REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.93 OF 2011

G M K..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

[Appeal from original Conviction and Sentence in Nakuru in C.M.CR. No.70 of 2010 by Hon. E. Tanui, R.M. dated 22nd March, 2011]

JUDGMENT

1. The Appellant, GMK, was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**, No.3 of 2006. The particulars of the charge were that on the 11th day of May, 2010 at [particulars withheld] in Nakuru District within Rift Valley Province, unlawfully and intentionally did an act which caused penetration of his male genital organ namely penis by inserting it into female genital organ namely vagina of JW,(**the Complainant**) a child aged 11 years.
2. The facts of the case as recorded by the trial court are that on 11th May, 2010, the Complainant's mother **(P.W.2)** left for work at about 6a.m. She left the Complainant, her sibling and the Appellant in the house. The Complainant and her sister were getting ready for school whilst the Appellant was sleeping in an adjacent room. As the Complainant's sister was taking a bath, the sister requested the Complainant to retrieve her panties from the bedroom where the Appellant was sleeping. Upon entering the room, the Appellant pulled the Complainant onto the bed, covered her mouth and defiled her. The Complainant confided to her class teacher, **J W (P.W.3)** after the deputy headmaster noticed her continuous crying in school who then pointed this out to the class teacher. She was taken for examination at Nakuru Provincial General Hospital where a P3 Form was completed by Dr. Siro. A report was made at Nakuru Police Station and the Appellant was subsequently arrested
3. The Appellant denied the offence and gave a sworn statement in defence. He stated that the Complainant's mother had fabricated the story after he had won a green card to the United States. According to him, the Complainant's mother felt that the Appellant would discontinue his financial support to the family. She thus fabricated the story to deny him the opportunity of pursuing his green card. The Appellant raised the defence of ***alibi*** that on the night of 10th May, 2010 he visited **S T G (D.W.2)** where the two cooked and shared dinner. He left D.W.2's house around 10p.m. and went to sleep in his tent-house which was approximately 100 metres from that of D.W.2's.
4. The Appellant was convicted by the Resident Magistrate's Court at Nakuru and was sentenced to life imprisonment.
5. Being aggrieved by both conviction and sentence, the Appellant filed a Petition of Appeal on 5th

April, 2011 and Amended Grounds of Appeal raising the following grounds of appeal:

a. **that the learned magistrate erred in law and fact convicting the Appellant on fabricated evidence;**
b. **That the learned magistrate erred in law and fact by not taking to account the evidence of the medical doctor;**
c. **that the evidence of the prosecution was flimsy and insufficient to sustain the charge;**
d. **that the learned magistrate erred in law and fact in rejecting the defence tendered by the Appellant;**
e. **that the sentence imposed on the Appellant is harsh and severe given the circumstances.**

6. The appeal was heard on 24th February, 2014 with Mr. Marete, appearing as Prosecuting Counsel for the State and the Appellant was present in person. The Appellant relied on his written submissions which are to the effect that the prosecution did not prove its case beyond reasonable doubt; that the evidence of the prosecution was scanty and contradictory. In particular, he submitted that the Complainant in her testimony stated she did not bleed which is inconsistent with the medical observation of a freshly broken hymen, inflamed labia majora and minora. Further, he submitted that the Complainant was observed on 24th July, 2010, which was over one month from the date of the alleged defilement. The doctor who observed the Complainant was also never called by the prosecution to testify. According to him, the prosecution failed to prove its case beyond reasonable doubt and prayed that his appeal be allowed and the conviction be quashed and sentence set aside.
7. In opposing the appeal, Mr. Marete, learned Prosecuting Counsel for the State submitted that the sequence of events as narrated by the Complainant are watertight. The Complainant was crying when she reached school and upon inquiry she confided to her class teacher. The mother of the Complainant was called by the school and the mother then took her to the hospital for examination. She was observed and the doctor formed the opinion that the Complainant had been defiled. According to Counsel, the trial magistrate rightfully disregarded the appellant's *alibi*. Counsel submitted that the conviction was safe and the sentence imposed was as per the law provided and he urged the court to not to interfere with the conviction and sentence.

<u>ISSUES FOR DETERMINATION</u>

8. Taking into consideration the submissions made by both parties this court finds the following issues.
   a. Whether the evidence adduced was insufficient and whether the trial magistrate erred and relied on wrong principles of law to form a basis for conviction?
   b. Whether the trial magistrate erred in disregarding the Appellant's defence of ***'alibi'***?
   c. The sentence passed.

