**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**HIGH COURT CRIMINAL APPEAL NUMBER 68 OF 2018**

**MUEMA NYAMAI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***Being an appeal from the Judgement delivered by Hon. J.M. Munguti(PM)***

***in Criminal Case No. 65 of 2016 at Kitui on 18th of January, 2018)***

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**J U D G E M E N T**

1. **Muema Nyamai** the Appellant herein, was charged with the offence of defilement Contrary to ***Section 8(1) (2) of Sexual Offence Act Number 3 of 2016 vide Kitui Chief Magistrate's Court Criminal Case Number 65 of 2016***. The particulars of the charge were that, on 6th November, 2016, at around 2:00 am in Mosa Location, Kisasi Sub-County, within Kitui County, intentionally caused his penis to penetrate the anus of (name withheld) a child aged 7 years. The Appellant also faced an alternative charge of committing an indecent act with a child Contrary to ***Section 11 (i) of Sexual Offence Act***, but since he was convicted on the main charge, the subject of this appeal, the alternative charge is not relevant in this appeal.

2. The summary of the prosecution's case presented at the trial indicates that, the Appellant sneaked into where the victim (PW2) was sleeping with other children and committed the offence and just as he was living at around 3:00 am, the father (PW3), who had been attending a wedding arrangement ceremony arrived, and surprised at seeing someone getting out of his house at such an hour. His suspicion grew, when the person started running away, on seeing him. He gave a chase and caught hold of him with the help of a neighbour (PW 4). When the Appellant was taken back to the house, they found the child crying saying she had been defiled. The Appellant was escorted to Mbitini Police Station and the child was thereafter, escorted to Mbitini Police Station and the child was thereafter taken to Kitui Hospital where the doctor confirmed that she had been defiled and was treated.

3. When the Appellant was placed on his defence, he opted to remain silent upon which the trial found sufficient evidence to convict him. He was then sentenced to serve life imprisonment as provided by law.

4. The Appellant was aggrieved by both conviction and sentence. He lodged this appeal and listed the following 3 grounds namely-:

> ***(i) That the learned pundit Magistrate erred in both law and facts by convicting him on doctor's evidence which he claims was insufficient.***
>
> ***(ii) That the learned Magistrate erred by relying on evidence of family members who could gang up against him.***
>
> ***(iii) That the trial erred by not considering that he was not examined by a doctor to prove that he had committed the offence.***

5. The Appellant in his written submissions, has raised seven other new grounds without leave of this court as provided under ***Section 350 (2) (b) (iv) of the Criminal Procedure Code***. The new grounds being incompetently raised, won't be considered in this appeal.

6. The Respondent has opposed this appeal and specifically responded to the three grounds raised in the original petition of appeal.

7. The Appellant in his written submissions submits that, there was no direct evidence linking him with the offence. He claims that, he was

not caught in the act and that the fact that the medical examination on the complainant revealed yellowish discharge could not be indicative of sodomy adding that, the doctor's opinion was speculative and could not establish beyond doubt that he had defiled the minor.

8. The Appellant faults the medical evidence (P3) tendered contending that, the author was not called to testify and instead another doctor called instead.

9. He submits that, there was no medical evidence showing that samples were extracted from him and subjected to forensic analysis to connect him with the offence. He faults the police for not carrying out comprehensive investigation.

10. The Respondent in its written submissions contends that, the prosecution's evidence tendered was sufficient to found a conviction. Mr. Okemwa for the Respondent submits that, the doctor's evidence corroborated the evidence of the minor in regard to penetration. The state further submits that, the fact that family witnesses testified is due to the nature of offence which normally is not committed in public and it is usually close family members who got to learn about the incident.

11. This court has considered the evidence tendered by the prosecution at the trial in respect to penetration, a key ingredient in the offence of defilement. There is no doubt that the minor or the victim was sleeping alone with her other sibling who was also a child. The mother (PW1) told the trial court that she had slept at her mother's home on that night while the father (PW3) was away attending a function.

12. The child was vulnerably sleeping alone when the Appellant creeped in and started defiling her. She told the trial court that, when she started screaming, he blocked her mouth.

She stated;

> ***''I found a person in the house and he was defiling me……..I started screaming (sic) and he blocked my mouth…….''***

13. The evidence of the minor was corroborated by the father (Prosecution Witness 3) who testified that when he arrived at his house at around 2:00am, he saw a person leaving his house and knowing that he had left children alone in the house, he got suspicious when the person started running away as he gave chase and caught up with him. He testified that, he recognized him as he was from the same locality and that when he took him back to the house, the child reported that the same person (Appellant) herein, had defiled her.

