IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 309 OF 2008

(From original conviction and sentence in Criminal Case No. 93 of 2008 of the Chief Magistrate's Court at Nakuru – E. TANUI, RM)

STEPHEN NDUNGU NJOGU……...……..APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

This is an appeal by Stephen Ndungu Njogu who was charged with the offence of defilement contrary to **Section 8(1)** and **(2)** of the **Sexual Offences Act 2006** before Ms Tanui, Resident Magistrate, Nakuru, in Criminal Case No. 93 of 2008. It was alleged that on 30/5/08, at Nakuru District, unlawfully had sexual intercourse with EM, a child aged 14 years old. In the alternative, he faced a charge of indecent act contrary to **Section 11(1)** of the **Sexual Offences Act**.

The appeal was supported by the grounds of appeal filed in court on 29/5/2013. The grounds can be summarized as follows:-

1. **That the conviction was based on a defective charge sheet;**

2. **That the medical evidence did not link him to the offence;**

3. **That the magistrate failed to comply with Section 19 of the Oaths and Statutory Declaration Act;**

4. **That the court erred when it relied on the evidence of a single identifying witness;**

5. **That the prosecution failed to call material witnesses to the case;**

6. **That the conviction went against the weight of the evidence adduced.**

The appeal was not opposed. Ms Idagwa, the learned State Counsel submitted that the witnesses gave contradictory evidence on the age of the complainant; that whereas the charge sheet indicates that she was 14 years of age, the Investigation Officer said she was 9 years old, while the prosecutor said she was 6 years; that no birth certificate was produced and the treatment cards and P3 form did not indicate the complainant's age. Counsel urged that the age is important in determining the sentence that the court will impose upon conviction; that the mother of the complainant was not called and there was no basis upon which the court convicted the appellant.

This being the 1st appellate court, it behoves me to evaluate and analyse the evidence a new and come up with my own independent findings and conclusions.

Before the trial court, 3 witnesses testified. The complainant testified as PW2. The court observed that due to her tender age she did not seem to understand the meaning of the oath and the court directed that she gives unsworn evidence. She told the court that she was 8 years old, and in class 3 at Primary School. She recalled that her father had chased her from the house at night for losing 5/-. She met the appellant who introduced himself as a police officer and offered her a place to sleep. He took her to his house, gave her food, and allowed her to sleep on his bed. He followed her to the bed, removed her pants, removed his clothes and removed his 'thing' for urinating and put it in her crouch which she pointed out to the court; she felt a lot of pain. In the morning he told her to go home and while outside, she met a man who took her to another woman who then took her to the police station.

PW3, PC Zipporah Mututha of Njoro Police Station recalled that on 31/5/2008, while at the station at about 7.30 a.m. she was informed that a girl about 9 years had been brought to the station with a case of defilement. She interviewed the girl (PW2) who told her what happened to her. She noted the girl was bleeding.

PW1, Tabitha Ngigi, a Clinical Officer at Njoro Health Centre said that on 31/5/2008, the complainant was taken to her for examination with a history of defilement. She had a blood stained pant, hymen was missing, there were injuries to the genitalia and a whitish vaginal discharge, had mobile spermatozoa and approximate age of injury was one day. PW1 put the complainant on treatment. PW1 produced the P3 Form and treatment cards in evidence and treatment chit for the appellant – Exh.3.

When called upon to defend himself, the appellant gave a sworn statement and denied committing the offence. He however, admitted meeting the complainant at about 8.00 p.m., assisted her by taking her to sleep the place where he slept. He cooked for her and woke her up next morning and told her to go home. He was surprised to be arrested for allegedly raping her.

After considering the evidence on record, there is overwhelming evidence that the complainant was defiled. She told the court what happened to her at the hands of the appellant and her evidence was corroborated by the evidence of the medical officer and the treatment notes, that the hymen was missing, she had injuries to her genitalia, she had a whitish discharge, the complainant's urine had mobile spermatozoa meaning that she had been involved in a recent sexual act. PW2 was examined within one day of the incident i.e. 31/5/2008 and the incident had occurred the night before.

