REPUBLICOF KENYA

IN THE HIGH COURT O F KENYA

AT ELDORET

CRIMINAL APPEAL NO. 89 OF 2017

FRED NAMUGONGO..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the conviction and sentence of the Resident Magistrate's Court at Iten (Hon. N.C. Adalo) dated 22 August 2017 in Iten Senior Principal Magistrate's Criminal Case No. 12 of 2016)

JUDGMENT

[1] This appeal by **Fred Namugongo** (the Appellant), was filed herein on **11 September 2017**, from his conviction and sentence in **Iten Senior Principal Magistrate's Case No. 12 of 2016**. He had been charged and arraigned before the lower court with the offence of Defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**, **No. 3 of 2006**. In the alternative, the Appellant was charged with Indecent Act with a Child, contrary to **Section 11(1)** of the **Sexual Offences Act**. He denied the charges and after his trial, in which the Prosecution called 5 witnesses, the lower court was satisfied as to the truthfulness of the Prosecution Case. Accordingly, the Appellant was found guilty, convicted of the offence of Defilement and sentenced to life imprisonment.

[2] Being aggrieved by his conviction and sentence, the Appellant lodged this appeal on the following grounds:

> **[a]** That the Learned Trial Magistrate erred in law and fact by dismissing his defence without cogent and concrete reason;
>
> **[b]** That the Learned Trial Magistrate erred in law and fact by convicting him on the basis of contradictory evidence adduced by the Prosecution;
>
> **[c]** The Learned Trial Magistrate erred in law and fact by convicting him on hearsay evidence;

[3] Accordingly, the Appellant prayed that his appeal be allowed, his conviction quashed and the sentence imposed by the lower court be set aside. The Appellant relied on his written submissions, wherein he contended that the P3 Form relied on by the Prosecution before the lower court is a nullity because some sections were not completed by the medical officer who filled it, notably Section C, as to the nature of injuries and the probable type of weapon causing the injuries. On the authority of **Chila vs. Republic [1967] EA 722**, the Appellant also found fault with the lower court for relying on the uncorroborated evidence of a minor without warning or cautioning itself about the danger entailed thereby. He argued therefore that the P3 Form and the evidence of the **PW3** fell short of proving the elements of the Charge of Defilement to the requisite standard.

[4] Section 36 of the **Sexual Offences Act** was also cited by the Appellant to support his argument that the case against him was a frame-up; and that it was for that reason that no attempt was made to comply with that provision of the law; and that neither was the scene ever visited for purposes of verifying the Complainant's allegations. Thus, the Appellant urged the Court to find that the case against him was not produced beyond reasonable doubt.

[5] On behalf of the State, written submissions were filed herein on **5 September 2018** by **R.N. Karanja** defending the decision of the lower court in all its aspects. It was pointed out that although the medical examination took place several days after the incident, the evidence was nevertheless conclusive that the minor had a torn hymen, which was sufficient proof of penetration. It was further submitted that the age of the minor was established by way of age assessment and therefore that all the ingredients of the offence of Defilement had been proved beyond reasonable doubt; the Appellant having been identified as the perpetrator of the offence.

[6] I have given careful consideration to the appeal and taken into account the written submissions made herein. I am cognisant of the requirement that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and

come to its own conclusions thereon. (See **Okeno vs. Republic [1972] EA 32)**:

[7] In the Main Count, the Appellant was charged with Defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act.** The particulars of the Charge were that on the 1st day of January 2016 at around 3.00 p.m in Elgeyo Marakwet County, the Appellant intentionally and unlawfully caused his genital organ, namely penis, to penetrate into the genital organ, namely vagina of **EW,** a girl aged 9 years. In the alternative, the Appellant was charged with Indecent Act with a Child contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars were that on the on the 1st day of January 2016 at around 3.00 p.m in Elgeyo Marakwet County, the Appellant intentionally and unlawfully touched the genital organ, namely vagina of **EW,** a girl aged 6 years.

