IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 41 OF 2012

BETWEEN

ABRAHAM AGORE KIBOGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. G. Mutiso, RM dated 27th February 2012 at the Magistrates Court at Kapsabet in Criminal Case No. 659 of 2011)

JUDGMENT

1. The appellant, **ABRAHAM AGORE KIBOGO**, was charged and convicted of the offence of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars of the offence were that on 1st April 2011 in Nandi County, he unlawfully and intentionally caused his penis to penetrate the vagina of BMR, a child aged 3 years.

2. The appellant was sentenced to life imprisonment and now appeals against conviction and sentence. In his grounds of appeal, the appellant complains that the prosecution failed to prove its case beyond reasonable doubt. He complained that the investigation was incomplete and that there was no evidence connecting him to the offence. He stated that the evidence was contradictory and inconsistent. Counsel for the respondent submitted that the prosecution proved its case beyond reasonable doubt.

3. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**).

4. The prosecution called 3 witnesses. PW 1 testified that she was the mother of BMR, the child. She testified that the child was aged 3 ½ years old. On 1st April 2011, she had left home with her three children including BMR. When she returned home, the child told her that she was having pain and could not eat. She could also not urinate. When PW 1 touched her private parts, she screamed in pained while PW 1's hands were blood stained. She asked the child what happened and the child told her it was *Baba Stephen* whom she knew as the appellant. While she was talking to BMR, the appellant came into the house and asked her what was wrong and she told him what BMR had told her. She took the child to hospital and reported the matter to the police. She told the court that the appellant lived in a one roomed house next to her.

5. The doctor who examined BMR, PW 2 testified that she examined her on 4th April 2011 and noted that the child had difficulties in walking, pain in urinating and her lower abdomen was painful, the hymen was torn and both labia were inflamed, the vulva was inflamed and urinalysis showed blood in her urine. He concluded that the child was subjected to penetration.

6. The final prosecution witness, PW 3, was the investigating officer. He confirmed that PW 1 reported the incident of defilement on 2nd April 2014 accompanied by BMR. When he interviewed the child, she mentioned that it was *Baba Stephen* who had injured her. On the next day the appellant was arrested by police officers and issued a P3 medical form. He told the court that the appellant was identified by PW 1 as he was her tenant.

7. In his unsworn statement, the appellant denied the offence. He told the court that he was arrested on 3rd April 2011 by police officers who came to his home.

8. Since the issue in this appeal is whether the prosecution proved its case beyond reasonable doubt, under **section 8(1)** of the ***Act***, the prosecution must prove that an accused did an act of penetration with a child. *"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."*

9. The fact of penetration is not in doubt. BMR's mother saw her in a state of distress and her private parts were injured. Those injuries were confirmed by PW 3 who examined her. Likewise her age was proved by her mother who produced the original birth notification and immunization card. She was aged 3 years at the time of the offence. The question for determination is whether the appellant is the person who caused the act of penetration.

10. The trial magistrate examined the child to determine whether she could testify and concluded that, *"Although some of the answers the child is giving are correct, the court is of the view that she is not possessed of sufficient knowledge and intelligence to be able to testify."* The Court of Appeal in ***M. M. v Republic*** **NRB Criminal Appeal No.41 of 2013 [2014]eKLR** observed that, "*Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice."* Hence the failure of the child to testify is not fatal to the prosecution case. In such instances, the general principle concerning proof of the case by circumstantial evidence must be applied which was distilled in the seminal case of ***Rex v Kipkering Arap Koskei and Another*** **[1949] 16 EACA** 135, where the East Africa Court of Appeal stated that, "*In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses other than that of his guilt."*

11. In this case the only evidence implicating the appellant are statements made by BMR to PW 1 and PW 3. Those statements are inadmissible hearsay and cannot form the basis of a conviction. **Section 63** of the ***Evidence Act (Chapter 63 of the Laws of Kenya)*** provides as follows:

> 63(1) Oral evidence must in all cases be direct evidence.
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> (2) For the purposes of subsection (1) of this section, "direct evidence" means —
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> (a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;
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> (b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;
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> (c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;
>
> (d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:
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> Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.
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> (3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.

12. The testimony of PW 1 and PW 3 that BMK spoke to them is direct evidence under section 63 of the Evidence Act but what BMK told them is what is indirect evidence or otherwise known as hearsay. In ***Maina Kinyatti v Republic*** **NRB CA Criminal Appeal No. 60 of 1983 [1984] eKLR**, the Court of Appeal had this to say about hearsay evidence:

> Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence; cases and materials on evidence by J D Heydon, 1975 p 5. The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated: Archbold Criminal Pleading Evidence & Practice 40th Edition p 809 para 1282

13. The statement made to PW 1 and PW 3 by BMK pointing to the appellant could not be admitted as proof of their truth and did not fall into any of the exceptions provided in **section 33** of the ***Evidence Act***. In the circumstances, the only evidence available is that the appellant was a neighbour to PW 1 and he came to see her on the material day. The evidence did not exclude the possibility that anyone else could have committed the felonious act or that it was only the appellant who could have done it. The conviction is therefore unsafe.

14. I allow the appeal, set aside the conviction and sentence and direct that the appellant shall be released unless otherwise lawfully held on a separate warrant.

SIGNED AT KISII BY

D. S. MAJANJA

JUDGE

DATED and DELIVERED at ELDORET this 3rd day of June 2019.

H. A. OMONDI

JUDGE

Appellant in person.

Ms Oduor, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.