REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 170 OF 2013

J M J……..……..APPELLANT

VERSUS

REPUBLIC …….....RESPONDENT

(Being an appeal against conviction and sentence in Murang'a Senior Principal Magistrate's Court Criminal Case No. 2654 of 2008 (Hon. J. Gathuku) on 31st December, 2009)

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to **section 8(3)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the 23rd day of August 2008 at [Particulars Withheld] in Murang'a district, within Central Province, the appellant intentionally and unlawfully had carnal knowledge of G W K a girl of 7 years.

The appellant faced the alternative charge of indecent act with a child contrary to **section 11(1) of Sexual Offences Act No.3 of 2006**. In this alternative count, it was alleged that on the 23rd day of August 2008 at [Particulars Withheld] in Murang'a District within Central Province the appellant intentionally and unlawfully did indecent act to G W K by touching her private parts.

After hearing both the prosecution case and the defence case, the learned magistrate came to the conclusion that the appellant was guilty of the alternative count of indecent act with a child contrary to **section 11(1) of the Sexual Offences Act No. 3 of 2006** and convicted him accordingly; he was sentenced to ten (10) years in prison.

Being dissatisfied with the conviction and the sentence, the appellant appealed against the decision of the learned magistrate. Amongst the grounds in his appeal, the appellant argued that the learned magistrate erred in law and in fact for relying on uncorroborated doctor's evidence; that the learned magistrate erred in law and in fact in failing to consider that there was a grudge between him and his wife; that the learned magistrate should have noted the failure of the prosecution to summon vital witnesses. The appellant also argued that the learned magistrate erred in law and in fact in convicting and sentencing him without considering his defence contrary to **section 169(1)** of the Criminal Procedure Code.

At the trial, the learned magistrate received the evidence of four prosecution witnesses and the appellant's sworn testimony. It is necessary at this stage of the appeal to reconsider the entire evidence that was

presented before him and evaluate it afresh before this court can form its own opinion bearing in mind that the court does not have the advantage of seeing and hearing the witnesses as the magistrate's court did.

The complainant was a child of tender years and so before the learned magistrate took her evidence, he took her through a *voire dire* examination; after the examination the learned magistrate came to the conclusion that the complainant did not understand the duty to speak the truth and based on this finding, he took the complainant's evidence unsworn. According to her evidence she was in her bedroom on the fateful day changing her dirty clothes when, the appellant, whom she identified as her father suddenly appeared and took her to his bedroom where defiled her. She gave a vivid account and illustrated to the court how she was defiled. At the material time she was staying with her grandmother who lived nearby since her mother had had gone back to her parents a few days earlier as a result of the differences between her and the appellant. The complainant told the court how painful the ordeal was and that soon thereafter she bled and some whitish discharge was also coming out of her genital organs. The appellant is alleged to have threatened her with death if she told anybody what had happened.

A few days after the complainant was defiled, she informed her mother what had happened; she was taken to the hospital where she was examined and treated by a doctor.

The complainant's mother, **F W (PW2)** told the court that indeed she was married to the appellant and the complainant was the first issue of their marriage. On 31st August, 2008 she was washing her daughter when she complained that she felt pains in her private parts whenever she urinated. Upon further interrogation, the complainant told her what her father had done to her while she had gone to her parents' home. When she checked her daughter she noticed unusual whitish substance on her; she took the complainant to the hospital where she was treated. This witness also lodged a complaint with the police who gave her a P3 form. The witness testified that she could not tell with any certainty when the offence was committed.

Police constable **Tom Onyango (PW3)** was the investigating officer; at the material time, he was based at Kahuro police station. He told the court that the report concerning this offence was made on 1st September, 2008 but the appellant was arrested almost two weeks later on 13th September, 2008 because, as he alleged, the appellant had gone into hiding. In his investigations, the officer took statements from the complainant and her mother and in his evidence in court he only reiterated what the two witnesses told him; he added that he referred the complainant to hospital for treatment and to ascertain whether the offence complained of was actually committed.

