REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.93 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. Onyango – SRM delivered on 7th November 2011 in Kibera CM. CR. Case No.3598 of 2010)

AOA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **8(2)** of the **Sexual Offences Act.** The particulars of the offence were that, on diverse dates between 3rd August 2010 and 12th August 2010 at [particulars withheld] within Nairobi County, the Appellant intentionally caused his penis to penetrate the vagina of MA, a child aged eleven (11) years. In the alternative charge, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars of the offence were that on diverse dates between 3rd August 2010 and 12th August 2010 at [particulars withheld] within Nairobi County, the Appellant intentionally touched the vagina of MA, a child aged eleven (11) years with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main count and sentenced to life imprisonment.

In his petition of Appeal, the Appellant raised three grounds of appeal challenging his conviction and sentence. He was of the view that the evidence adduced by the prosecution was not sufficient to sustain a conviction. He was aggrieved that the trial magistrate failed to appreciate that the age of the complainant was not established. Finally, he faulted the trial magistrate for convicting him yet the ingredient of penetration was not established by the prosecution.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged this court to allow his appeal. Ms. Atina for the State opposed the appeal. Learned State Counsel submitted that penetration was established. The minor narrated to the court how the Appellant defiled her on numerous occasions. Medical evidence presented to court corroborated the same. With regards to the minor's age, she averred that no documentary evidence was produced. However, the minor stated that she was eleven (11) years old. The same was corroborated by PW3. On identification, Learned State Counsel asserted that the minor lived with the Appellant and his wife. The Appellant was her uncle. She maintained that the prosecution had proved its case to the required standard of proof beyond any reasonable doubt.

The facts of the case according to the prosecution are as follows: PW1 is the minor, subject of the present appeal. She stated that she was eleven (11) years old. At all material times, she lived with her uncle A (Appellant) and his wife. One day, sometime in August 2010, she did not go to school. She was in the house with the Appellant. He asked her to remove her clothes. She obliged. She stated that he lay on top of her. He inserted his penis into her vagina (pointing). Later after three days, he again took her to the bedroom and did ***'tabia mbaya'*** to her. He ordered her not to tell anybody about the incident. PW1 narrated to the court how the Appellant's wife assaulted her. She came home one day and accused PW1 of stealing her money. She canned her. She picked a bottle of soda and inserted it into PW1's vagina on two occasions. The Appellant's wife beat her up numerous times after that day. One day, the Appellant's wife, in the company of a lady and two men, escorted her to a house of a lady who was a doctor. PW1 did not know the said lady. The Appellant's wife asked her not to return back home. She stayed with the said lady for about a week. The lady took her to Kenyatta National Hospital where she was examined and received treatment.

PW2, Dr. Hezron Chege examined PW1 on 10th August 2010. The complainant told her that she was sexually assaulted by her uncle and aunt, whom she lived with at the time. PW1 complained of pain on her breasts and in her vulva. PW2 examined PW1's genitalia. Her hymen was broken. There was presence of a white discharge from her vagina. She had ulcers around her genitalia. There were bruises on both breasts. PW2 produced a Post Rape Care form of the complainant into evidence. PW3, Dr. Zephania Kamau examined PW1 on 30th August 2010. PW1 alleged to have been defiled. She had earlier been treated at Kenyatta National Hospital. PW3 stated that there were no injuries

on the minor's vagina. He also examined the Appellant. He had no visible physical injuries on his penis. He stated that he undertook an age assessment and determined that PW1 was eleven (11) years old at the time. On inquiry by the trial court, PW3 stated that if PW1 had ulcers in her vagina, the same would have healed within the three weeks prior to his medical examination. He stated that ulcers can heal within seven days.

PW4, P.C. Susan Ndungu, investigated the case. She was stationed at Kilimani Police station, attached at the Children's desk. She was on duty on 17th August, 2010. Volunteers from The Cradle came and reported that PW1 had been sexually assaulted by her uncle and aunt. PW1 was admitted at Kenyatta National Hospital. PW4 visited the said hospital and interrogated PW1. PW1 narrated to her how her uncle had sexually assaulted her on several occasions. Her aunt physically assaulted her. She also inserted a bottle of soda into her vagina. After concluding her investigations, she arrested the Appellant and his wife at their home and accordingly charged them.

The Appellant was put on his defence. He gave an unsworn statement. He stated that he lived in Kibera. On 26th August 2010 at about 10.00pm, six police officers came to his house. They forced him to accompany them to Kilimani Police Station. He was informed that he was facing defilement charges. The Appellant denied sexually assaulting PW1. He stated that he had been framed.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination, whether or not to uphold the decision of the said court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make remarks regarding the demeanour of the witnesses and therefore is required to give due regard in that respect (See **Njoroge vs Republic [1987] KLR 19).** In the present appeal, the issue for determination is whether the prosecution established the charge of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** brought against the Appellant, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case.

