REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 74 OF 2014

(FORMERLY KISII HCCRA NO. 65 OF 2013)

BETWEEN

MORRIS MONGORI GISIRI ……..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 486 of 2012 at Principal Magistrate's Court at Kehancha, Hon. A. P. Ndege, Ag. PM dated on 16th July 2013)

JUDGMENT

1. The appellant, **MORRIS MONGORI GISIRI**, was charged with the offence of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act, 2006***. The particulars of the offences were that on the diverse dates between 24th September 2012 and 1st October 2012 at [Particulars Withheld] in Kuria West District the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SMM a child aged 13 years.

2. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act***. He was convicted on the alternative charge and sentenced to serve 13 years imprisonment.

3. He now appeals against the conviction and sentence on the basis of the grounds set out in the petition of appeal filed on 26th July 2013. The grounds may be summarized as follows; that the prosecution did not supply him with witness statements, he was forced to use Kiswahili instead of his mother tongue which is a language he was comfortable with, that material witnesses were not called to support the prosecution case, that the medical evidence did not support the conviction and that the age of the complainant was not proved. The appellant, who appeared in person, supported by the grounds of appeal with written submissions.

4. Learned counsel for the respondent, Ms Owenga, supported the conviction and submitted that the prosecution proved all the elements of the offence and that the sentence was proper and legal.
5. As this is the first appeal, the court is enjoined to review all the facts and evidence and come to its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**).

6. In order to deal with the appeal it is necessary to outline the material facts as they emerged from

the evidence in the subordinate court. The thrust of the prosecution case was that the appellant abducted the complainant and kept her as his wife. PW 1 testified that she was a standard 7 primary school student and that on 24th September 2012 she was coming from school in the evening. At about 6.30 pm she met the appellant, whom she knew as a friend of her father. He grabbed her, threatened her with a knife, took her to his house, locked her up and had sexual intercourse with her. He then took her to his cousin's place at Ikerege where he cohabited with her as his wife. During that time he continued to have sexual intercourse with her. She stated that on a certain Tuesday her father came to rescue her. He informed her that the appellant had been arrested. She was taken to Isebania Hospital she where was examined and a P3 form filled.

7. PW 3, a clinical officer at Isebania District Hospital, testified that PW 1 was 13 years old and that she was seen at the hospital on 3rd October 2012. He examined her vagina which was normal. There were bruises on the thigh region and the absence of the hymen. He sent specimens to the laboratory which revealed HIV and spermatozoa. She was given the necessary treatment. He concluded that there was penetration. He filled the P3 form and signed it. On the same day, PW 3 examined the appellant. He did not observe any injuries and upon conducting urinalysis, there was presence of pus cells. He prepared a P3 form for the appellant.

8. PW 3, the father of PW 1, testified that on 24th September 2012, his daughter, aged 13 years, did not come back home from school. He made efforts to look for her and on the next day 25th September 2013, his wife told him that she was at the appellant's place. He confronted the appellant but the appellant denied that he had his daughter. He later received an anonymous call informing him that his daughter was at the appellant's home. He sent his young sons to the appellant's home to confirm. They came back and reported to him that she was there and that they had been chased by the appellant with a panga. He reported the matter to the school where his daughter was attending, to the local chief and at Isebania Police Station. PW 1 made several efforts to try and lure the appellant until they laid ambush with his three brothers who captured him and took him to the police station. He revealed where PW 1 was whereupon they rescued her.

9. PW 4, a police officer, testified that on 1st October 2012, PW 2 made a report at Isebania Police Station that his daughter has been missing since 24th September 2012. She also confirmed that the appellant was brought to the station on 1st October 2012 by members of the public and officers from Mabera AP Camp. She recorded statements and issued a P3 form to PW 1. PW 5, an administration police officer, testified that on 1st October 2012, the appellant was brought to the Motemorabu AP Camp by members of the public on the allegation that he had eloped with a child. He was arrested and taken to Isebania Police Station.

10. When the appellant was put on his defence, he gave an unsworn statement. He stated that on 30th September 2012, he was asleep in his house when people, who claimed that they were government officers, came to his house and arrested him. They assaulted him, tied him and took him to Motemorabu AP Camp without telling him the reason for his arrest. He was later taken to Isebania. On 3rd October 2010, he was taken to hospital and examined. He stated that he did not know anything about the charges facing him.