The clinical officer who examined the complainant and filled the P3 form was Martin Kariuki Mwangi. He examined the complainant on 15th September, 2008 and estimated the complainant's age to be seven years. At the time of examination the complainant had a history of having been sexually assaulted by a person she identified as her father. According to his findings which were contained in a P3 from that was admitted in evidence the complainant was said to be in a fair condition. He established that the complainant's hymen was broken though the penetration was not fresh. A discharge was noted on her private parts and there was indication of an infection which, in the medical officer's opinion, the complainant had contracted a sexually transmitted disease. The witness confirmed that though the offence was committed on 23rd August, 2008, the complainant was treated on 1st September, 2008 and her P3 form was filled on 15th September, 2008. The medical officer testified that the complainant was treated by his colleague and that his duty was to examine the degree of the injury.

In his defence the appellant gave a sworn statement and confirmed that on 27th July, 2008, he had quarreled with his wife as a result of which she left and stayed away for one week. He also said that the complainant was staying with his mother and that on 24th August, 2008, his mother summoned him to her house. On reaching there, he found his wife and after some discussions the appellant's wife agreed to rejoin him. On 12th September, 2008 at around 9.30 pm while in his house, the appellant heard his friend talking to his mother but was told to come back the following day. When he insisted he must see the appellant, the appellant came out of the house to meet him; it is then that he was told about a P3 form in

which he had been implicated as having sexually assaulted his daughter. He was later arrested, more particularly on 13th September, 2009 by a District Officer and two police officers and charged with the offences of defilement and indecent act with his daughter.

The appellant testified that on 23rd August, 2008 when the alleged offence is alleged to have been committed he was at working at Mwangi's home at [Particulars Withheld] and only went back to his house at 5 pm; Mwangi was his uncle. The appellant confirmed that the complainant was her eldest daughter who was then aged 8 and that she was living with the appellant's mother at the material time. He testified that while her mother was away she was staying with grandmother mother whose house was about twenty (20) metres away from his house.

In analysing the foregoing evidence, the first issue this court has to consider is whether the evidence of the complainant should have been taken. As noted earlier, before the learned magistrate took the evidence of the complainant he subjected her to a *voire dire* examination; at the conclusion of this examination the learned magistrate noted on the record that, "*complainant does not know the importance of telling the truth or meaning. She will give unsworn statement."*

When the learned magistrate established, as a fact, that the complainant did not understand the duty to speak the truth, there was no reason to take her evidence; her evidence was valueless. **Section 19** of the **Oaths and Statutory Declarations Act, Chapter 15,** Laws of Kenya, explains why her evidence was of no use to the case against the appellant; it says:

> ***"19. (1) Where in any proceedings before any court or person having by law or consent of the parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court , or such person as aforesaid, understand the nature of an oath, his evidence may be received, though not given upon oath, if , in the opinion of the court or such other person as aforesaid, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section."***

It is apparent from this provision of the law that while evidence of a child of tender years may be received though not on oath, the court must satisfy itself that first, the child is possessed of sufficient intelligence to justify the reception of the evidence and second, that he understands the duty of speaking the truth. In this case, nothing was said about the child's intelligence but the learned magistrate was convinced that the child did not understand the duty of speaking the truth. Having so found, reception of the complainant's evidence appears to be contrary to the provisions of **section 19 of the Oaths and Statutory Declarations Act** which expressly sets the conditions of taking unsworn evidence from children of tender years such as the complainant in the case against the appellant. Under that provision there was no justification for taking the complainant's unsworn evidence.