Section 8(1) of the **Sexual Offences Act** provides that:-

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

It is now trite that for the prosecution to establish the charge of defilement, it must establish, firstly, the age of the complainant, secondly, penetration and thirdly, the identity of the perpetrator. It was the Appellant's case that the age of the complainant was not proved to the required standard of proof. In particular, the Appellant argued that the prosecution did not adduce any documentary evidence to support its contention that PW1 was aged eleven (11) years at the time of the incident. In defilement cases, it is imperative that the prosecution establishes the age of the complainant to the required standard of proof. In the present appeal, no documentary evidence was adduced by the prosecution to establish PW1's age. However, jurisprudence has held that the age of the complainant can be ascertained by documentary evidence, oral testimonies or by professional age assessment. In **Francis Omuroni vs Uganda Court of Appeal Criminal Appeal No. 2 of 2000** the court held that-

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…."***

PW1 testified that she was eleven (11) years old at the time. She was in class five. The same was not challenged by the Appellant on cross-examination. PW3 (the doctor) stated that he conducted an age assessment test and determined that PW1 was eleven (11) years old. The P3 form produced in evidence also indicated that PW1 was eleven (11) years of age at the time of the sexual assault. The trial magistrate, who had the benefit of seeing PW1 testify, assessed the complainant's age to be that of a child of tender years. This is evident since the trial magistrate deemed it necessary to conduct a *voire dire* examination on the complainant before proceeding to take her evidence. This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act and was of the apparent age of eleven (11) years.

This court now turns to the ingredient of penetration. **Section 2(1)** of the **Sexual Offences Act** defines penetration as:

> ***"the partial or complete insertion of the genital organ of a person into the genital organs of another person."***

As regard to whether the prosecution proved penetration, the medical evidence adduce by the two doctors established that indeed PW1's vagina was penetrated. PW1 narrated to the court how the Appellant defiled her in his house. He ordered her to remove her clothes. He proceeded to insert his penis in to her vagina. She stated that he did "*tabia mbaya*" to her. It was her first sexual experience. He had sexual intercourse with her on several occasions. Taking into consideration the P3 form and Post Rape Care form produced in court, as well as PW1's testimony, this court is of the view that the prosecution did establish the element of penetration to the required standard of proof beyond any reasonable doubt.

The third issue is whether the penetration was perpetrated by the Appellant. PW1 lived with the Appellant and his wife, who was his co-accused in the trial case. The Appellant contends that the penetration was done by his wife and not him. This is because PW1 stated in her testimony that the Appellant's wife inserted a bottle of soda into her vagina. This court disagrees with the submission by the Appellant. PW1 narrated in detail how the Appellant sexually assaulted her on several occasions. The insertion of the bottle into PW1's vagina by his wife was merely an additional element of the sexual assault she underwent in that house. This court dealt with the Appellant's wife's appeal in **Nairobi HC. Criminal Appeal No.303 of 2011 Caroline Otieno Oduko –vs- Republic.** The court confirmed her conviction and sentence on the charge of sexual assault contrary to Section 5(1)(a)(i) & (ii) of the Sexual Offences Act.

PW1 gave a sworn statement. She deposed how the Appellant inserted his penis into her vagina and did ***"bad manners"*** to her. Three days

later, he took her to his bedroom and sexually assaulted her again. There is no doubt that she implicated the Appellant as the one who defiled her. PW1 gave a detailed testimony. The trial record indicated that she broke down in tears while narrating to the trial court how she was sexually assault by the Appellant and his wife. The Appellant's defence that he had been framed with the offence does not hold. In the case **of J.W.A. v Republic [2014] eKLR,** the Court of Appeal observed:-

> ***"We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."***

In this court's assessment, PW1 was telling the truth. The defence of the Appellant was merely evasive and did not dent the otherwise strong culpatory evidence adduced by prosecution witnesses. It was properly dismissed as being of no evidential value. His guilt was established to the required standard of proof beyond any reasonable doubt. This court, having re-evaluated the evidence adduced before the trial court and the submission made on this appeal, cannot see any reason to disagree with the finding reached by the trial court. The Appellant's appeal on conviction lacks merit. The same is hereby dismissed.

As regards the sentence, **Section 8(2)** of the **Sexual Offences Act** provides a sentence of life imprisonment for any person convicted of defiling a child aged eleven (11) years or less. The sentence meted out by the trial court was therefore legal. The appeal on sentence is similarly dismissed. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF MARCH 2019

L. KIMARU

JUDGE