[8] In proof of the Charges, the Prosecution called a total of 5 witnesses before the lower court, the first of whom was the Complainant herself, **EW (PW1).** She told the lower court that she was at home with her sibling when the Appellant, a person well known to her, went there, called her out of the house and carried her to his house and defiled her. She explained that her mother was away at the time; and that she later reported the incident to her.

[9] The Complainant's mother was **AM (PW2),** a Ugandan, who told the court that the Appellant is a nephew of hers. Her evidence was that she left her house for work on **1 January 2016** at about 8.00 a.m., leaving her two daughters at home alone; and that upon her return at about 5.00 p.m. she noted that the older girl, the Complainant herein, was unsettled. She asked her what the matter was but the Complainant did not respond. She later got to learn from a certain boy, at about 8.00 p.m. that the Appellant had defiled the Complainant. She followed up the matter and caused the Complainant to be taken to **Chemnada Health Centre** for treatment; and was referred to **Chebiemit Sub-County Hospital,** but could not go there immediately due to lack of funds. She further testified that the Complainant was born in **2008** and explained that she was unable to produce the Child Clinic Card because it had remained in Uganda.

[10] Naomi Rotich (PW3) was then working at **Chebiemit Sub-County Hospital** as a Clinical Officer. She confirmed that the Complainant, a six year old girl, was presented to her on **9 January 2016** by her mother for examination following allegations of defilement. She examined her and found that her hymen was torn. As the examination took place 8 days later, there was no bleeding or laceration noted. Her conclusion was that the girl must have been assaulted sexually. She filled the P3 Form detailing her observations and findings and had it produced before the lower court along with the treatment notes as the **Prosecution's Exhibit No. 1 and 2.**

[11] Dr. Henry Wanyoike Mwangi (PW4) was then a Dental Officer based at **Iten County Referral Hospital**. He testified before the lower court on **31 October 2016** and stated that he was on duty on **24 October 2016** when the minor, **EW**, was taken in for age assessment. He ordered for a dental x-ray from which he concluded that the minor was approximately 9 years old. He prepared his report to that effect, which he produced before the lower court as the **Prosecution's Exhibit No. 3.**

[12] The last witness was **P.C. Michael Kiura** of **Chebiemit Police Post.** He was on duty on **7 January 2016** when the Appellant was handed over by **APC Cheserek** from **Chemnada AP Camp** on allegations of defilement. He told the lower court that, since the suspect was accompanied by the mother of the victim and the victim, he recorded their statements and thereafter escorted both the victim and the suspect to **Chebiemit District Hospital** for examination to verify the allegations of defilement and to ascertain the age of the minor. He thereafter caused the Appellant to be charged with the offence of defilement.

[13] The Appellant, on his part, testified that he was then working as a herdsman in **Chemnada** in **Marakwet**; and that while out harvesting maize on his employer's field, his employer, whose name he gave as Walter, called some people to beat him up. He explained that his employer had given him some task to plant some potatoes, but that when he demanded for his pay the said employer started avoiding him. He added that the assailants almost killed him on the allegation that he had defiled a child; an allegation that he denied. His defence therefore was that he had been framed and accused falsely for having demanded his dues.

[14] In cross-examination, the Appellant conceded that he knew the minor's mother, but denied that they were related. According to him he crossed paths with the minor's mother over his phone memory card valued at **Kshs. 700/=,** which she sold and refused to account for. The Appellant called **Nicholas Wamalwa Masika (DW2)** as his witness. **DW2** evidence was short and simple; but introduced a significant facet to the trial. Here is all he had to say:

> **"I come from Chemnada Sublocation. I am a casual worker. I know Fred Namugongo. He used to come for Joseph Kiplagat as a herdsman and he is not completely normal.**
>
> **I heard that he had defiled a young girl. That is all."**

[15] It was in the light of **DW2's** evidence that the Learned Trial Magistrate made an order that the Appellant be taken to **Moi Teaching and Referral Hospital** for assessment as to his mental health. The assessment was done and a report dated **19 April 2017** was presented before the lower court in readiness for the proceedings of **21 April 2017**. In the doctor's view, it was difficult to conclude "collaborative history" due to inconsistencies in the mental state assessment. He advised for a re-assessment after one month; which was done and a follow-up report dated **22 May 2017** filed. The second report advised that a relative be availed to provide corroborative history. It was otherwise the conclusion of the Psychiatrist that the Appellant was not fit to plead.

