REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 33 OF 2017

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 3487 of 2010 of the Chief Magistrate's Court at Naivasha – T.W.C. Wamae, SPM)

E N N.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein was charged with Defilement contrary to Section 8 (1) as read with Section 8 (2) of the Penal Code. In that on the 25th December, 2010 in Naivasha Municipality within Nakuru County, he caused his genital organ namely penis to penetrate genital organ namely anus of **H. N.** a girl aged one year. Following a full trial, the Appellant was convicted and sentenced to 30 years imprisonment.

2. Aggrieved at the outcome, he has lodged an appeal to this court that raises seven grounds. Three of the grounds target the evidence at the trial, as follows:-

> **"4. THAT the medical evidence did not reach the required standard of medical testimony of an expert.**
>
> **5. THAT immediate neighbours were not called so as to deliberately call a preferred witness PW5 one JAMMILLA AUMA in order to fix me.**
>
> **6. THAT there was inherent grudge between my first wife and PW1 who had quarreled over the phone which definitely led to the fixing of the charges leveled against me."**

Grounds 1, 2, 3 and 7 are technical in nature and raise legal challenges in respect of the trial.

3. In written submissions, the Appellant asserts that the charges are defective due to variance; that the trial evidence was that he was the father of the victim, and therefore the charge against him ought to have been Incest contrary to Section20 (1) of the Sexual Offences Act. Secondly, he complains that he was prejudiced at the trial because he was not accorded appropriate interpretation in his native language, Bukusu. He relied on Section 198 (1) of the Criminal Procedure Code and cited the case of **Adan -Vs- Republic [1973] EA 443**, *interalia.*

4. He further complains that his right to fair trial under Article 50 (2) of the Constitution regarding access to the prosecution evidence was violated. In the same vein, he contends that he was held beyond the limit prescribed in Article 49 of the Constitution before the arraignment.

5. In support of grounds 4, 5 and 6, the Appellant attacks the medical evidence, pointing out that it did not connect him to the offence. Further that immediate neighbours did not testify yet they were essential witnesses. He asks the court to draw an adverse inference therefore. He further reiterated the evidence that there was a grudge between the complainant's mother and his first wife.

6. Mr. Koima for the DPP opposed the appeal. He argued that the charges were proper. Restating the prosecution evidence at the trial, he submitted that all the elements of the offence were proven and the Appellant identified as the culprit. The Appellant's reply restated his earlier complaints raised in written submissions.

7. In the case of **Pandya -Vs- Republic [1957] EA 336** the Court of Appeal for Eastern Africa outlined the duty of the first appellate court, stating that:-

> ***"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear***

the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

8. The prosecution case in the lower court was as follows. The Appellant befriended **C.K.** (**PW1**) of [particulars withheld] village after she was introduced to him by his sister, one H who, had temporarily hosted her and 1 year 3 month old daughter, **H**. In a short while, the Appellant asked **PW1** to "marry" him, which basically meant the two moving in together. In the material period therefore, the Appellant and **PW1** were cohabiting at Kasarani. **H.** lived with them.

9. On 25th December, 2010, about a month since the cohabitation commenced, the family was in their room/house. In the evening, at about 6.30pm, **PW1** left **H.** asleep on the bed and the Appellant lounging on a chair and went to see a neighbour. She returned home within an hour to find the Appellant standing by the bed when wielding a whip and threatening to **H.** who was still on bed**. H.** was crying. When **PW1** picked and examined **H.,** she noted that she had a bleeding injury on the anus. Questioned the Appellant, before running out, screaming. **PW1** went to the house of a neighbour **J.A.** (**PW5**).

10. At **PW1's** request, **J.A**. accompanied **PW1** to her home. She found the child on a chair and the Appellant seated. On examining the child she too noted bleeding from the anus. Members of the public had been attracted by the commotion. They arrested the Appellant as **PW1** and **PW5** rushed the child to Naivasha District Hospital. **APC Suruya** (**PW3**) of Kasarani AP Post on receiving the report rushed to the scene and re-arrested the Appellant. He also later retrieved the child's clothes being a blood stained trouser and shawl [Exhibit 2 and 3].

11. On arrival at the Naivasha District Hospital **H.** was examined and treated. The **PRC** (**Exhibit 2**) completed at the time reflects that she had bruises on the anal orifice with blood stains, and her clothes equally blood stained. On 28th December, 2010, **Dr. Peris Njiiri Maina** (**PW2**) examined the minor and recorded his findings in the **P3** form, **Exhibit 3**. He documented bruises on the upper thigh, vulva and anus with bleeding from the anal orifice. He concluded that:-

"There was peno-anal penetration."

He assessed the degree of injury as grievous and estimated the child's age as one year.

12. In his unsworn defence statement, the Appellant stated that he had two wives, the youngest being **PW1** and resided with him at Kasarani in the material period. The eldest wife lived upcountry. The said wife had called him on 20th December, 2010, **PW1** stating a desire to talk to her co-wife. Again the older wife called on 25th December, 2010 and spoke to **PW1** and the two exchanged insults, which left **PW1** unhappy. The Appellant went out and on his return, **PW1** also went of the house, returning later to raise an alarm, claiming that the Appellant had defiled the victim child. He was attacked by a crowd attracted to the scene, later handed over to police. He denied the charges.

13. There is no dispute regarding the relationship between the Appellant and **PW1**, or the fact that the couple lived together with their young child **H.** in the material period.

14. So far as the legal challenges are concerned, none of them to my mind hold water. Just because the Appellant stood charged with defilement of his wife's daughter did not make the charges defective. **PW1** gave evidence that the victim child was not sired by the Appellant. Besides, the couple had cohabited merely a month prior to the offence and despite **PW1** asserting that the Appellant was not the child's father, he did not challenge the evidence by way of cross-examination. Nor claim the child as his daughter in the course of cross-examination.

