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. S.K. Mutai Senior Resident Magistrate delivered on 27/07/2012 in Mutomo Senior Resident Magistrate Criminal Case No. 118 of 2012)

****

(Before Hon. B. Thuranira Jaden J)

J U D G M E N T

1. The Appellant, **N K**, was charged with the offence of **defilement** contrary to **section 8(1) (3)** of the **Sexual Offences Act No. 3 of 2006**.

   The particulars of the offence were that on the 15th day of December 2011 at unknown time at **Kaateni Sub-location**, **Mutha Location**, **Mutomo District** within the **Kitui County** intentionally and unlawfully caused his penis to penetrate the vagina of **M M** a girl aged 13 years.

2. In the alternative the Appellant was charged with the offence of indecent assault with a child contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**.

   The particulars of the offence were that on the 15th day of December 2011 at unknown time at **Kaateni Sub-location**, **Mutha Location** in **Mutomo District** within the **Kitui County** committed an act of indecency with **M M** a child aged 13 years by touching her private parts namely breasts, vagina and thighs.

3. When the Appellant was arraigned in court, he pleaded not guilty. After a full trial, the Appellant was convicted and sentenced to twenty (20) years imprisonment.
4. The Appellant was aggrieved by both the conviction and sentence and appealed to this court. His grounds of appeal can be summarized as follows:-

a. **That the prosecution case was not proved beyond reasonable doubt.**
b. **That the evidence of PW1 and PW2 was not credible.**
c. **That the evidence of the Clinical Officer was inadmissible.**
d. **That the trial magistrate did not give the Appellant's defence serious consideration.**

5. During the hearing of the appeal, the Appellant relied on written submissions. The same basically expounded the grounds of appeal. The appeal was opposed by the State. The learned counsel for the State made oral submissions which I have duly considered.
6. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – *See* **Okeno –vs- Republic (1972) EA 32**.
7. The prosecution case was that on the material day at about midnight, PW1 **M M,** a thirteen (13) year old primary school girl was sleeping in her bed at home in the bedroom that she shared with her younger brother, twelve(12) year old **M M**. The Appellant who was a family friend and had come to visit shared the same room for the night with the children but slept in PW2's bed. At about 12.00 midnight, the complainant found the Appellant in her bed. The Appellant removed the complainant's clothes and had sexual intercourse with her.
8. The complainant fell pregnant and following inquiries from her parents, she revealed what had happened. The matter was reported to the police. The complainant was issued with a P3 form and referred to hospital for examination and treatment. After investigations the Appellant was arrested and charged.
9. In his defence, the Appellant stated that the complainant's father was his friend. That they used to visit each other and sometimes the Appellant would sleep in the house of the complainant's father who treated him as his own child. The Appellant stated that this case was a frame up and further stated that he was not informed of the reason for his arrest.
10. The trial magistrate subjected the complainant (PW1) and PW2 to a *voire dire* examination. This was unnecessary. Although **section 19** of the **Oaths and Statutory Declarations Act Cap 15 Laws of Kenya** provides that a child of tender years be examined by the court to see whether the child understands the nature of an oath, PW1 and PW2 were not children of tender age. **Section 2** of the **Children's Act** defines a child of **"tender years"** as any human being under the age of ten years.
11. The evidence of both PW1 and PW2 is that of recognition. PW1's evidence that the Appellant shared their room for the night is given credence by that of PW2, her brother who slept in the same bed with the Appellant. It was the evidence of both PW1 and PW2 that the Appellant shifted from PW2's bed to PW1's bed. The encounter by PW1 and PW2 was one that cannot fail to know who they share the bed with. According to the evidence of PW1 and PW2 the Appellant went to their home at about 6.00 p.m and spent the evening with them. Inquiries made by the complainant's father, PW3 **M M** and the investigations carried out by the Investigating Officer, PW5 **P.C. Samson Kerre** confirmed the evidence of PW1 and PW3.
12. The evidence of the Clinical Officer corroborated the complainant's. According to the Clinical Officer, the complainant was defiled and was twenty-eight (28) weeks pregnant at the time of the examination.
13. On whether a Clinical Officer is a competent expert witness as provided for under **section 48** of the **Evidence Act**, the matter was put to rest by the **Court of Appeal** in **Raphael Kavoi Kiilu – vs- Republic (2010) e KLR** where it stated as follows:-

> **"Under section 2 of the Clinical Officers Act (Training, Registration and Licensing Act Cap 260 (LOK) a clinical officer means:-**
>
> > ***"a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act……..."***
>
> **Section 7(4) of the Act States:-**
>
> ***"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette."***
>
> **The Act goes further to provide that such officers may engage in private practice *"in the practice of medicine, dentistry or health work for a fee."* It follows that the clinical officer did testify in this case on his area of competence."**

14. The defence by the Appellant acknowledges that he used to visit the complainant's father as a friend and would sometimes spend the night there. Although the Appellant has denied the offence, no reasons emerge from the evidence on record why the complainant's family would frame up the Appellant.
15. The trial magistrate who saw the witnesses testify and observed their demeanour believed the complainant. I have no reason to differ with the findings of the trial court. Although the evidence of the complainant's mother would have shed more light in the mater, her failure to testify was not fatal to the prosecution case.
16. Having re-evaluated the evidence first, I find no merits in the appeal. However, the trial magistrate erred in convicting the Appellant without stating whether the conviction was in the main count or in the alternative count. Consequently, I correct the same to reflect the Appellant's conviction as in the main count of defilement contrary to **section 8 (1) (3)** of the **Sexual Offences Act**. The sentence remains the same.
17. The appeal has no merits and is dismissed.

……

B. THURANIRA JADEN

JUDGE

Dated and **delivered** at **Machakos** this **24th** day of **February** 20**14**.

……

B. THURANIRA JADEN

JUDGE