[16] It was on account of that report that the Court **(Hon. Chemitei, J.)** made an order herein on **19 October 2018** that the Appellant be subjected to a fresh mental status assessment. The Appellant was accordingly presented for a fresh mental status assessment and a report filed herein dated **22 October 2018**. That report shows that the Appellant had no evidence of mental illness and that he was fit to plead. It is curious to note that, although **DW2** voluntarily availed himself before the lower court to testify on the "not completely normal" status of the Appellant's mental health, he was unavailable to provide the necessary corroborative history that the Psychiatrist required. Indeed, from the two reports presented to the lower court, the inconsistencies were questionable; thereby raising the question as to whether **DW1's** assertion was but a ploy to get the Appellant off the hook. Nevertheless, the Court has to confront the pertinent question as to what the mental status of the Appellant was between the time of his plea and the date of his conviction, as this would have a direct effect on the legitimacy of the lower

court proceedings.

[17] A careful perusal of the record of the lower court shows that at no time was there any indication that the Appellant was not fit to plead to the Charges or to participate in the hearing, until the last witness, **DW2,** testified. To the contrary, the record confirms that the was in control and perfectly understood what was going on throughout his trial. He was therefore able to intelligibly field questions in cross-examination. In particular, he appears to have engaged the Clinical Officer **(PW3)** on medical issues with admirable clarity of thought, given the answers that ensued from his cross-examination of **PW3;** and when his turn came for him to make his defence, he started off by stating that:

> **"...I understand the charges I am facing in court. I heard what the Prosecution witnesses said and I had one chance to cross- examine them..."**

[18] In the premises, and given the conclusion made by the Psychiatrist in the final Mental Status Assessment Report filed herein on **22 October 2018,** there can be no doubt that the Appellant was in full control of his mental faculties not only at the time when the offence of defilement was committed but also throughout his trial before the lower court. Indeed, **Section 11** of the Penal Code recognizes that:

> **"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."**

[19] Accordingly, the Appellant is presumed to have been of sound mind throughout his trial, and I so find. I would proceed to consider the appeal on its merits, on the basis that the proceedings held by the lower court were valid in every sense.

[20] The main charge, of which the Appellant was convicted, was presented under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**, which provide as follows:

> **(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement;**
>
> **(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

[21] Thus, the Court would be interested in finding the answer to the basic question; namely, whether the ingredients of the offence of defilement as laid in the particulars of the Charge were proved against the Appellant beyond reasonable doubt.

[a] <u>On the Ingredients of the offence of Defilement</u>

[22] The three key ingredients that the Prosecution was under duty to prove before the lower court were: that the Complainant was a child then aged 9 years; that there was penetration of her vagina; and that the same was perpetrated by the Appellant. As regards the age of the minor, the record does show that, in her *voir dire* examination, she conceded that she did not know her age. Nevertheless, her mother testified that she was born in **2008,** which evidence was unchallenged. Accordingly, she was about 8 years old by **1 January 2016** when the offence is said to have happened. That evidence was not controverted in any way by the Appellant, noting that according to his version, he did not know **PW2** or the victim prior to his arrest.

[23] In addition to the evidence of **PW2** on the minor's age, **PW5** as the Investigating Officer, testified that he caused the minor to be escorted to **Chebiemit District Hospital** for age assessment. The age assessment, which was conducted by **PW4** showed that the minor was probably 9 years old as of **24 October 2016** when the assessment was done. The Age Assessment Report was produced by **PW4** as the **Prosecution's Exhibit No. 3.** Again, that evidence was uncontroverted and therefore, taken alongside the evidence of **PW2,** proved beyond reasonable doubt that **PW1** was a minor for purposes of **Section 8(2)** of the **Sexual Offences Act** as read with **Section 2** of the **Children Act, No. 8 of 2001.**

[24] On whether penetration was proved to the requisite standard, the only witness was the minor, who told the lower court that she was at home with her younger sister when the Appellant, a person she knew well, went there in broad daylight and called her out of the house and carried her to his house and defiled her. Her mother **(PW2),** told the court that upon her return at about 5.00 p.m. she noted that the Complainant was unsettled. She asked her what the matter was but that the Complainant did not respond. She later got to learn from a certain boy, at about 8.00 p.m. that day that the Appellant had defiled the Complainant. Her immediate reaction was to cane the minor and thereby got her to speak about the incident. She followed up the matter and caused the Complainant to be taken to **Chemnada Health Centre** for treatment; and was referred to **Chebiemit Sub-County Hospital**, but could not go there immediately due to lack of funds.