15. In his defence he referred to the victim child as **PW1's** daughter. There is therefore no variance between the evidence and the charge and assertions that the charge sheet was defective have no basis.

16. Regarding language interpretation during the trial, the record shows clearly from the plea date to the defence that the Appellant was accorded the benefit of interpretation from English to Swahili. The record shows that he communicated with the court and cross-examined witnesses at length. He understood the charges, based on his robust participation in the trial. It is not believable that a person who gave a defence statement as he did in Kiswahili did not understand the proceedings. This complaint is an afterthought.

17. Contrary to his assertions the record of the trial shows that the Appellant adequately understood the charges read to him, denied them and proceeded to participate fully in the trial. At any rate, he could have raised the issue of language interpretation if indeed he was unable to comprehend the proceedings. The record does not show any such objection, and the Appellant did make several different requests, initially for adjournment and later recalling of **PW1**. Subsequently when the ruling on case to answer was read to him, he made an election and made a coherent defence in Kiswahili. Thus the complaint in respect of the language of the trial does not hold.

18. Similarly, the Appellant's complaint that he was arraigned before the court outside the period prescribed in Article 49 of the Constitution has no place in an appeal of this nature and is equally dismissed (See **Julius Kamau Mbugua -Vs- Republic [2010] eKLR**). Grounds 1, 2, 3 and 7 have no merit therefore.

19. Turning now to the real "meat" of this appeal, as contained in grounds 4, 5 and 6, the latter two grounds suggest that the Appellant was brought to court on trumped up charges because **PW1** was angry over insults from the Appellant's first wife. The trial court dismissed the

Appellant's defence on the basis of the weight of the prosecution evidence.

20. The trial court stated in its judgment:-

> **"PW1 admitted that he had quarreled with Accused's first wife but denied that he framed the Accused. There is no evidence that any other person went to PW1's house while she was away. Accused does not deny that he was left in the house alone with the child when PW1 went away. He does not explain why he was threatening the 1 year old with a whip. The injuries on complainant's vulva clearly show that there was an attempt to penetrate therein. The injuries and bleeding from the anal area confirm that there was penetration therein. In the absence of evidence that anyone else went to PW1's house while she was away there is no doubt that the injuries observed on complainant were caused by Accused. Although the complainant who is a minor could not tell what happened to her because of her tender age, circumstantial evidence points at the guilt of the Accused person. The said circumstantial evidence is corroborated by the doctor's evidence and I have no reason to doubt that prosecution has been proved beyond any reasonable doubt. PW1 told court complainant was 1 year old. The doctor estimated complainant's age to be 1 year……."**

21. The evidence by **PW1** and **PW5** clearly pointed to defilement of the victim on the material date. Contrary to the Appellant's claim, the P3 form clearly indicates that there was peno-anal penetration of the child who had sustained anal and vulva injuries. These injuries were noted in the treatment notes recorded in the PRC Form early on the night of 25th December, 2010. The Appellant, according to **PW1** was left alone with the child as **PW1** went to a neighbour's home. Under an hour later she returned to find the child crying while the Appellant wielded a whip by the bedside. **PW1** noting the injuries called a neighbour **PW5,** who also noted the victim's injuries.

22. The Appellant appears to suggest that the mother of the child **PW1**, somehow caused the injury on the child in order to 'fix' him over a quarrel **PW1** had with his other alleged wife. Were that the case, he would have been the first to hear the child cry as the said injuries were inflicted, having been present in the home. The suggestion is ridiculous on all accounts as even the Appellant admits that **PW1** left him, and the child in the room with the child and returned later.

23. There is no requirement that the prosecution should call a certain number of witnesses to prove its case (See Section 143 of the Evidence Act). In any event **PW5** was also a neighbour to the couple and she gave evidence of what she witnessed. No adverse inference can be made in respect of unknown witnesses when the evidence tendered is quite strong. (See **Bukenya & Others -Vs- Uganda (1972) EA 549**).

24. I am unable to see how the alleged impending visit of the Appellant's first wife and her exchange of words with **PW1** could have caused **PW1** to inflict horrific injuries on her own child, in order to get even with the Appellant. **PW1** flatly denied this, albeit accepting the strained relationship with the Appellant's first wife.

25. Section 111 of the Evidence Act states:

> **"(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**
>
> **Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**
>
> **Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.**
>
> **(2) Nothing in this section shall—**
>
> > **(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or**
> >
> > **(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or**
> >
> > **(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity."**

26. As stated in **Republic -Vs- Kipkering Arap Koskei [1949] 16EACA 135** to the effect 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 hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."**

27. And in **Simoni Musoke -Vs- Uganda (1958 E.A.)715** the Court of Appeal for Eastern Africa further stated:

> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there**

are no co-existing circumstances which could weaken or destroy the inference."

28. The Appellant was alone in a room with the minor victim while **PW1** went to a neighbour's house. He ought to be able to give an explanation of what happened to lead to the anal penetration and injury of the victim's genitalia. Considering the prosecution evidence, his denials were displaced and correctly rejected by the trial court. There was overwhelming and solid evidence as to the age of the victim, her penetration and the identity of the perpetrator thereof. Grounds 4, 5 and 6 lack merit and are rejected. In total sum, the entire appeal is without merit and must fail. I will accordingly dismiss it.

Delivered and signed at Naivasha, this 3rd day of May, 2018.

In the presence of:-

Mr. Koima for the DPP

Appellant – present

C/C – Japheth and Kamau

C. MEOLI

JUDGE