REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

CRIMINAL APPEAL NO. 60 OF 2018

SAMUEL BETT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, **Samuel Bett**, was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the **Sexual Offences Act***('the Act'*). The particulars were that on the diverse dates between 1st September and 7th September 2017 at Oldonyoro location, in Transmara West Sub-County within Narok County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MC a child aged 13 years. In the alternative, the Appellant was charged with committing an indecent act contrary to Section 11(1) of the Act.

2. The appellant was sentenced to 20 years imprisonment and now appeals against conviction and sentence.

3. As this is a first appeal, I am required to re-evaluate the evidence and reach an independent decision as to whether I should uphold the conviction. I must take into account that I neither heard nor saw the witnesses testify.

4. **Pw2**, RCM, recalled that on 01/09/2017 she took Pw1 to school after which the complainant disappeared for one week. **Pw1**, MC, testified that on 01/09/2017 she accompanied her mother to the market and later left with her sister whom she stayed with for the weekend. She later went to her Aunt's house. The appellant came to her aunt's house and spoke to her aunt. The appellant left only to return with maize, sugar and tea. Upon receiving instructions from her aunt to leave with the appellant, Pw1 and the accused left for the appellant's home. On arrival the appellant forcefully removed her inner wear and had sex with her. In the morning she went to her aunt's house to shower and change her clothes but had to return to the appellant's home for some keys she left in his home. Upon arriving she found Pw3 her father and the police. They were taken to the police station. She was taken to hospital.

5. JAK **(Pw3)** recalled that on 01/09/2017 Pw1 went to school but did not come back. He reported it to the chief and conducted his own investigations for 5 days and when he was told where Pw1 was he reported the matter to the police. They proceeded to the place and arrested the appellant together with Pw1.Hosea Kiplangat Kiringa (Pw4) a clinical officer testified that on examination of Pw1 her labia was normal, external genitalia was normal, with normal vaginal cervix but the hymen was broken. High vaginal swab revealed no spermatozoa. His conclusion was that Pw1 was defiled.

6. APC Tom Ochieng (**Pw5**) recalled that on 08/09/2017 upon receiving a report from Pw3 that Pw1 had disappeared from home for a week and that he had found where she was, Pw5 accompanied him to the appellant's home. They met the appellant on the road and arrested him. Pw6, APC Kelvin Njoroge Kimanga, recalled that they arrested the accused who was walking with Pw1 on the road after receiving a report from Pw3 on Pw1's disappearance.

7. Corporal EM, No. 24687 (**Pw7**) was the investigating officer in the matter. He recalled that on 08/09/2017. Pw3 complained that Pw1 was missing and on the 17/09/2017 when the Administrative police from Angata got word the Pw1 was with the appellant he was arrested. Pw7 found the appellant in the custody of the AP police officers, filled the P3 form and preferred the charge of defilement.

8. The appellant elected to give an unsworn statement. He testified that he was spraying animals and later took them to the grazing field. He then left for the center and on his way he met occupants in a motorcycle asking for directions to Angata. He was then taken to AP line and later to police post at Angata and charged with the offence he knows nothing of.

9. The appellant filed written submission. He was unrepresented in the lower court. Mr. Godia appeared for him during the appeal. The appellant's submitted that the complainant's evidence was not credible and that it was riddled with contraction and that there was no sufficient evidence to support the charge. That the prosecution failed to establish the ingredients necessary for defilement. It submitted that

the only evidence by the prosecution on penetration was only that of the complainant and that medical evidence did not indicate whether the hymen was freshly broken. They also submitted that the court failed to take into consideration that the accused was a first offender and thereby the sentence imposed by the trial magistrate was excessive. The State opposed the appeal on grounds that the prosecution had proved all the elements of the offence of defilement.