11. In order to secure a conviction for the offence of defilement under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must establish that the person has committed an act which causes penetration with a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

12. The first issue for consideration in this appeal is whether the accused committed the offence. PW 1 knew the appellant as a friend to his father. The threats and subsequent abduction occurred in the evening of 24th September 2012 at about 6.30 pm. It was not dark and the conditions were favourable for such recognition. Furthermore, PW 1 stayed the appellant for at least a week hence removing any doubts as to his identity. The prosecution evidence was solid as to the identity of the

appellant as the person who committed the act.

13. The next issue is that of penetration. This was proved by the testimony of PW 1. Her account of her ordeal was very clear and consistent and was not contested by the appellant in cross-examination. The presence of spermatozoa, a torn hymen and thigh bruises as confirmed by PW 2 corroborated the fact that there was penetration. There is no evidence that PW 1 had sexual intercourse with any other person other the appellant during the time she was abducted. The fact that the appellant may have had any infection or disease with which he did not affect PW 1 does not negate the fact of penetration. It only means that the PW 1 was not infected.

14. The appellant argues that did not call material witnesses like a person from the school to testify that PW 1 was missing. **Section 143** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** states that, *"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact."* Although it is not necessary for the prosecution to call all or any number of witnesses to prove its case, in ***Bukenya and Others v Uganda*** **[1972] EA 549**, the Court held that that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. A witness from the school would only confirm that PW 1 was away from school for the period she was abducted by the appellant. The testimony of PW 1 was clear and uncontested and I do not think any adverse inference can be drawn in this case as her absence was also confirmed by the testimony of PW 1 and the fact that he went to report the matter to the police as stated by PW 4.

15. It is in light of the prosecution evidence that the appellant's defence, which amounted to a mere denial, could not stand scrutiny. The testimony of PW 4 and PW 5 confirms that fact and manner of his arrest. The appellant did not put any questions to them to suggest that his arrest was without any cause. His testimony did not touch the events that were so clearly laid out by PW 1. I therefore find and hold that there was sufficient evidence that it is the accused who defiled PW 1.

16. The issue of proof of age is a question of fact. The age of the child PW 1 proved that by the production of the birth certificate which shows she was born on 14th May 1998. It is clear that PW 1 was a child and for purposes of the sentence under **section 11(1)** of the ***Sexual Offences Act***, the minimum sentence is 10 years imprisonment. The sentence imposed on 13 years was neither harsh nor excessive. The minimum sentence was enhanced taking into account the fact that the appellant abducted PW 1.

17. The appellant complains that he was not supplied with witness statements. From the record, it is clear that learned magistrate ordered that he be supplied with statements on 31st October 2012. On 18th February 2013, the appellant prayed for the case to start afresh as he did not have witness statements. The learned magistrate declined to start the matter afresh but called upon the appellant to indicate which witnesses he had an issue with and who should be called for further cross-examination. The accused responded, *"The doctor, so that he comes and clarify how he stated that he found my semen and genitalia. I have no issues with PW 1, PW 3 and PW 4 the police officer. Only PW 2 – the doctor."* The doctor was recalled and cross-examined by the appellant. I therefore find no basis for the allegation that the accused was not supplied with statement. Once the issue was raised before the learned magistrate took steps to ensure that the appellant did not suffer any prejudice by allowing him to re-call the witnesses of his choice.

18. Likewise, I find no merit in the contention that the proceeding proceedings were conducted in Kiswahili, a language he was not comfortable with. Under **Article 50(2)(m)** of the Constitution, the accused is entitled, *"to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."* The issue here is not whether the accused preferred to conduct the trial in Kuria but whether he understood the language the trial was conducted in. The trial was conducted in Kiswahili and it evident from the record that the appellant actively participated in it and at no time did he raise the issue of language as he did the issue of witness statements during the trial.

19. The learned magistrate concluded that the main count having read "**section 8(1)(3)"** of the ***Sexual Offence Act*** was not clear and he therefore dismissed the charge as defective. While the section quoted in the charge sheet does not exist in the statute, the charge sheet complied with **section 134** of the ***Criminal Procedure Code*** which states;

Every charge shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." [Emphasis mine]

20. The charge as framed was lucid. It disclosed the offence of defilement. The error was not fatal to the charge nor did it result in a failure of justice. Such an error is curable under **section 382** of the ***Criminal Procedure Code*** which provides;

382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

21. In the circumstances, the learned magistrate was wrong to dismiss the principal charge but as the State did not cross-appeal in this issue, I shall not interfere with the conviction on the alternative charge.

22. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at MIGORI this 21st day of November 2014.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.