REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 173 OF 2012

DAVID KARIUKI NJERU …….APPELLANT

-VERSUS-

REPUBLIC ……..RESPONDENT

(From the original conviction and sentence in Criminal Case Number 1148 of 2008 in the Senior Resident Magistrate's court at Baricho -Mr J.N. Mwaniki-(SRM)

JUDGMENT

The appellant **DAVID KARIUKI NJERU** was tried by Hon. E.M. Nyaga Resident magistrate at Kerugoya Law Courts for the offence of defilement **contrary to section 8(1) as read with Section 8(2)** of the **Sexual Offences Act** and for the alternative count of committing an indecent act with a child **contrary to section 11(1) of the same Act.**

In the principal count, it was alleged that on the 9th day of December 2010 at Mikarara sub location in Kirinyaga County, the appellant intentionally caused his penis to penetrate the vagina of **FNM** a child aged 9 years.

In the alternative count, it was alleged that on the same day and place, the appellant intentionally touched the vagina of **FNM** with his penis a girl aged 9 years.

After full trial, the appellant was convicted with the offence of defilement and was sentenced to life imprisonment.

Being aggrieved by both conviction and sentence, he filed this appeal relying on the following grounds:-

1. ***The learned trial magistrate erred in law and in facts by failing to consider that no exhibits were produced in court to support the evidence of the complainant.***
2. ***The learned trial magistrate erred in law and in facts by failing to consider that the prosecution side did not take me for the medial examination to prove beyond reasonable doubt that I had actually defiled the complainant.***
3. ***The learned trial magistrate erred in law and in facts by failing to consider that the complainant was being forced to accept that she was raped. This is when I was cross-examining the complainant. A court employee was the one forcing the child to say yes or no depending on what she wanted the child to answer.***
4. ***The learned trial magistrate erred in law and in facts failing to consider that I could not be able to cross examines the arresting officer for I was sick and begged for adjournment but the magistrate refused to post pone the hearing.***
5. ***The learned trial magistrate erred in law and in facts by failing to consider the evidence***

adduced by the doctor that no **spermatozoa were found when the complainant was medically examined. So no proof of defilement.**

6. ***The learned trial magistrate erred in law in facts by not considering my defence.***

When the appeal came up for hearing, the appellant relied on written submissions which he presented to the court.

The state through M/S Macharia state counsel conceded to the appeal on grounds that the complainants age was in doubt as no evidence had been adduced to ascertain her correct age.

Briefly, the prosecution's case was that the appellant was a person known to the complainant prior to the material date as he worked as a farm hand and lived in a house neighbouring the complainant's home.

After a brief voire dire examination, the complainant testified that on the 9th day of December 2010 she was in her home with her grand mother (PW2) when the appellant called her and sent her to the shops to buy cigarettes for him.

On taking the cigarettes, the appellant grabbed her and pulled her to his house after which he removed both his clothes and her clothes and after covering her mouth to prevent her from screaming, he laid her on her back and defiled her. He then opened the door for her and she walked home. It was by then around 4 p.m. and on arrival at home, she immediately reported to her grandmother what had happened.

Her grandmother who testified as PW2 told the court that she was aware that the appellant had sent PW1 for cigarettes but on her return, she was crying and she complained that the appellant had defiled her. She checked her private parts and saw some discharge on the child's thighs. She immediately caused the appellant's arrest by members of the public and was present together with the complainant when he was handed over to PW4 P.C. **Morris Kimotho** at Kutus patrol base. PW3 recalled that on the same day, he escorted the complainant and the appellant to Kerugoya District Hospital where they were examined. He then charged him with the offence for which he was tried and convicted by the lower court.

In his defence, the appellant denied having committed the offence and claimed that the charges were fabricated against him by PW2 with whom they had a grudge after drinking together.

I have re-evaluated the evidence on record as I was required to do this being the first appellate court: see

- **OKENO VS REPUBLIC (1972) EA 32**
- **SIMIYU VS REPUBLIC –(2005) 1 KLR 192**

I have also considered the grounds of appeal together with the submissions made by the appellant and the state counsel.

After analysing the evidence on record , I find that it is not disputed that the complainant and the appellant were neighbours who knew each other well prior to the material day. The complainant was clear and consistent in her evidence that it is the appellant who defiled her when she went to his house to deliver cigarettes she had bought on his instructions.

It is significant to note that the offence was committed at around 4 p.m. in broad day light and that the complainant had been with the appellant a few minutes before when sending the girl for cigarettes. Her identification of the appellant as her assailant was therefore done in circumstances which were conducive to a positive and correct identification.