10. It is trite that the prosecution bears the burden of proof on every element in a criminal charge beyond reasonable doubt. The appellant in this appeal was charged with the offence of defilement contrary to Section 8(1) as read with section 8 (3) of the Sexual offences Act which provides: *"A person who commits an act which causes penetration with a child is guilty of the offence termed defilement and if the offence is committed with a child between the age of twelve and fifteen years they shall be liable upon conviction to imprisonment for a term of not less than twenty years."*

11. This court carefully analyzed the evidence that was tendered by the Prosecution witnesses and noted that the case herein was premised on the evidence of a single witness, a minor. Indeed, in sexual offences, a trial court can believe the evidence of that single witness if he or she is satisfied that the victim is telling the truth. Section 124 of the **Evidence Act Cap 80 (Laws of Kenya)** provides as follows:-

> *"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*

12. For the state to sustain a conviction against an offender the following elements must be proved:

a. Penetration of the male offender into the genitalia of the female victim.

b. The age of the child.

c. Evidence that the accused was positively identified as the perpetrator.

"Penetration" under section 2 of the Act means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*Pw1 gave clear testimony on how she was sexually assaulted including a clear chronology and sequence of events leading to the arrest of the appellant. The accused gave evidence before the trial court that:

> *"My aunt told me to go with the accused herein. I went with him to his place. There was nobody at home. We entered into the house. Accuse went to bed and later invited me there. He forcefully removed my inner wear. I screamed but nobody responded. He defiled me. He had sex with me. I screamed as I felt pain. I had never had sex before. The next morning I left at 6:00 a.m., I left for my aunt's place."*

13. Pw1 gave evidence that the appellant had been to her aunt's home and he spoke to her aunt. She later made some tea for them before later heading to the appellant's house. She testified that the appellant had sex with her. I find that Pw1 was therefore able to identify the appellant in view of the substantial amount of time they had spent together.

14. Evidence of Pw1 is also corroborated by medical evidence of Pw4 who gave evidence that upon examination of Pw1 hymen was broken and he came to the conclusion that Pw1 was defiled. Evidence of Pw3, Pw5 and Pw6 was that they found Pw1 in the company of the appellant. Pw1 testified that as she was getting out of the accused house she found Pw3 and police officers outside. The totality of the evidence presented by Pw1, Pw3, Pw5 and PW6 clearly placed the appellant at the scene of crime. Pw1's evidence was sufficiently corroborated.

15. The appellant also submitted that the prosecution did not prove its case beyond reasonable doubt given that the prosecution case was full of contradictions. As regards contradictions and inconsistencies, the Court of Appeal in ***Erick Onyango Ondeng' v Republic NBA CA CRA No. 5 of 2013 [2014] eKLR*** observed that:

> *"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."*

16. He also contended that Pw1 gave evidence that when she was leaving the appellant's house she met the police and Pw3. Evidence of Pw3, Pw5, Pw6 and Pw7 was that the appellant was arrested while walking on the road with the complainant. I do not think this issue is material to the main charge, this is really a matter of perception or description of where the appellant was at the time of arrest and does not go to the heart of the charge. Evidence of Pw1 clearly puts the appellant at the scene of crime.

17. On the issue of failing to call Pw1's aunty, the prosecution burden has the burden to call witnesses who are sufficient to establish a fact. It is not necessary to call the people who know something about the case. I find that the evidence of the witness called was sufficient to establish the prosecution case.

18. In his unsworn defense, the appellant's case when put on defense was that he was grazing animals on the material day. His unsworn statement put alongside the credible evidence of the witnesses, does not amount to anything and was properly dismissed by the trial magistrate.

19. The final ingredient in proving the offence of defilement is the age of the child. Proof of age is a question of fact. In this case, Pw4 produced an age assessment form showing Pw1 was 15 years at the time the offence was committed. There is no doubt that Pw1 was a child and the age proved by the prosecution fell within the provisions of section 8(3) of the Act which provides for a mandatory sentence of twenty years imprisonment. I therefore find and hold that the sentence was within the law and was neither harsh nor excessive to warrant interference. I affirm the conviction and sentence. The appeal is dismissed.

Dated, signed and delivered at Kisii this 7th day of March 2019.

R. E. OUGO

JUDGE

In the presence of;

Appellant Present

Mr. Kimaiyo h/b for Mr. Kiprotich For the Appellant

Mr. Otieno Senior State Counsel

Rael Court clerk