IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 63 OF 2014

(FORMERLY KISII HCCR APPEAL NO. 110 OF 2013)

BETWEEN

PETER MOKAMI NAHASHON.....APPELLANT

AND

REPUBLIC …..……..…….. RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 28 of 2012 at Principal Magistrate's Court at Kehancha, Hon.A. P. Ndege, Ag PM dated on 22nd January 2013)

JUDGMENT

1. In the subordinate court, **PETER MOHAMI NAHASHON** was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(4)** of the ***Sexual Offences Act, 2006***. The charge against the appellant was that on 15th January 2012 at [Particulars Withheld] in Kuria East District in Migori County, he intentionally caused his penis to penetrate the vagina of EMM a child aged 14 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts.

2. The appellant was convicted on the alternative charge and sentenced to 8 years imprisonment. He now appeals against the conviction and sentence on the grounds set in the petition of appeal filed on 8th October 2012. The grounds may be summarised as follows; that he was initially charged with defilement but was later convicted of the offence of committing an indecent act which led to a miscarriage of justice, that he was framed by the principal prosecution witnesses, that he was convicted in the absence of the evidence of the medical officer and the investigating officer and that the sentence was harsh and excessive.

3. Ms Owenga, learned counsel for the State, opposed the appeal and submitted that the prosecution had proved the elements of the charge and that there was sufficient evidence to support the conviction.

4. The appellant's grounds of appeal call for an appreciation of the evidence before the trial court. The prosecution marshalled a total of 6 witnesses.

5. The complainant, PW 1, testified that she was 14 years old and was a standard 7 student. She recalled that on 15th January 2012 at about 9.00 am she was at Gwitembe Centre where the appellant owns a shop. She recounted how the appellant called her into the shop, locked her in the shop and forcefully had sexual intercourse with her. He gave her two bottles of lotion which she identified to the court. Her screams attracted people to the shop. Among those people who came was PW 3. PW 1 stated that the appellant tried to bribe PW 3 with Kshs 100/= to get the people to go away. Her brother, PW 2, came to the shop

and broke the door and had a fight with the appellant. PW 1 was taken to Gwitembe AP camp then to Ntimaru Police Station. She was later taken Ntimaru Hospital where she was examined.

6. PW2 testified that on the material day at about 9.00 am, PW 3 and PW 4 came and told him that his sister, PW 1, had been locked in the shop by the appellant. He followed them and entered the shop where he called the appellant. The appellant came out. As he came out to open the main door, PW 2 went in and opened the door for PW 1 who went out. He interrogated the appellant for a while and went to get PW 1. In the meantime, the appellant fearing lynching by the people who had gathered outside went to the nearby AP camp to seek refuge. He noted that PW 1 had two bottles of lotion which the appellant gave her. He took PW 1 to report the matter at the AP camp and then Ntimaru Police Station. He later took her to hospital.

7. PW 3, a student, testified that he was at Gwitembe and when he passed by the appellant's shop he heard someone screaming. He called his friend, PW 4, to come and hear the crying. He decided to go into the shop and pretend to be a customer. At the time people started gathering outside. When he moved to the rear of the house, the appellant came and asked what was happening and he asked him who was crying in the shop. The appellant panicked and offered him a Kshs 100/= bribe to chase the people away. He declined. When the girl came out he recognised PW 1 whom she knew. She had two bottles of lotion. She was arrested by people. He testified that PW 2 was attracted by the crowd of people and he came and saw his sister.

8. PW 4, a student, testified that he was playing pool at Gwitembe on 15th January 2012 at about 11.00 am when PW 3 called him to come and hear a girl crying in the appellant's shop. When they arrived PW 3 told him to remain in front of the shop while he went to the rear. He saw the appellant talk to PW 3. He saw PW 2 and called him to come to the shop where he found PW 1. When PW 2 came he opened the door for PW 1 to escape while the appellant also escaped through the rear door.

9. PW 5, an administration police constable at Gwitembe AP Camp, testified that on 15th January 2012 at about 12.30 people came to the camp with a male suspect and a girl. They alleged that the suspect had defiled the girl. The girl had in her possession two bottles of lotion. They took possession of the lotions, recorded the complaint, re-arrested the suspect and escorted the girl and suspect to Ntimaru Police Station. PW 6, a police officer from Ntimaru Police Station, testified that on 15th January 2012 at about 2.00pm he received appellant and PW 1 in the company of officers from Gwitembe AP Camp. He also received the two bottles of lotion which were handed over to him. He recorded statements and issued P3 forms for both the appellant and PW 1 to examined. He decided to charge the appellant.

10. After the close of the prosecution case, the appellant was put on his defence. He elected to give sworn testimony. He stated that on 15th January 2012, he was at his shop when PW 2, PW 3 and PW 4 entered the shop. PW 2 grabbed him and beat him on the head. The other two entered the inside of the shop, opened the drawer and removed money and items from the shop. Customers who were there were screaming. The three escaped towards the nearby AP camp. He closed the shop and went to report the matter to the AP camp where he found AP officers who interrogated him and recorded his statement. While this was happening the people who had broken into his shop came into the camp accompanied by members of the public. They said they had come to report. After a while he was told to get into a room and forced to state that he was with a girl in the shop. He stated that he saw the girl in the camp for the first time. He was later taken to Ntimaru Police Station and later to for treatment at Ntimaru Hospital. He contended that he had been assaulted. He denied that he defiled the complainant.

