REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.102 OF 2012

CHARLES MULI ……..APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

J U D G M E N T

1. Charles Muli the Appellant is a Police officer who finds himself in the most unlikely place. On 8th November 2012, he was convicted on the offence of Defilement contrary to Section 8(1) (3) of the Sexual Offences Act and sentenced to life imprisonment. He is aggrieved with both the conviction and sentence and has preferred this Appeal.
2. The Appellant also faced an alternative charge of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act. Having returned a conviction on the main charge the Trial Court, correctly, made no orders on the alternative charge.
3. It had been alleged that the Appellant had on 21st of October 2011 at [particulars withheld] within Busia County intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of B.A.M a child aged six (6) years. During the trial, the Prosecution put together 11 witnesses. When invited to answer the charge under the Provisions of Section 211 of the Criminal Procedure Code the Appellant made a sworn statement.
4. The complainant was a young girl of 6 years at the time she testified on 16th of January 2012. Her date of birth was given as 15th March 2005 in the Certificate of Birth serial no.[particulars withheld]. On the tragic day (21st of October 2011) at around 3.00p.m the complainant had returned to her fathers' house after school. She found her mother C.A (PW3) in the house, in the company of the Appellant. PW3 gave the complainant some water to bath. After taking a bath, she returned to the house and applied body oil on herself. This was in the main house. PW3 was in the kitchen. It was then that the Appellant asked her to close the door and asked her to sleep on a chair. He then unzipped his trousers and had sex with her. The Appellant is said to have offered her some money. As this happened, PW3 tried to enter the main house only to find it locked. She was forced to peep into the room through a window. PW3 says that she saw the Corporal having sex with her child. She started to scream.
5. One of the people who heard PW3 scream was her (PW3) own mother G.I (PW4). PW3 locked the door from the outside. It was then that the Appellant made his way through a window and jumped out. It was the testimony of A.O.W (PW5) that he saw the Appellant make his way through the window. That the Appellant having successfully come out of the house sat down looking confused. J.O (PW6) and J.S.E (PW7) were also at the scene and saw the Appellant push himself through the window.
6. After the Appellant had left, the mother PW3 and PW4 came to the help of the distraught complainant. PW3 noticed something wet in the private parts of her child. PW4 who was with her, also noticed that the childs undergarment was torn. PW3 took the child to Sio Port District

Hospital at around 5.00p.m. She was attended to by Ignatius Okumu a Clinical Officer. Upon examination he noticed that the patient had some blood stains around the labia minora and vagina and that the hymen was torn. The Clinical officer noted his findings on a medical chit that was produced in Court. Three days later, the victim was sent for medical examination at Alupe Sub District Hospital at the request of the Police officer investigating the crime. Dr. Zacharia Njau (PW9) examined the victim and found that she had a bruised and hyperemic labia minora and majora and that the hymen was not intact. It was his view that the probable type of weapon that caused the injury was a penal shaft.

7. CIP Fredrick Simiyu (PW 10) was at the material time the Officer Commanding Sio Port Police Station. It was while at the Police Station on 24th of October 2011, that he received information from one PC Karuguto informing him that there were reports that one of his officers had defiled a child. He later summoned the Appellant whom he took to Busia Police Station and handed him over to the Officer in Charge of that Police Station.
8. Corporal Benedict Nyakundi (PW11) investigated the complaint. In addition to requesting for a medical examination of the complainant, he also requested for examination of the Appellant. In addition he caused DNA sampling to be done. The report of the Government Analyst who examined various exhibits submitted to him by the Police was received as evidence. The Government Analyst found no blood stains, semen or spermatozoa on the underpant, petticoat and dress of the victim.
9. In his defence, the Appellant says that on the date of the alleged offence he alongside PC Wanjohi and PC Ojiji were on their way to Muramba. They had to bypass the house of G.M who is the father of the complainant and husband to PW3. At that home, was a crowd of people. That illicit alcohol was being sold. That the people who were there scattered and run away on seeing the Police. PW3 started to scream alleging that thieves had invaded her home. She continued to do so even as the Appellant inquired of the whereabouts of her husband. They later left and proceeded to Muramba. He denied committing the offence.
10. That, in a nutshell, is the evidence that this Court will now evaluate with a view to reaching its own conclusion and findings. That duty of the first Appellate Court must be carried out with the caveat that unlike the Trial Court a Court sitting in Appeal does not have the benefit of first hand interaction with the witnesses as they testified (**see Okeno –vs- Republic) [1972] E.A. 32**. The Petition of Appeal raised the following grounds:

1. **THAT** the learned trial magistrate erred in law and in fact in reaching a finding of guilt when evidence on record was insufficient.
2. **THAT** the learned trial magistrate erred in law and in fact in not finding that the injury relevant to defilement had not been established medically.
3. **THAT** the learned trial magistrate erred in law and in fact in not finding that material aspects of the case remained unestablished.

11. In the cause of arguing the Appeal, the Appellant relied on written submissions which he supplemented with some oral arguments. It was the argument by the Appellant that the evidence was inconsistent in various respects. This Court shall consider those arguments as it now turns to examine the evidence. On the part of the State, Mr. Kelwon was of the view that there was corroborative evidence of the witnesses and that the medical evidence confirm the commission of the offence.
12. Before receiving the evidence of the complainant, the Trial Magistrate carried out a comprehensive *voire dire* inquiry. She then made the following observation,

> **"Court: The minor aged six (6) years is a child of tender years. Though she knows that she is expected to speak the truth, I find that her level of understanding is not developed enough to appreciate the punishment she can be given if she lies on oath. I will take her evidence unsworn."**

It was her evidence that she knew the Appellant. And this may be true because the Appellant himself in his defence confirmed that he had on at least 3 occasions visited their home. Although he stated that on those occasions he had not seen the complainant. The young victim gave evidence how on that dreadful

day, she found her mother and the Appellant inside the house. She gave a vivid description of how she was defiled. This is what she said:-

> **"He then told me to sleep on a chair which is big. He then unzipped and had sex with me. I had put on my clothes. I had put on my pants, petticoat and dress. The corporal removed my pant through one leg. Corporal told me that he will give me money. Corporal slept on me I was sleeping on my back. I was at home, I do not know what the corporal did. He use his saliva (minor puts her hands in the mouth and rubs her palm)."**

That evidence of how the offence is said to have occurred was not upset in cross-examination. It seems to me that the mind of a six year old child may not be complex enough to conjure up such a consistent story.

13. There is then the evidence of PW3 who is the mother. It is her evidence that, peeping through a window, she saw the Appellant having sex with her child. This as would be expected distressed her and she started to scream. Four people being PW4, PW5,PW6 and PW7 reacted to her distress call and went to the house. Each one of them told the Court that they saw someone inside the house and that person pushed his way through the window. And that person was the Appellant. It helps to recall some portions of their evidence in their own words. PW4 said as follows:

> **"She came to me. I saw the corporal inside the house trying to put on his trouser. Witness points to the accused. It was him inside the house. When I took the child I saw the child's pant torn and one of her leg was out of the pant. I do not know what tore the pant. I called her mother to come and check the child. I did not check her it was the mother who checked her. The accused came out of the house through the window of the bedroom. He then fell outside and sat there."**

The account of PW5 is as follows:

> **"I went to see I saw someone inside the house standing near a window. I then saw the person push himself through the window. He fell outside and sat there looking confused. The person is the accused person. Witness points to the accused."**

And this is what PW6 said:

> **"I knew the person as he was the in-charge of Mulukhoni police. Witness points to the accused. I saw him push himself through the window. He fell outside the house and sat there. I then saw the accused zip up his trouser."**

On his part PW7 said:

> **"I went to look through the window to the bedroom and indeed I saw the person inside the house. The person is the one at the dock. Witness points at the accused. I then saw the child being taken out through the window."**

14. An analysis of the evidence of these four witnesses is that on reaching the house of PW3 each one of them looked through the window and was able to see a person inside the house. But the person then pushed himself through a window and made his way out. That, the person was the Appellant. Their evidence was consistent and places the Appellant at the scene of the crime. The Appellant argued that there was inconsistency as to the time of the incident. PW3 said that B.A.M (the complainant) came home at around 5.00pm. PW4 says that she answered to the distress call at around 6.00p.m. PW5 and PW6 thought that it was between 5.00pm and 6.00p.m. For PW7 it was at 5.00p.m. This Court is unable to find that there is such a big variance as to the time when the offence is said to have been committed and when the witnesses are said to have seen the Appellant at the scene. It would seem to have been between 5.00p.m and 6.00 p.m. And this

indeed may be so because PW2 who attended to the victim on the very day of the incident stated as follows in the medical chit,