In the case of **Sakila versus Republic (1967) E.A** , the court (Platt, J as he then was) referring to the decisions in the cases of **Kibangeny Arap Kolil versus Republic** (supra), **Nyasani s/o Bichana versus Republic (1958) E.A 190**, **Fransisio Matovu versus Republic (1961) E.A 260** and **Oloo Gai versus Republic (1960) E.A 86** said at page 406 that:-

> ***"It is well established that before evidence of a person of tender years is admitted, a voire dire examination should be carried out in order that the court may satisfy itself that the witness is possessed of sufficient intelligence and that he understands the duty of speaking the truth in order to justify the reception of his evidence. And further that where it is clear that he understands the nature of the oath, his evidence may then be received on oath or affirmation. Where this procedure is not carried out and the evidence of a person of tender years is of a vital nature, it may be that the omission may occasion a miscarriage of justice."***

Again in the case of **Nyasani s/o Bichana versus Republic (supra),** which is one of the decisions that

the court in **Sakila versus Republic (supra)** relied on, the court of appeal said at page 191 that**:-**

> ***"It is the duty of the court under that section (that is section 19 of the Oaths and Statutory Declarations Act) to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and if the finding on this question is in the negative, to satisfy itself that the child "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth". This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there has been a due compliance with the section."***

The next question that begs an answer in this appeal is whether the offence of defilement or indecent act with a child was proved. With the exclusion of the complainant's evidence did the prosecution provide any other evidence to prove to the required standard the offence of the defilement or indecent act with a child? To answer this question, two witnesses were crucial; the complainant's mother and the clinical officer who examined the complainant.

Going back to the complainant's mother's testimony, it is noted that her daughter complained to her on 31st August, 2008 that she felt pain whenever she urinated. It is only after she enquired from the complainant about source of her pains that the complainant told her that she had been defiled by the appellant while her mother was away at her parents' home. As a result of the complainant's complaint her mother checked her and noticed an unusual whitish substance on her; it is then that she took the complainant to the hospital for treatment and also lodged a complaint with the police who gave her a P3 form.

In the P3 form that was admitted in evidence as prosecution exhibit 2 the findings of the clinical officer were that the complainant was indicated to be seven years old; she was assaulted and the injury sustained thereby was described as "*maim*" which term is defined in the P3 form itself as "*the destruction or permanent disabling of an external or internal organ, member or sense."* The hymen was found to have been broken and a discharge was noted on the complainant's genitalia. It was also established that the complainant may have contracted a sexually transmitted disease.

In my humble view, the testimony of the complainant's mother coupled with that of the clinical officer point to the fact that the complainant was sexually assaulted as contemplated under section **8(1) of the sexual Offences Act**. That section defines the offence of defilement; it states as follows:-

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***

The term "penetration" in **section 8(1)** of the Act is so crucial to the offence of defilement that, as a technical term, it is defined in Section 2 of the Act; it means "***the partial or complete insertion of the genital organs of a person into the genital organs of another person."*** There is no doubt that the findings of the clinical officer are consistent with what amounts to penetration as defined under this provision of the law.

Sub-section **(3)** thereof under which the appellant was charged prescribes the punishment for defilement; it says:-

> ***(3) A person who commits an offence of defilement with child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than 20 years.***

I do not understand why the appellant was charged under this section because the complainant's age was not between twelve and fifteen years. According to the evidence on record, the complainant was seven years and therefore the appropriate section under which the appellant ought to have been charged was section **8 (2)** of the Act which states:

> ***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.

However, the fact that an accused person is charged under **section 8 (3) of the Sexual Offences Act** rather than under **section 8 (2)** of the same Act is not fatal to the prosecution case against the accused person because **subsections (2), (3)** and **(4)** of section **8** of the Act only go as far as defining the penalties for an offence committed under **section 8(1).** In any event, under **section 186** of the **Criminal Procedure Code,** one may even be convicted of an offence for which he was not charged with if the court is of the opinion that he is guilty of that offence in a case where he is charged with the offence of defilement of a girl under the age of fourteen years; the complainant in the case against the appellant was aged seven.