11. The defence witness, DW 2, stated that on 15th January 2012 at about 9.00 am, he was at the appellant shop, when PW 2, PW 3 and PW 4 came into the shop and knocked on the counter door. The appellant refused to open whereupon PW 1 used a crow bar to break it. They all attacked the appellant, ransacked the shop and left with phone cards, watches and other items. He tried to intervene without any success and he left screaming. When they went to the AP camp they told that they were not going to record the statement. He did not see PW 1 at the shop.

12. After considering the evidence, the learned magistrate was satisfied that the prosecution had proved its case and subsequently convicted the accused. The grounds set out by the appellant call upon the court to re-evaluate the evidence afresh and reach its independent conclusions having regard to the fact that it never heard or saw the witnesses testify. This is the task of the first appellate court as elucidated in ***Okeno v Republic*** **[1973]EA 32**.

13. A person is said to have committed an act of defilement under **section 8(1)** of the ***Sexual Offences Act*** when the person commits 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."*

14. The first issue for consideration is whether the appellant committed the offence. In his defence he states that he did not know PW 1 and only saw her at the AP Camp. His presence at the shop on the material date and time is not in doubt. The presence of PW 1 at the shop was confirmed by PW 2, PW 3 and PW 4 who all placed her at the shop. PW 1's testimony how she was assaulted was very clear. The chain of events leading to the arrest of the appellant remained unbroken confirming the fact that the appellant and PW 1 were present at the shop at the same time.

15. The appellant's defence when considered with the prosecution evidence does not have merit. Despite intense cross-examination by the counsel for the appellant in the trial court, he did not put any questions to the prosecution witnesses to suggest that the appellant was robbed by PW 2, PW 3 and PW 4 and that the administration police officers were accomplices to frame him the offence. Moreover, DW 2 who said he had witnessed what could be a serious offence of robbery with violence did not report it to the police. I also find that the appellant's defence was an afterthought, as the defence successfully objected to an adjournment to enable the prosecution call the clinical officer who examined both the appellant and PW 1. The said officer would have confirmed that the appellant sustained the injuries during the alleged robbery.

16. PW 1 stated gave a graphic description of how she was defiled by the appellant. Her screams were heard by PW 2 and PW 3 who were near the shop. PW 1's testimony that she was enticed by the appellant to have sex with him by giving her two bottles of lotion was confirmed by PW 2, PW 3, PW 4 and PW 5 who saw the bottles of lotion which were produced in evidence.

17. The appellant contends that the prosecution did not prove penetration as it did not call the clinical officer who examined PW 1 and the appellant. In ***Andrew Cauri Ndungu v Republic*** **NAI CA Criminal Appeal No. 132 of 2008 [2013]eKLR,** the Court of Appeal stated that; *"We agree that there are instances in which an accused person ought to be medically examined before a court of law can positively connect him to commission of an offence, but we do not think that in this particular case there was dearth of evidence to enable the two courts below reach a conclusion that it was the appellant who defiled the complainant. Even in the absence of a medical examination on the appellant, there was sufficient evidence to enable the trial court reach the finding that it arrived at. We must, therefore, reject the third ground of appeal."*

18. In my view, the medical evidence would only go to corroborate the testimony of PW 1. The testimony of PW 1 does not require corroboration as the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** states that,

> *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 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.*

19. Taking PW 1's testimony together with that of PW 3 and PW 4 and the chain of events leading to the arrest of the appellant, I find and hold that penetration was proved beyond reasonable doubt, lack of medical evidence notwithstanding. The learned magistrate gave the appellant the benefit of doubt due to the lack of medical evidence and reduced the offence to one of committing an indecent act with a child.

Under **section 361(4)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***, the court in entitled to convict an accused of a lesser but cognate offence where the principal offence is not proved and there is evidence to support a lesser offence. In this case though, the charge against the appellant included the lesser offence as an alternative charge. In the circumstances, there was no miscarriage of justice as a result of the conviction. As the State did not cross-appeal on this point the conviction shall remain undisturbed.

20. Proof of age is required to establish that the victim is a child and secondly to establish the level of punishment where the offence is that of defilement under **section 8** of the ***Sexual Offences Act***. In this case, the appellant was convicted of an indecent act with a child therefore the proof necessary was that the victim was below the age of 18 years. Proof of age is a question of fact and in this case, there is sufficient evidence from the testimony of the PW 1 that she was 14 years and was attending primary school in Standard 7. I find that this was sufficient evidence to establish the fact that she was a child.

21. The thrust of the appellant defence was to deny the offence and imply that he was framed. Having considered the entire evidence as laid out above, the appellant's defence is weak tea and could not in any way dent the prosecution evidence. I therefore find and hold that he was properly convicted and I therefore affirm the conviction.

22. The minimum sentence under **section 11** of the ***Sexual Offences Act*** is 10 years imprisonment. The sentence imposed of 8 years which was below the minimum provided by the law. Although the State did not give notice of enhancement of the sentence, the sentence prescribed by statute is the minimum sentence hence the trial court lacks discretion to impose a lesser sentence. The sentence was an illegal sentence and this court is entitled to intervene to restore the correct sentence. I set aside the sentence of 8 years imprisonment and substitute it with the minimum sentence of 10 years imprisonment.

23. The conviction is affirmed and the sentence is enhanced to 10 years imprisonment. The appeal dismissed.

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

D.S. MAJANJA

JUDGE

Appellant in person

Ms Owenga, Senior Prosecution Counsel, instructed by Office of the Director of Public Prosecutions for the respondent.