REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 04 OF 2019

MARTIN MUTUA KAMENDE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. B. J. Bartoo – RM Thika dated and delivered on the 12th day of July 2017 in the original Thika Chief Magistrate's Court Criminal Case No. 3428 of 2015}

JUDGEMENT

The appellant is serving a term of twenty (20) years imprisonment for the offence of Defilement contrary to Section 8 (1) as read with 8 (3) of the Sexual Offences Act. The particulars of the offence are that on 5th July 2015 in Gatanga District within Murang'a County the appellant committed an act which intentionally caused his penis to penetrate the vagina of CWW a child aged 15 years.

This appeal is against the conviction and sentence. The same is premised on the Amended Grounds of Appeal filed herein on 11th February 2019 which are: -

> **"1. THAT, the learned trial magistrate erred in points of law and facts by failing to find that the element of defilement namely age was not proved beyond reasonable doubt.**
>
> **2. THAT, the learned trial magistrate erred in points of law and facts by failing to find that the charge I was charged with was defective in nature.**
>
> **3. THAT, the learned trial magistrate erred in points of law and facts by failing to find that the case of defilement was no proved beyond reasonable doubt as required by the law.**
>
> **4. THAT, the learned trial magistrate erred in points of law and facts by failing to find that the prosecution's evidence was tainted with material contradictions.**
>
> **5. THAT, the learned trial magistrate erred in law and facts in failing to find that there existed a grudge between the appellant and the victims family and the probable reason for implication with this offence."**

At the hearing of the appeal the appellant relied on written submissions to which Counsel appearing for the State responded orally. I have considered the rival submissions carefully but as the first appellate court I have also to analyse and re-evaluate the evidence in the lower court so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses who gave evidence **(see Okeno v Republic [1972] EA 32).**

The ingredients for the offence of defilement are that the victim is a child hence **age of the victim; penetration** and **identification of the perpetrator**. It is my finding that in this case all the three elements were proved beyond reasonable doubt.

The **age** of the complainant was proved through a Birth Notification issued under the Births and Deaths Registration Act which as stated at its foot is a precursor to a certificate of birth. That notification indicates she was born on 13th March 1999 meaning she was sixteen years old when this offence was committed which means she was still a child as defined in **Section 2 of the Children Act** and hence incapable of consenting to acts of penetration as defined in the **Sexual Offences Act**.

On **penetration** the complainant who lived with her grandmother (Pw2) gave evidence that she was home alone one Sunday when the appellant dragged her to his house not very far from theirs and after undressing her and lying on top of her he inserted his penis into her vagina. After he finished he warned her not to tell anybody more so her grandmother and then gave her 20/=. She stated that he did the

same the following Sunday and the one after that and because of fear she did not tell anybody until a teacher in her school asked her why she was keeping to herself. She opened up and told the teacher (Pw3) about it. The teacher in turn informed the school head teacher who involved a social worker at a certain children's home (Pw5). With the help of the Social worker the matter was reported to the police and the complainant was taken to Ithanga Health Center for examination. The appellant was subsequently arrested and charged with this offence. It is the appellant's contention that defilement was not proved beyond reasonable doubt but my finding is that it was. **Defilement** is defined as – **"the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

The complainant testified that the appellant inserted his penis into her vagina and that he repeated it several times. She also stated that it was not the only time he did it. **Section 124 of the Evidence Act** removes the need for corroboration in sexual offences the only rider being that to convict on the evidence of the victim alone the court must believe the victim and record its reasons for doing so. In this case I believed the complainant told the truth. She was very consistent and even in the face of rigorous cross examination by the appellant, she remained steadfast. Whatever she told the teacher is also what she told this court. The submissions by the appellant that there has never been a witness to this offence has no basis in light of **Section 124 of the Evidence Act**. In any event were corroboration a requirement there is medical evidence to corroborate that the complainant was defiled. Peter Njau Chege (Pw6) a clinical officer at Ithanga Health Centre testified that he examined the complainant on 9th July 2015 and came to the conclusion that she had been defiled. He produced treatment notes, a P3 Form and a Post Rape Care Form (PRC) in which the findings of the examination were filled. The appellant's defence that he was framed by one Michael Kawi and the complainant's kin cannot be true as there is evidence that the investigations in this case were instigated not by the complainant's grandmother but by her teachers who did not even know the appellant and who therefore could not have had reason to lie against him. The clinical officer was also an independent witness. There is no evidence that he had any interest in this case other than doing the work for which he was employed. I am therefore satisfied that penetration was proved beyond reasonable doubt.

The appellant was the complainant's neighbour. According to the complainant's grandmother they had lived in the same neighbourhood for twenty years. I am satisfied therefore that the complainant knew the appellant well and that as the offence occurred in broad daylight there was no possibility of mistaken identity and identification of the appellant as the perpetrator was also proved beyond reasonable doubt.

It was also the appellant's contention that the charge was defective. While I agree with him that the age of the complainant at the time of the offence was 16 years which placed her in the age category under **Sub-section 8 (4)** and not **8 (3)** it is my finding that the defect was curable under **Section 382** of the **Criminal Procedure Code** and was therefore not fatal to the prosecution's case as the only difference is in the sentence but not the offence. The complainant was still a child who was incapable of consenting to sexual intercourse and the complainant still committed the offence of defilement albeit under **Section 8 (1)** as read with **8 (4) of the Sexual Offences Act**. I find that given the age of the complainant he should have been sentenced to imprisonment for fifteen (15) years which in my view is reasonable in the circumstances of this case.

The **appeal on conviction is dismissed** but the sentence of imprisonment for twenty (20) years is set aside and substituted with one for fifteen (15) years imprisonment from the date he was sentenced by the lower court. It is so ordered.

Signed and dated this 15th day of October 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 17th day of October 2019.

C. W. MEOLI

JUDGE