<u>ANALYSIS</u>

9. This being the first appellate court it is incumbent upon this court to re-assess and re-evaluate the evidence on record afresh and arrive at it's own independent conclusion bearing in mind that this court did not have the benefit of hearing and seeing the witnesses testifying. Refer to the case of **<u>Okeno</u> V. <u>Republic</u>, (1972) EA 32.**
10. The Appellant submitted that the trial magistrate convicted him on the only available evidence of a minor and that no one else saw the actual commission of the offence. and that the main ingredient of the offence which was **'penetration'** was not proved by the prosecution to the desired threshold as required in law.
11. This court notes that the Complainant was a minor and the court is satisfied that the trial magistrate properly conducted voire dire examination in the format of a question and answer and upon establishing that the minor was intelligent and understood the meaning of an oath and the need to tell truth, the trial magistrate then proceeded to take the Complainant's evidence on oath.
12. From the evidence on record this court notes that the Appellant was a person known to the Complainant as he was her mother's companion and that identification was therefore not an issue

and this court is satisfied that he was positively identified. The Complainant gave a narrative of what transpired on that fateful morning when she was defiled. The Appellant raised the ground in his appeal of there being no one else who saw the commission of the offence.

13. At this court at this juncture makes reference to the proviso of **Section 124** of the **Evidence Act** which reads as follows;

> **"Provided that 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 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."**

14. This proviso provides an exemption in sexual offences on the need for corroboration, particularly and in most instances, there will always be no eye witness to the commission of the offence.
15. This court after re-assessing and re-evaluating the evidence of the Complainant on record on the issue of commission of the offence notwithstanding the absence of corroboration finds the trial magistrate believed the evidence of the Complainant on defilement and was satisfied that the child was truthful and was telling the truth and from the circumstances of the case found that the evidence pointed strongly to the guilt of the Appellant and to no one else.
16. The above notwithstanding this court notes that there was corroboration of the injuries. In that the complainant went to school after being defiled and the Deputy Head teacher noticed that Complainant was distressed and requested **J W (PW3)** to intervene whereupon the complainant was taken to Nakuru PGH and upon examination was found to have a fresh broken hymen and inflamed labia majora and minora. **Dr Samuel Onchere (PW4)** testified and confirmed finding the injuries to the complainants private parts and formed an opinion that the complainant had been defiled and he produced exhibit **'PExb.No.1(a)'** a duly signed P3 Form, in support. Upon re-evaluation of this evidence this court is satisfied and finds the Doctors evidence corroborates the evidence of the complainant in that she had been defiled and that there was penetration.
17. In this case the Appellant placed reliance on a defence of **'alibi'** and it was the testimony of **S T G (DW2)** that they both had dinner together at the witness's tent at the IDP camp**.** At 10.00 pm the Appellant excused himself and left for his tent that was 100 metres away from that of the witness. The witness clearly stated in his evidence that he did see the Appellant the next morning.
18. The Appellant in his defence says he was not at the scene at the scene at the time of the alleged commission of the offence of defilement, took place. The defence of alibi was challenged by the prosecution and from the time lines which were between 10pm (when the Appellant was last seen by his witness) and 6am (when the offence was committed) the trial court correctly noted that the Appellant had ample time and opportunity to commit the offence .
19. From the evidence adduced and after perusing the exhibit marked as **"D Exb.2**" this court is satisfied that the Appellant did not prove the allegations of envy and financial dependence and that the trial magistrate correctly and properly found that the exhibit **DExb.No.2** was not a Green Card and correctly disregarded the defence of the Appellant that the charges were fabricated by the Complainant's mother (**PW2**) due to envy.
20. The age of the complainant is stipulated in the exhibit produced by the doctor and this court finds that the complainant's age was correctly determined and proved and that the trial court was properly guided and that the conviction and sentence were proper and had a sound legal basis. This notwithstanding, this court has perused the proceedings and notes that the Appellant is a first offender. The sentence prescribed is rather harsh and excessive for a first offender. This court makes reference to H.C.CR.A. No.36 of 2013 **JKG** V. **Republic** (2014 eKLR and is persuaded by the observation made by Karanja, J that the punitive section is not framed in mandatory terms. This court opine that the sentence provided is a maximum sentence.

FINDINGS

21. This court finds that the prosecution proved the case to the desired threshold and this court further finds that the trial magistrate applied the proper principles of law in finding the Appellant guilty.
22. This court finds that the defence of ***alibi*** was not strongly corroborated by the Appellant's witness and that the trial magistrate was correct in disregarding it.

23. For the reasons stated above, this court finds the conviction to be safe and proper but finds the sentence to be harsh and excessive for a first offender.

CONCLUSION

24. The Appeal is found to be lacking in merit on the issue of conviction.
25. The conviction is hereby upheld.
26. The sentence is hereby set aside and substituted with a sentence of ten (10) years from the date of judgment, that is 22nd March, 2011.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 30th day of June, 2014.

A. MSHILA

JUDGE