IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 283 OF 2011

(From original conviction and sentence in Criminal Case No.688 of 2011 of the Principal Magistrate's court at NYAHURURU – D. N. MUSYOKA, RM)

ALEX MUTHOGA KIRETHI……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

Alex Muthoga Kirethi, the appellant herein, was charged with the offence of defilement contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on 20/3/2011, at about 4.00 p.m. within K Village of L sub-location in Nyandarau District of Central Province, intentionally and unlawfully caused his penis to penetrate the vagina of J W K, a child aged 11 years. In the alternative, the appellant faced a charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No.3 of 2006**. The appellant denied the offence and the case went to full trial before Hon. Teresia Matheka, PM, who found the appellant guilty on the main charge of defilement, convicted him and sentenced him to life imprisonment on 1/11/2011. Being aggrieved by both the conviction and sentence, he preferred this appeal based on the amended grounds of appeal filed in court on 28/5/2013, which are as follows:-

1. **That the conviction was based on a defective charge sheet;**
2. **That the prosecution evidence was full of contradictions and inconsistencies;**
3. **That the prosecution failed to call some essential witnesses;**
4. **That the trial court erred in rejecting the defence.**

The appellant therefore prays that the conviction be quashed, sentence set aside and the appellant be set at liberty forthwith.

The learned State Counsel, Mr. Marete, opposed the appeal for reasons that the subject child was examined by the court and found to be intelligent and understood the meaning of oath. She gave evidence on oath; that the subject vividly explained what happened to her; PW2 who saw her walking in a weird way corroborated her evidence and the Doctor did find that there was evidence of defilement. Counsel also submitted that the child was found to be 11 years old and the trial court sentenced the appellant in accordance with the law.

The prosecution called a total of 5 witnesses. The complainant (subject) testified as PW1 after the court found that she was intelligent and understood the meaning of the oath. She recalled that on 20/3/2011, she went to borrow a book from K, the son of the appellant who is in the same class with her. The appellant was a neighbour. When in the appellant's house, he sent one son to the shamba and the other

for his phone. The appellant then took PW1 to the son's room, removed her clothes and removed his **"thing for urinating"** and put it between her legs where she urinates. When he finished, he promised to buy her lotion and let her go. There was nobody at her home and so she did not tell anybody till PW2, Grace W W whom PW1 referred to as **"Mama C"** asked her why she was walking in a strange manner and she told PW2 that the appellant defiled her. PW2 said that on 24/3/2011, she was passing by the home of PW1 when she noticed her walking with legs apart. PW2 asked PW1 what happened to her and she said that the appellant defiled her after she went to his house to borrow a book and he sent his children away. PW2 said that PW1's mother is mentally disturbed while the father was away. PW2 therefore called PW1's sister, M N (PW3) to come home. PW3 confirmed having been called by PW2 on 24/3/2011 evening and on 25/3/2011, she went home, found PW1 at school. PW1 repeated to her how she had been defiled by the appellant. PW3 went to report at the Chief's office and in company of APC Eric Mbogo of Leshau AP Camp, they went and arrested the appellant. PW1 was examined by Dr. Joseph Muthaiga of Nyahururu District Hospital on 1/4/2011. He estimated PW1's age to be about 11 years old. On examining her genitalia, he found no tears but her hymen was missing and there was evidence of penetration. PW5 produced the treatment notes from the same hospital and the P3 form as PEx.1 & 2.

The appellant gave unsworn evidence in his defence. He said that the charges are false. He said that on 20th which was a Sunday, he did his manual chores from 7.00 a.m., came back home at 10.00 a.m., went to the shamba again till 2.00 p.m. when he returned home, went to rest till 5.00 p.m. He sent his son to the shop for the phone while his wife and child went to the shamba and he was left with the daughter in class 7 and the baby. He denied ever leaving the house and was arrested on 25th. The appellant's wife testified as DW2, M W. She reiterated what the appellant said and that she left him resting in the house at 2.00 p.m. till she came back at 5.00 p.m. DW2, JW, the appellant's daughter reiterated what DW1 and DW2 said that her father went to sleep at 2.00 p.m. and she was left with the baby while her brother went for the battery.

This being the first appellate court, it behoves me to re-evaluate and analyse the evidence anew and arrive at my own findings and conclusions but always bearing in mind that I did not have the opportunity to see the witnesses to weigh their credibility.

The charge indicates that the appellant was charged under **Section 8(1)(2)** of the **Sexual Offences Act**. No such provision exists in the **Sexual Offences Act**. **Section 8(1)** of the **Sexual Offences Act** creates the offence of defilement. **Section 8(2), 8(3)** and **8(4)** provide for the different kinds of sentences that may be meted on a person convicted based on the age of the victim. In this case, the complainant's age was stated to be 11 years and therefore the appellant should have been charged under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. It seems that the error in the charge sheet was typographical because in the judgment, it caught the magistrate's eye and she noted that the defect was only in form, and that it must have been a mere typographical error that was not prejudicial to the defence. What was missing between the letter (1) and (2) was the word **'and'**. I find that the appellant has not suffered any prejudice as a result of that error.