[25] Naomi Rotich (PW3), a Clinical Officer at **Chebiemit Sub-County Hospital,** corroborated the evidence of **PW1 and PW2** by confirming that the minor was presented to her on **9 January 2016** for examination following allegations of defilement; and that she examined her and found that her hymen was torn. She explained that for a girl of the age of **PW1**, there was no doubt that she had been defiled. I note that in his written submissions, the Appellant took issue with the evidence of **PW3** and the P3 Form that she produced before the lower court, contending that the evidence was worthless owing to the fact that some parts of the P3 Form were either not completed by **PW3** or the completion was unsatisfactorily done, in his view. For instance, he questioned why no discharge or bleeding was noted in the minor's genitalia; and why the weapon used was not indicated in the P3 Form.

[26] However, it was well explained by **PW2** and **PW3** that there was a time lapse between the date of commission of the offence and the date of examination; which is why Section C of the P3 Form shows that nothing abnormal was detected. **PW2's** explanation was that she did not have the necessary funds to enable her take the minor to hospital promptly. Though the delay was undesirable, **PW2** cannot therefore faulted for it, granted her explanation. What is vital for purposes of the Main Charge, was that the minor's hymen was torn; and therefore there was credible proof of penetration beyond reasonable doubt for purposes of **Section 2** as read with **Section 8(1) and (2)** of the **Sexual Offences Act**. Indeed, the Appellant did not, and could not, dispute the fact that the Complainant was defiled; his defence being that the

offence was not committed by him, and that he was being framed by his employer in collusion with the minor's mother. Accordingly, there was proof beyond reasonable doubt that penetration occurred in this instance and therefore the Learned Trial Magistrate cannot arrived at the right conclusion in that regard.

[27] On whether the defilement was perpetrated by the Appellant, the Appellant took issue with the fact that **PW1** was the only witness; and that, being a child of tender years, her evidence required corroboration. He relied on **Sections 33 and 43** of **the Sexual Offences** Act as well as **<u>Chila vs. Republic [1967] EA 722</u>** for the holding that:

> **"The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied tht there has been no failure of justice."**

[28] It is therefore trite that a conviction can be based on the sole evidence of a complainant, if the trial court is satisfied that the witness is truthful. Indeed, the proviso to **Section 124** of the **Evidence Act** is explicit that:

> **"...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"**

[29] Accordingly, the question is, what probative value was given by the trial court to the evidence of the Complainant and what impression did she create on the mind of the court in terms of her credibility as a witness? In his Judgment, the Learned Trial Magistrate had the following to say in this regard:

> **"The question then would be whether this court believed the evidence of Pw1. Pw1 was a minor aged 9 years and this court conducted voire dire examination as per the Oaths and Statutory Declarations Act and formed the opinion that the minor was possessed of sufficient intelligence and composed. The court decided that she be affirmed. Pw1 passed as a young vulnerable child whom the accused had taken advantage of. The court observed the demeanour of the young girl. She spoke elaborately in swahili though her accent was punctuated with Buganda but she was consistent and firm. I am convinced that she was telling the truth. Pw2 had delayed in taking the child to hospital allegedly because she did not have any money. Can the sins and failures of the mother then be visited on the innocent child? The answer is to the negative..."**

[30] It is noteworthy too that the Learned Magistrate gave due consideration to **<u>the Chila Case</u>** at page 50 of the Record of Appeal then proceeded to exercise caution in the following terms:

> **"In that light therefore, having warned myself of the dangers of convicting on the uncorroborated evidence of one witness, and on the strength of Section 124 of the Evidence Act, I do find that the evidence adduced by the Prosecution in respect to the main count has proved beyond reasonable doubt that the accused herein did defile EW., a minor aged nine years..."**

[31] It is therefore manifest from the foregoing that the court properly directed and cautioned itself as appropriate and was of the view that the Complainant was trustworthy and therefore that her evidence was credible. Accordingly, I find no basis for differing with the conclusion reached by the Learned Trial Magistrate that the minor's evidence identifying the Appellant as her defiler was credible and sufficient to sustain a conviction. Indeed, **Section 143** of the **Evidence Act, Chapter 80** of the Laws of Kenya, provides that:

> **"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."**

[32] Accordingly, in **<u>Daniel Muhia Gicheru vs. Republic Criminal Appeal No. 90 of 2007 (UR)</u>** it was held that:

> **"The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In <u>BUKENYA AND OTHERS V. UGANDA [1972] EA 349</u> the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the material witnesses..."**

[33] In the premises, not much turns on the Appellant's argument that the trial court erred in relying on the evidence of **PW1**. In the same vein, the Judgment of the lower court shows that the Appellant's *alibi* defence was taken into account and given due consideration in the Judgment of the lower court; but was found incredible and therefore displaced by the Prosecution. Likewise, I find no merit in the Appellant's contention that failure by the Prosecution to comply with **Section 36** of the **Sexual Offences Act** was fatal to the Prosecution Case. This is because **Section 36(1)** provides that:

> **"...where a person is charged with committing an offence under this Act, <u>the court may direct</u> that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."** (Emphasis added)

[34] Clearly therefore, DNA testing is not mandatory. Hence, in **<u>Evans Wamalwa Simiyu vs. Republic [2016] eKLR</u>** in which the Court of Appeal had occasion to consider a similar argument, it took the following view of the matter:

"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."

[35] Likewise, in **AML v Republic [2012] eKLR,** the view was expressed, which I entirely agree with, that:

"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

I therefore find no merit in the Appellant's argument that it was obligatory for the Prosecution to comply with **Section 36** of the **Sexual Offences Act.**

[36] Having been convicted of the offence of Defilement under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**, the Appellant was liable to the penalty provided for in **Subsection (2)**, which stipulation is that:

"**A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

[37] It is plain therefore that, where the victim is aged eleven years or less, as was the case in this matter, the sentence is mandatory and it is life imprisonment. Thus, while the sentence imposed on the Appellant may be harsh, it is otherwise lawful; and although the Appellant complained that it was not clear which Count the sentence was for, the record is manifest, and the Learned Trial Magistrate was specific at paragraph 16 of the Judgment that the conviction was in respect of the Main charge. In the premises, the Appellant's contention that the Second Count was not proved is misplaced; for there was no Second Count. What was laid was an Alternative Count in respect of which no specific inculpatory conclusions was made as shown in Paragraph 17 of the Judgment. Although the Learned Trial Magistrate made reference to the Alternative Charge being **"...dispensed with...",** the proper thing to do in such a scenario is to make no finding in respect of the alternative charge where a conviction has been recorded in respect of the main charge. The rationale for this was well explicated by the Court of Appeal thus in **Robinson Mwangi Maina vs. Republic [2006] eKLR**:

"The trial court found that the alternative charge was part of the robbery and therefore acquitted them of the same charge of handling stolen property. That was not really correct. Where an accused person is convicted on the main charge, the usual practice is to make no findings on the alternative charge so that if on appeal the court thinks that the main charge was not proved but the alternative one was, the court can substitute a conviction on the alternative charge which would still be available on the record..."

[38] In the result therefore, I am satisfied that the conviction of the Appellant in respect of the Main Charge of Defilement contrary to **Section 8(1**) as read with **Section 8(2)** of the **Sexual Offences Act** was based on sound evidence. I am further satisfied that the sentence is not only lawful but also deserved given the circumstances. I would accordingly confirm the Appellant's conviction and the sentence of life imprisonment. Thus, the Appellant's appeal fails and is hereby dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF MAY 2019

OLGA SEWE

JUDGE