14. The evidence of PW3 regarding how the Appellant was caught was corroborated by KW (PW4) who stated that, he had been with the victim's father at a function and left for home together at 2:00 am. He added that, when they parted ways, he shortly heard screams from him and on rushing to check what it was, he found the Appellant under the grip of PW3.

15. The trial court noted in its judgement that, it believed the truthfulness of the minor and going by the provisions of ***Section 124 of the Evidence Act***, her evidence alone was sufficient to found a conviction even discounting the medical evidence which the Appellant submits that it was faulty. This court notes that, the Appellant's concerns regarding the admissibility of the evidence of Doctor Joseph King'oo are legitimate because, he testified on behalf of Doctor Mutuku, but failed to state how long he had worked with the said doctor. The law requires that, before a court admits in evidence any document signed by an expert other than the one producing it, the person producing must satisfy the court that it is well acquainted with the handwriting or signature of the author.

> ***Section 50(1) of the Evidence Act*** provide as follows: -
>
> ***''When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is admissible.''***

16. This court also finds that, the prosecution was also at fault because, before calling Dr. King'oo (PW5) to testify, they were required to lay basis under ***Section 33 of the Evidence Act***, and show that the maker of the medical documents could not be found without unnecessary delay or expense.

The law provides clearly that, evidence is admissible where some witnesses cannot be found on account of say, death or where a witness cannot be procured without amount of delay or expense that in the circumstances is unreasonable. The prosecution either due to lack of diligence or due to an inadvertent mistake, failed to comply with the law prior to adducing the medical evidence and trial court fell into error by going ahead to admit the evidence without questioning the whereabouts of the author of P3 (P.Exh 1)and PRC form. The omission in my considered view, rendered medical evidence tendered hearsay evidence.

17. This court however, finds that, despite the omission by the above omission by both the prosecution and the trial court, the evidence of PW1, PW2 and PW3 in my considered view was sufficient on their own prove that the offence of defilement had taken place. As I have observed above in offences of this nature, medical evidence though corroborative in value, is not a prerequisite to a finding of guilt. The provision of **Section 124 of the Evidence Act** states that, the evidence of the victim is sufficient to found a conviction of the trial court has reasons to believe that the minor is speaking the truth. The trial court indicated in its judgement, that it believed the minor was speaking the truth.

18. This court has re-evaluated the evidence and I do find that the minor gave a vivid account of what had happened to her that night when her both parents were away. The evidence of the minor was supported by the father who after arresting the Appellant as he tried fleeing from the scene of crime, was taken back to the house where the father found her daughter crying.

He stated thus in his evidence-in-chief;

> ***''My daughter came crying and told me that the Accused had defiled her…….. my daughter knew the Accused. He is a person from our area.''***

The Appellant was therefore, positively identified by the minor and her father. The evidence of PW4 corroborated the fact of positive identity even more. I also find the evidence of PW6 the Investigating Officer to be corroborative of the fact that, the Appellant was arrested at the scene of crime and escorted directly to Mbitini Police Post. In my view, the fact that PW3 and PW4 took the action of escorting the Appellant to the police in the wee hours of the morning, despite the fact that they had come from an event, shows that they took the matter serious because the matter was indeed serious. I am satisfied on that account that the prosecution did prove their case beyond reasonable doubt, notwithstanding that, the medical evidence tendered was hearsay evidence.

19. On sentence, though the Appellant has submitted that the sentence was harsh, but I do find that, the act of sodomizing a 7-year–old child was so cruel and dehumanizing to the minor. The psychological scar left on the minor will remain a permanent feature in her life and may require intensive psychotherapy to help the minor get over it. The Appellant in my view, deserved the harsh sentence as prescribed by law and I have no hesitation to find that the trial court was justified in meting out the prescribed sentence. The Appellant was given a chance to defend himself but chose to keep quiet, which of course was his right, but he cannot turn back and say he was framed when he did not give any evidence to that effect.

In the premises, for the reasons fore stated, the appeal on conviction fails. The conviction was safe and is upheld. The life sentence meted out though a little harsh is what the law **(Section 8(2) Sexual Offence Act)** provides and going by the recent Supreme Court's guidelines in the case of **Francis Karioko Muruatetu**, the discretion of courts is only limited to murder cases. It is on that basis, that the sentence meted out by the trial court is upheld.

## DATED, SIGNED AND DELIVERED AT KITUI THIS 19TH DAY OF JULY, 2021.

**HON. JUSTICE R.K. LIMO**

**JUDGE**