The second ground raised by the appellant is that the prosecution evidence was full of contradictions and inconsistencies. It is the appellant's contention that the evidence of PW1 and that of the Doctor as to when the incident occurred were contradictory. According to PW1, she was defiled on 20/3/2011. PW2 noticed that the complainant was walking in a weird manner on 24/3/2011, about 4 days later. PW1 admitted that by then, she had not told anybody. On the same date, 24/3/2011 PW2 called PW1's sister, PW3. PW3 confirmed that she was called on the evening of 24/3/2011. PW3 then reported to the AP Camp on 25/3/2011. It is on that same day that the complainant was examined and treated at Nyahururu District Hospital as evidenced by the treatment card, PEx.1. It is dated 25/3/2011. PW5 then examined the complainant and filled the P3 form on 1/4/2011. I find nothing contradictory or inconsistent in the evidence of PW1, PW2, PW3 and PW5.

PW5 examined the complainant on 1/4/2011 about 10 days after the incident. The Doctor's only finding was that the hymen was broken and he noted signs of penetration. In filling the form, he must have considered the treatment history from the treatment card PEx.1. The complainant had been examined at

the District Hospital only 4 days after the incident and the findings were that the hymen was broken, there were ulcerations on the minora and there was a yellowish discharge. It means that by the time PW5 examined PW1, it is likely the ulcerations had healed and the discharge was no more. Again, I find no contradiction in the medical evidence. The evidence of the treatment notes and PW5 does corroborate PW1's evidence that she was defiled and was examined by the Doctor about 10 days later.

In defilement cases, the age of the victim must be proved because the age determines the sentence to be meted in the event of a conviction. **Section 8(2)** provides for the sentence to be meted where the victim is aged 11 years and below. When PW1 testified, she said she was 12 years. PW1's older sister, PW3 also said that she was 12 years. That was only 2 months after the offence was committed. The birth certificate and clinic cards were not produced. The hospital and Doctor estimated the complainant's age to be 11 years. Since the complainant and her sister knew about her age better, the court should have resolved that discrepancy by adopting the higher age of 12 years in sentencing and the applicable provision of law would have been **Section 8(3)** of the **Sexual Offences Act** where the sentence is imprisonment of not less than 20 years.

No doubt the prosecution is under a duty to call relevant and material witnesses to prove their case. however, it does not mean that a conviction cannot be based on the evidence of a single witness unless a particular law provides otherwise (**S.143** of the **Evidence Act**). In this case the appellant faults the prosecution for failing to call one **"Mama Cecilia"** to whom the complainant first complained and the two sons of the appellant one of whom the complainant allege to have gone to borrow a book from. In my view, 'Mama C' is the same as PW2 whom PW1 said she informed first on 24/3/2011. As regards the two sons of the appellant, apart from PW1 saying that she found them at home, they were not present when she was defiled. To confirm that PW1 went to the appellant's home, PW1 did testify to the appellant having sent one of his sons for his phone and the appellant did confirm this fact in his defence. Even without calling the two boys, by the appellant's own admission, I am satisfied that the complainant must have been in the appellant's house on the material date. DW2 and SW3 could not tell what he did between 2p.m. to 5p.m. when he is said to have been resting. DW2 said she was away but DW3 did not tell exactly where she stayed with the baby. In the case of **Bukenya & Others v Rep. (1972) EA 549**, The Court of Appeal

> **"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case (Trial on Indictments Decree, s.37). Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."**

In the instant case, the evidence on record cannot be said to be inadequate and there was no need for the prosecution to call a superfluity of witnesses.

In this case the appellant is not a stranger to PW1. They are neighbours. PW1 vividly discussed what the appellant did to her and I find her testimony very impressive. There is no reason why PW1 would have framed the appellant, a person whom she had felt safe to go to his house and borrow a book from the son only for him to turn against her. PW1 told the court that the appellant sent both his sons, one to the garden and one for phone in order to get an opportunity to remain with the complainant alone. The appellant admitted in his defence that he had sent one son for his phone. How would PW1 have known that fact if she was not in the appellant's house when he sent his son? The trial court considered the appellant's defence and found that it was not convincing. The court found that the defence witnesses did place the appellant in his house, between 2.00 p.m. to 5.00 p.m. the time PW1 claims to have been defiled. He had the opportunity to commit the offence and the court was satisfied as this court is, that the appellant defiled PW1.

In conclusion, I find no merit in any of the grounds of appeal. The evidence against the appellant is overwhelming and the conviction was safe and I confirm it.

I had earlier observed that the complainant was 12 years at the time the offence was committed. Under **Section 8(3)** of the **Sexual Offences Act**, a person who commits and offence of defilement with a child of between 12 years and 15 years is liable upon conviction to imprisonment of not less then 20 years. In the result, the appeal on conviction is dismissed. However, I partially grant the appeal on sentence. I hereby set aside the life sentence and instead sentence the appellant to a term of 20 years imprisonment under **Section 8(3)** of the **Sexual Offences Act**. It is so ordered.

DATED and DELIVERED this 12th day of July, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant present

Mr. Marete for the State

Kennedy – Court Clerk