This was infact a case of recognition which is always safer and more reliable as opposed to a case of

identification of a mere stranger. The fact that PW1 headed home from the scene of crime and immediately reported to her grand mother that it was the appellant who had defiled her shows certainly on her recognition of her assailant. There cannot be any doubt from the evidence on record that the complainant was actually defiled at the time alleged since on the same day, she was examined by PW3 who confirmed that her hymen was torn and there were bruises in her genitalia. Slight blood was oozing from one of the bruises in her genetalia and her vagina was wet. In his evidence in cross examination, he clearly stated that the injuries noted were proof of penetration.

The fact that no spermatozoa was found in the complainants genitalia cannot amount to proof that she had not been defiled since from the definition of the offence of defilement, the act of sexual intercourse does not need to be complete for the offence to be committed.

It is sufficient if there is penetration of the male organ into the victim's genitalia. And penetration does not need to be complete. It can be partial or complete. See **section 2 and section 8 of the Sexual Offences Act.**

In view of the foregoing, it is my finding that it is the appellant who defiled the complainant as alleged. His claim that the charges were a fabrication by PW2 with whom he allegedly had a grudge cannot hold since PW2 was not the complainant in this case and PW 1 positively identified him as the person who had defiled her. Besides, if infact he had a grudge with PW2 prior to the material date, he would have taken up the matter with PW2 when cross examining her in the lower court and also in his defence. The fact that he did not do so and is only raising the issue on appeal seems to suggest that the claim was only an afterthought.

The appellant also took issue with the fact that he was not taken for medical examination to prove that he is the one who had sexually assaulted the complainant . This claim is not true because the evidence on record shows that he was actually taken to Kerugoya District Hospital for medical examination.

Even if he was not taken for medical examination, this would not have affected the prosecution case since it had not been alleged that the appellant was suffering from any sexually transmitted disease which he would have passed on to the complainant . Taking him for medical examination therefore would not have been necessary.

The appellant had also complained that he was denied the opportunity of cross-examining the investigating officer allegedly because he was sick and his request for adjournment to another date was denied by the trial court.

I have carefully gone through the record of proceedings on 10th February 2011 when the investigating officer testified and there is no indication from the record that the appellant ever applied for and was denied an adjournment on that date instead the record shows that it is the appellant who opted not to cross examine the investigating officer. In the premises, nothing turns on that ground of appeal.

Lastly, the appellant faults his conviction on ground that the learned trial magistrate in convicting him failed to appreciate that the age of the complainant had not been properly proved.

The appellant and the state counsel were of the view that since the complainant's exact age was not proved, the offence of defilement had not been proved and the appellant was wrongly convicted.

In this case, thought it is true that the complainant's actual age was not proved by any documentary evidence, there was evidence from PW1 that she was ten(10) years old when she testified . Her age was stated to be 9 years In the particulars of the charge sheet and in the P3 form.

In my view, strict proof of the age of the victim by documentary evidence may only be necessary in borderline cases where there is room for doubt whether or not the victim had reached or

crossed the age of majority which is 18 years.

In all other cases where the victim is obviously a child that is, where there is uncontested evidence that the victim was below the age of 18 years, strict proof of exact age of the victim is not necessary considering that the offence of defilement is complete if the victim is under the age of eighteen years. Proof of actual age would only be necessary when determining the sentence to be imposed on a person convicted of the offence of defilement.

In this case, the trial magistrate who saw the complainant as she testified was convinced that she was a child of tender years (below 10 years of age) and that is why he conducted a voire dire examination before allowing her to testify.

It is my view that in this case whether the complainant was proved to be 9 or 10 years of age was really not a matter that would have affected the prosecution case one way or the other since the important point for consideration was whether or not she was a child within the meaning of **Section 2** of the **children's Act** which defines a child to be a person under the age of 18 years.

For the foregoing reasons, I am satisfied that the trial magistrate properly interrogated the evidence before him and came to the correct conclusion that the appellant had committed the offence of defilement as alleged. The appellant was therefore properly convicted.

On sentence, the appellant was charged under **Section 8(1)** and **8 (2)** of the sexual offences Act. **Section 8(2)** prescribes the sentence applicable to persons convicted of the offence of defilement where the victim was less than 11 years of age. The prescribed sentence is life imprisonment.

As stated earlier, it is not disputed that the complainant was either 9 or 10 years old at the time the offence was committed meaning that she was below 11 years old.

The appellant was sentenced to life imprisonment which is the sentence allowed by the law.

In the circumstances, the sentence was lawful and this court has no reason to interfere with it.

In the result, both appeals against conviction and sentence are not merited and they are hereby dismissed.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED at KERUGOYA THIS 11TH DAY OF DECEMBER 2013 in the presence of:-

The appellant

Mr Sitati for state

Kariuki Court Clerk