REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 156 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

LUKE MUTHURI MWAMBA...............APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. E. Ayuka, RM dated 15th September 2017 at the Principal Magistrate's Court at Nkubu in Criminal Case No. 33 of 2016)

JUDGMENT

1. The appellant, **LUKE MUTHURI MWAMBA**, was charged with the offence of defilement contrary to **section 8 (1)** and **(2)** of the ***Sexual Offences Act***. It was alleged that on 4th January 2014 at around 2.00pm at [particulars withheld] Village, Kingogone Location in Imenti South District of Meru County, he unlawfully and intentionally caused his penis to penetrate the vagina of RFM, a child aged 11 years. He also faced an alternative count of an indecent act with a child contrary to **section 11 (1)** of the ***Sexual Offences Act*** based on the same facts. The appellant was convicted on the principal charge and sentenced to life imprisonment.

2. He now appeals against conviction and sentence based on the petition of appeal dated 4th December 2017 and the submissions highlighted by his counsel, Mr Mokua. The appellant contends that the charge against him was defective and that the prosecution failed to prove the main ingredient of the offence. Counsel submitted that the appellant was convicted without corroborative evidence and that the medical evidence relied upon was inconclusive and could not be relied upon. He further submitted that there were glaring gaps and inconsistencies in the prosecution case and that he was framed. The appellant also contended that due consideration was not given to his defence.

3. The respondent's case was that the prosecution proved all the elements of the offence beyond reasonable doubt.

4. 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**).

5. After a *voire dire*, the child (PW 2) was duly sworn and she told the court that she was 11 years and attending school in Class 7. She stated that she knew the appellant as he was a shamba boy. On 4th January 2016, the appellant called her to his house and she went in thinking that he wanted to send her. She narrated what took place as follows;

> *On entering he threw me to his bed he removed my clothes …. He took me to [the] bedroom. That day I was wearing a trouser and panty and t-shirt he removed my trouser and panty. He removed his penis he opened his zip and removed his penis lying in bed. I was lying on my back. He was lying face down. He tried to push his penis inside my vagina. When I tried to scream he used his hand to block my mouth as he was doing so I have my brother [NM] calling me ……*

6. PW 2 told the court that her brother, NM (PW 3), came into the room and found the appellant on top of her and left. She later told her mother what had happened. PW 3 testified that on the material day, he went to look for PW 2 as he wanted the shop keys. He went to the appellant's house where he found PW 2's books on the table. He then entered the appellant's room and found PW 2 and the appellant naked having sexual intercourse. He walked away and in the evening told PW 2's mother what had transpired.

7. PW 2's mother (PW 4) recalled that on the material day she came home from work. PW 3 told her about what had transpired. When she confronted PW 2 about the issue, she hesitated but after PW 4 slapped her she narrated what took place. After that she also confronted the appellant the issue but he did not respond. In the meantime, a commotion ensued between the appellant and PW 3 causing some people to

come and arrest the appellant. PW 4 took PW 2 to the hospital and reported the matter to the police station.

8. PW 1 was examined by a Clinical Officer from Kanyakine District Hospital, PW 1, on 5th January 2016. She noted that the hymen was absent and that the vagina area was inflamed although there were no obvious tears, discharge or bleeding. PW 1 also testified that PW 2 informed her that the appellant had had had sexual intercourse with her three times before. The Investigating Officer, PW 5, gave an account of the investigation. He also produced the birth certificate which showed that PW 2 was born on 9th May 2004.

9. In his sworn defence, the accused told the court that he worked at PW 4's homestead. Since he was sick, he was given an off day and he was at home. In the evening he was called by PW 4 and told to go to the shop where he was attacked by people and arrested. His witness, DW 2, testified that she was a business lady and a friend. She also stated that she knew PW 4 who had lent her some money. When she returned the money, she testified that PW 4 told her that she would implicate the appellant in a defilement case.

10. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of 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."*

11. I have considered and re-evaluated the entire evidence and I find as follows. The appellant was not a stranger to PW 2. He admitted that he was employed by PW 4, a fact confirmed by PW 2, PW 3 and PW 4. The incident took place in broad daylight hence the case of mistaken identity does not arise. As regards penetration, PW 1 gave clear testimony of the act of penetration. In light of **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, this evidence was sufficient to sustain a conviction of the appellant without corroboration if, for reasons stated, the trial magistrate believed that the child was telling the truth. I note from the proceedings that the trial magistrate did not comment on whether he believed the child was telling the truth but this does not necessarily undermine the prosecution case as there was sufficient corroborative evidence.