The last question for determination is whether it is was proved to the required standard that the appellant is the person who committed the offence. The evidence of the complainant's mother is crucial in this respect; part of her evidence to court was as follows:

> "***On 31st August, 2008 at 7 pm I was washing G when she told me she was feeling pain where she urinates from. That was the first time she was feeling pain. I asked her why she was paining. She told me that her father had found her removing clothes when he was drunk. He had placed her on the bed and lay on top of her. She told me he entered her with his thing. She said he had removed his trouser. At the time this happened I had gone to my parents' home. I had problems with my husband. I stayed for about one week. I had gone back to collect my things. My mother in law told me not to go. It was the following day that G told me about what happened. The following day I took her to hospital. We were told to go to Kahuro station."***

What I gather from the complainant's mother is that she innocently stumbled on the evidence that her daughter, the complainant had been sexually assaulted; I say so because were it not for the pain that her daughter was feeling she would not have known that she had been sexually assaulted. As any other responsible mother, the complainant's mother must have been curious to know what could have happened to her daughter and that it is only after she made enquiries that the complainant opened up and related to her what had happened.

I have not found anything on record to doubt her testimony; while it is true that she had previously had some differences with the appellant which led her to go back to her parents, the evidence on record suggests the appellant's mother had brought them together and that they had made up and reconciled; indeed it is only after the complainant's mother had gone back to the appellant that she innocently discovered what had the appellant had done to their daughter. In my view, there is nothing on record that would persuade me to believe that the complainant's mother's testimony was made up because of the differences between her and the appellant prior to their reconciliation. I do not see any reason why she should have accepted to go back to her husband for the sole purpose of framing him. In his cross-examination the prosecution was able to establish that there was no reason why the complainant, in her statement both to the police and to her mother, could have implicated her father in a crime that he did not commit.

The evidence of the complainant's mother comprised what she saw and what her daughter told her and this evidence was corroborated by the clinical officer whose findings corroborated the aspect of evidence regarding the complaint's injuries and the discharge she noticed on the complainant's genitals.

In my humble view, it is apparent from the evidence of the complainant's mother and the medical officer that the complainant was sexually assaulted and circumstances under which she was assaulted pointed more to the appellant's guilt than to his innocence. In the Court of Appeal decision of **Simon Musoke versus Republic (1958) EA page 715** at page the court said;

> "… ***in a case depending exclusively upon circumstantial evidence he(the trial judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."***

This decision has been followed in the case of **Okeno versus Republic (1972) EA 32 at page 35** where the Court of Appeal said;

> ***"In our view the magistrate clearly appreciated that a conviction based on circumstantial evidence can only be had where the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."***

My conclusion is that there was enough evidence to sustain a conviction on the principal count of defilement contrary to section **8(2)** of the **Sexual Offences Act**. The evidence suggests that the appellant had time and opportunity to commit the offence with which he was charged and as stated in the decision of the cases I have cited, the inculpatory facts were incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilt. I cannot discern any other co-existing circumstances which would destroy or weaken the inference that the appellant was guilty of the principle count of defilement.

While responding to the appellant's submissions, Mr Njeru for the state asked the court to substitute the conviction of the appellant on the alternative count of indecent act with a child with the principle count of defilement. As noted there was sufficient evidence to convict the appellant on this principal count; however, I have noted that the state did not warn the appellant in advance that it would be seeking for the enhancement of the sentence before the appeal was argued. Considering the severity of the sentence which the appellant faces should the charge on which he was convicted be substituted, it was necessary that he be given adequate notice prior to the hearing of the appeal to enable him reconsider whether he would wish to proceed with the appeal in view of the state's intentions. I do not consider the state's quest for alteration of the conviction and enhancement of the sentence while responding to the appellant's submissions to be such a notice. Had this notice been issued, this court would, no doubt, have exercised its powers under **section 354 (3) (a) (ii) and (b) of the Criminal Procedure Code**, and altered the conviction on the offence of indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act for that of defilement contrary to **section 8 (2) of that Act**. Accordingly, the sentence of 10 years imprisonment imposed upon the appellant would have properly been substituted with that of imprisonment for life.

In the absence of adequate notice to the appellant all I can say for now is that the appellant was lucky to escape with a conviction of a minor offence and a lesser sentence than what he deserved. His appeal is dismissed in any event.

Signed, dated and delivered in open court this 21st day of March, 2014.

Ngaah Jairus

JUDGE