REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 295 OF 2008

SIMON MUREITHI NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 188 of 2007 of the Senior Resident Magistrate's Court

at Kikuyu by L.M. Wachira (Mrs.) Resident Magistrate)

JUDGMENT

The appellant, **SIMON MUREITHI NJERU**, was convicted on 2 counts of Defilement **contrary to section 8 (1) of the Sexual Offences Act.** On count 1, he was imprisoned for life, whilst on count 2 he was sentenced to 12 years imprisonment. The 2 sentences were ordered to run concurrently.

In his appeal, he has submitted that there had been non-compliance with **section 200 (3) of the Criminal Procedure Code**.

Secondly, he contends that the ages of the 2 complainants had not been verified. In his view, the doctor who examined the 2 girls should have established their ages.

The need to verify the ages of the victims was attributed to the fact that under the Sexual Offences Act, the offences and the sentences stipulated for any such offences were based on the ages of the victims.

The 3rd issue raised by the appellant was that there had been no other evidence saves for that tendered by the complainants. He reiterated that he had not committed the alleged offences.

Finally, the appellant asserted that the report from the Government Chemist had exonerated him from the offence.

In answer to the appeal, the respondent submitted that the evidence produced by the prosecution was sufficient to prove the offences for which the appellant was convicted.

The respondent submitted that the appellant was recognized, as he was well known to the victims.

It was also said that the victims had no reason to fabricate the cases against the appellant.

Finally, the respondent submitted that the assertion about the existence of a grudge between the appellant and the mother of one of the complainants was nothing more than an afterthought. That submission was founded on the fact that the assertion was never raised when the witness concerned was being cross-examined.

Being a first appellate court, I am enjoined by law, to re-evaluate all the evidence on record. I will draw my own conclusions, whilst bearing in mind the fact that I did not have the benefit of seeing the witnesses as they testified.

PW 1, M.N.K, is the mother to **J.M (PW 5).** Her said daughter was 9 years old at the time of the incident. She was one of the 2 complainants.

PW 1 saw her daughter together with **(PW 4),** the other complainant. That was after the 2 girls had been outside the house, playing.

PW 1 noted that the 2 girls were ill at ease. When **PW 1** inquired from them where they were from, the girls just looked at each other.

PW 1 then sent for **PW 2, M.S.M**. She did so for two reasons;

(a) *PW 2* ***was the mother to the 2nd complainant,*** *M.M.G (PW4);* ***and***

(b) M had told PW 1 that she had seen the appellant talking to the 2 girls. That information caused *PW 1* ***to become suspicious.***

When **PW 2** questioned the girls, in the presence of **PW 1**, the girls narrated how the appellant defiled each of them, in turn. They said that he did so inside the nappier grass, which he had been cutting. The said grass was at a place close to the home of **PW 5's** grandmother, where the 2 girls had gone to play.

At that time, the appellant was working for a neighbor to **PW1** and **PW 2.**

After defiling the 2 girls, the appellant is said to have given KShs.20/- to **PW 4,** who was to share it with **PW 5**.

The appellant also told the 2 girls that if they told anyone about what had happened, he would beat them.

When **PW 1** and **PW 2** were questioning the 2 girls, the appellant arrived and asked what was being discussed about him.

PW 1 asked the appellant about what he had done to **PW 4**, but the appellant denied doing anything to her. It is then that the parents of the 2 girls decided that the appellant should accompany them to hospital, so that the truth could be ascertained.

The girls' parents hired a taxi which took them, together with the girls and the appellant, to a Police Post. One police officer examined the girls and verified that they had been assaulted.

The police then arrested the appellant, whilst referring the victims to a Health Centre, for medical examination.

The doctor at the Health Centre referred the girls to the Nairobi Women's Hospital, where they were examined and treated.

During cross-examination, **PW 1** said that the appellant had, at some point in time, admitted having defiled the 2 girls. At that time, the appellant blamed his actions on the devil, and sought reconciliation.

PW 2 corroborated **PW 1's** evidence in all material particulars.

She also said that when the appellant was questioned by the police officer at thePolice Post, the appellant agreed having assaulted **PW 5**.