"child was well until this evening around 5.00p.m. when she was defiled……"

15. Let me now turn to the medical evidence, there are 4 documents on this; the medical chit from Sio Port District Hospital on 21/10/2011, P3 Forms of the victim dated 21/10/2011 and 24/10/2011, P3 Form of the Appellant of 24/10/2011.

On the very date of the beastly act, the 6 years old victim was attended to at Sio Port District Hospital and the Clinical Officer observed that she had a swelling to her vagina lips and bleeding from the vagina. And that her hymen was broken. A medical examination conducted on 22nd October 2011, a day after returned the following findings,

> **"Bruises with hyperemia of the labia minora, with torn hymen and blood stains around the labia minora and vagina(in) – penetration achieved blood stains in labia minora and vaginal opening"**

The medical examination carried out a day after is consistent with the findings of the Clinical Officer who immediately attended to the victim. It is a picture that Sexual Assault had been committed on the victim. That same picture is painted by the medical examination that was carried out by Dr. Njau (PW 9) on 24th of October 2011. It is my view that the overwhelming strength of these medical examinations is not disturbed by the finding of the DNA tests that no blood stains semen or spermatozoa were found on the underpant, petticoat and dress of the victim. There was no evidence by any of the witnesses that those cloths had been soiled or stained by blood, spermatozoa or semen. In fact the evidence is that the victim was defiled after the Appellant had removed her underpant.

16. My anlaysis of the evidence will not be complete without examining the defence. It was the evidence of the Appellant that he had visited the home of PW3 on the 21st of October 2011 where he found a crowd of people. It was alleged that they had gathered there because illicit alcohol was being sold. He says that PC Wanjohi and PC Ojiji were with him when they visited the home and when the crowd dispersed. As earlier observed, there was overwhelming evidence by the Prosecution that placed the Appellant at the scene and connected him to the crime. And so it did not help the Appellant's defence that he did not call PC Wanjohi and PC Ojiji to corroborate his side of the story. This Court just like the Trial Court, does not believe the account given by the Appellant.
17. There was direct and consistent evidence that connected the Appellant to the crime. The consistence of the evidence of the eye witnesses and the strength and clarity of the medical evidence was so cogent that there would be no doubt whatsoever that the Appellant defiled the young helpless girl. That conviction is upheld.
18. The victim was 6 years old at the time of the sexual assault. The Appellant was charged with an offence under Section 8(3) of The Sexual Offences Act instead of Section 8(2). The former is where the victim is of between ages 12 and 15 years. Nevertheless the sentence imposed was under the correct provisions of the law. Would this error on the charge vitiate the conviction and sentence reached by the Lower Court? I think not. The particulars of offence were clear that the age of the victim was 6 years. The Appellant was represented by Counsel at the trial. Counsel would have noticed the error and would have known that the correct provision of the Law was Section 8(2). There was no objection taken up by the Defence then. Such an objection ought to have been raised at the trial proceedings. In any event it has not been argued or shown that the error occasioned a failure of justice. For those reasons, this Court finds that this type of error is contemplated by the provisions of Section 382 of The Criminal Procedure Code which provides.

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court to 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 state in the proceedings."

I see no reason to reverse or alter the conviction and sentence reached by the Trial Court.

The Appeal is dismissed in its entirety.

19) In conclusion, I must apologize to the parties for the delay in preparing and delivering this decision. I was appointed an Election Court for purposes of hearing and disposing of three Petitions.The Constitutional timeframes for the hearing and determination of those Petitions is six months of the date they are lodged. The Petitions were involved and the Court dedicated its energy and time there.Other matters, like this, had to suffer.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 17TH DAY OF SEPTEMBER 2013.

IN THE PRESENCE OF:

KADENYI……COURT CLERK

APPELLANT ……..PRESENT IN PERSON

OBIRI …….....FOR STATE