The next question is who committed this act on the complainant? When PW2 appeared before the trial court the court was of the view that due to her tender age, she could not understand the meaning of the oath. She gave unsworn evidence. Under **Section 124** of the **Evidence Act**, the court can rely on the unworn evidence of a victim of sexual offence provided that the court is satisfied that the witness is telling the truth. In this case the complainant vividly explained what transpired on that night. Infact the appellant did admit having met the complainant on the road and taken her to his place to sleep, gave her food and a place to sleep just as PW2 narrated to the court. The appellant and the complainant spent the night alone in the appellant's house. The report of the complainant being defiled was received at the police station by 7.30 a.m., I believe this is soon after the appellant released her from the appellant's house. I am satisfied that the appellant did have the opportunity and did defile the complainant on the night he pretended to be helping her, yet she had fallen prey to his scheme. The complainant and appellant did not know each other before and there would have been no reason for PW2, a child of her age to frame a person who had been so good to her. I am satisfied beyond any doubt that it is the appellant who defiled the complainant.

The appellant was charged pursuant to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. **Section 8(1**) creates the offence of defilement whereas **Section 8(2), (3)** and **(4)** provide for the sentences which one is liable to be sentenced upon conviction, all determined by the age of the victim of defilement. The particulars of the main charge indicate the age of the complainant to have been 14 years, while the alterative charge, indicates that the complainant is a child aged 8 years. If indeed the

complainant was 8 years old, then the charge would have been under Section 8(1) as read with Section 8(2) of the Sexual Offences Act. It seems the trial magistrate never took note of that a normally in the charge sheet. The age of the complainant was not established. The complainant told the court that she was 8 years. None of her parents were called as witnesses and neither were any documents produced to confirm her age. In my view the prosecution and the court ignored very key evidence in this case because the case was not even adjourned for witneeses to come and testify. Before the complainant testified, the court observed that she was a child who could not understand the meaning of oath. It means that she was of tender age. PW1 who examined the complaint indicated that age as unknown. The age of a victim of defilement is fundamental in sentencing because it determines what sentence the court will hand the accused upon conviction. The court failed to consider this serious ingredient. If the court was of the view that the complainant was a child of tender age, then the sentence should have been under **Section 8(2)** and it is life imprisonment but the fact that the appellant was handed 22 years means the court did not sentence him under **Section 8(2)** of the **Sexual Offences Act**.

Taking all these discrepancies and omissions into account it behoved the trial magistrate to call for medical evidence to determine the age of the complainant since the prosecution did not bother to do so. Although there is overwhelming evidence that the complainant was defiled yet there is no evidence as to her age which is a serious omission in the requirement to a charge under **Section 8** of the **Sexual Offences Act**.

The appellant also argued that relevant witnesses who took the complainant to the police station, and her parents were not called as witnesses. I agree that the prosecution did not call the person who took the complainant to the police station nor were the complainant's parents. However, despite failure to call the said witnesses, that does fnot prejudice the proseucitoj case because they were not witnesses to the incident. There is overwhelming evidence on record that it is the appellant who defiled the complainant and there is no gap in the prosecution evidence that the witnesses who were not called could have filled. The law is clear that there is no particular number of witnesses that is required to prove a fact. A fact or facts can be proved by evidence of one witness (see **Section 143** of **Evidence Act**).

I am satisfied that the complainant was defiled and that it is the appellant who committed the offence and the trial court arrived at the correct finding. However, the court failed to reconcile the inconsistencies in the complainant's age so that it was not determined what the complainant's age was. For that reason, I will quash the conviction on the main charge set the sentence aside and substitute it with a lesser charge of indecent act contrary to **Section 11(1)** of the **Sexual Offences Act** as per the alternative charge and convict accordingly. I hereby sentence the appellant to 20 years imprisonment. It is so ordered.

DATED and DELIVERED this 19th day of July, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant in person

Ms Idagwa for the State

Jared Okumu – Court Clerk