PW 3, DR, GEROGE KUNGU MWAURA, examined **PW 5** at his Clinic. He established that the 10 year old girl had bruised genitals; a tear of the hymen membrane; and a smelly whitish discharge.

The doctor testified that those findings were consistent with defilement.

PW 3 also examined **PW 4**. He said that she was a 13 year old, who had bruising and laceration of her genitals. **PW 3** noted that the young girl's hymen membrane was torn.

He concluded his testimony by saying that those findings were consistent with defilement.

PW 4, M.M.G, was 13 years old. She testified that the appellant removed her skirt. He then removed his own clothes. Thereafter, he "put his thing" into her private parts.

He told her that he would beat her if she screamed. She therefore did not scream.

Later, he gave **PW 4**, KShs.20/-, and told both **PW 4** and **PW 5** that he would beat them if they disclosed what had happened.

PW 5, J.M, testified that she was 10 years old. She testified that the appellant led her into the farm wherein nappier grass was planted. He then removed his trousers. Thereafter, he inserted "his thing for urinating" into **PW 5's** private parts.

The court records indicated that **PW 5** pointed at her private parts when she was telling the trial court about the part of her body into which the appellant inserted his organ.

PW 6, J.M.W, was 8 years old. She was with **PW 4** and **PW 5** when the appellant called those other 2 girls.

PW 7, DR. KETRA MUHOMBE, examined both **PW 4** and **PW 5** at the Nairobi Women's Hospital.

Both girls told the doctor that they had been defiled by someone known to them, and whose name was Mureithi.

PW 7 noted that the girls had torn hymens and bruises on their genitalia. The doctor concluded that the complainants had both been defiled.

PW 8, PC MARY KILONZO, issued P3 forms to the victims, and referred them to hospital for examination.

After the P3 forms were returned to the police, and they verified that the complainants had been defiled, **PW 8** caused the appellant to be charged.

When the appellant was put to his defence, he alleged that he had been framed by **PW 1**. She allegedly framed him after he demanded his share of wages for some work which they had done together.

Having re-evaluated the evidence, it is clear that the line of defence adopted by the appellant was never raised during his cross-examination of **PW 1**.

If anything, during the said cross-examination, the appellant suggested to **PW 1** that she is the one who had been asking him for money.

Furthermore, I note that when **PW 1** first questioned the girls, they remained quiet. It is only after **PW 2** arrived, that her daughter disclosed what the appellant had done.

Therefore, even assuming that there had been some grudge between **PW 1** and the appellant, it is noteworthy that no such grudge is alleged to have existed between **PW 2** and the appellant.

The medical examination conducted by two independent doctors revealed that the 2 complainants had been defiled. Therefore, the fact of defilement was real. It was not a fabrication.

The appellant himself confirmed that he had lived within that area for 5 years. And the incident occurred in broad daylight. Therefore, there was no room at all for any mistaken identification.

Indeed, this was a case of recognition.

Dr. George Kungu Mwaura **(PW 3)** verified the ages of the two girls, contrary to the assertion by the appellant.

And the report from the Government chemist did not exonerate the appellant. At best, the report can be said to have fallen short of any conclusions as to whether or not there were physical connections between the appellant and the complainants.

However, as the complainants had already recognized the appellant as the person who had assaulted them sexually, the absence of any conclusions in the report of the Government Chemist did not water-down the prosecution case.

The succeeding magistrate made it clear that there had been compliance with the provisions of **section 200 (3) of the Criminal Procedure code.** The appellant did indicate a desire to have the trial proceed.

I believe that the said prayer, by the appellant, was in response to an inquiry from the succeeding magistrate. Therefore, although the record does not expressly spell out the said question to which the appellant was responding, I find that there was a substantial compliance with the provisions of **section 200 (3) of the Criminal Procedure Code**.

In the final analysis, the evidence adduced by the prosecution was corroboratory, consistent and sufficient to warrant conviction. Accordingly, I find no merit in the appeal. It is dismissed.

I uphold both conviction and sentence.

Dated, Signed and Delivered at Nairobi this 2ndday of November, 2011

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FRED A. OCHIENG
JUDGE