12. PW 3 found the appellant and PW 2 having sexual intercourse in the appellant's house. Counsel for the appellant submitted that PW 2's testimony could not be relied on as it was inconsistent with that of PW 3. Counsel pointed to the position PW 2 stated that she was with the appellant when PW 3 found them was different from the position PW 3 stated he found them. In ***Thomas Kitsao alias Katiba v Republic*** **MLD CA Criminal Appeal No. 123 of 2014[2015]eKLR**, the Court of Appeal stated as follows regarding inconsistencies in the evidence;

> *We shall promptly dispose of the question of contradictions and inconsistencies in the prosecution evidence. It is true that as regards the confessions there are slight variations from the account of one witness to the other. But we must ask ourselves whether these are normal variations that would be expected when different human beings recollect an event or incident or whether they are of such a nature as to betray a cooked up or contrived case? This Court has stated severally that the mere fact that there are some variations in evidence does not ipso facto prove that the evidence is false or unreliable (See WILLIS OCHIENG ODERO V. REPUBLIC, CR. APP. NO. 80 OF 2004 (KISUMU). Indeed variations must be expected in evidence that is true. It is said that sometimes evidence without the slightest variation may be a good indicator of coached witnesses.*

13. I hold that the variation between the testimony of PW 2 and PW 3 regarding the manner in which PW 2 and the appellant were having sexual intercourse is but a description of what happened from their own perspectives and does not take away from the fact that the act of penetration took place and PW 3 caught then in the act. Nor do I find the conduct of PW 3 strange as suggested by counsel for the appellant. It is PW 3 who reported what he saw to PW 4 when she came back in the evening.

14. The other is the medical evidence presented by PW 1. Counsel for the appellant suggested that the evidence was inconclusive. PW 4 testified that PW 2 was taken to hospital on the same day and the P3 form confirm that indeed she was examined and treated on 4th January 2016. Thus the evidence of the inflammation of the vagina, when looked at with the other evidence, is consistent with penetration having taken place on the same day.

15. The appellant's testimony puts him at home when the incident took place. He never raised the issue of the grudge alluded to by DW 2 in his testimony or put the same issue to PW 4 in cross-examination. The evidence of DW 2 was therefore an afterthought and his defence a sham. The totality of the evidence is that it is the appellant who committed the felonious act. I affirm the conviction.

16. Before I deal with the issue of the sentence, let me dispose of the appellant's contention that the charge sheet was defective on the ground that it referred to *"section 8(1)(2) of the Sexual Offences Act"* which does not exist. This issue was settled by the Court of Appeal in ***Samuel Kilonzo Musau v Republic*** **CA Criminal Appeal No. 153 of 2013 [2014] eKLR** where it held that:

> *As will be readily apparent, section 8(1)is the offence section; it creates the offence of defilement constituted by committing an act which causes penetration with a child. Section 8(2) is the punishment section and prescribes life imprisonment when the child defiled is aged eleven years or less. The charge would have been properly framed if it charged the appellant with defilement contrary to section (8) (1) as read with sections 8(2) because section 137 of the Criminal Procedure Code requires the statement of the offence to describe the offence in ordinary language and if the offence is one created by enactment, it shall contain a reference to the section of the enactment creating the offence.*
>
> *In this case, the statement of offence, though lumping section 8(1) and (2) together, contained the ingredients of the offence and the prescribed punishment. The irregularity was one that was, in our view, curable under section 382 of the Criminal Procedure Code. That provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice.*

17. As regards the age of PW 2, it was not in doubt that she was not an adult. Her birth certificate was produced showed that she was born on 9th May 2004 which means at the time of the offence she was short of her 12th birthday. In ***Hadson Ali Mwachongo v Republic*** **MSA CA Criminal Appeal No. 65 of 205 [2016]eKLR**, the Court of Appeal expressed the following view;

Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year. Back to the Sexual Offences Act, a victim who is days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age. On the same reasoning, the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 rather than 16 years old.

18. PW 1 was therefore aged 11 years for purposes of **section 8(2)** of the ***Sexual Offences Act*** and where the victim is 11 years old or below, the mandatory sentence is life imprisonment.

19. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at MERU this 5th day of June 2018.

D.S. MAJANJA

JUDGE

Mr Mokua, Advocate for the appellant.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.