REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 143 OF 2014

BETWEEN

J G I.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B. M. Ekhubi, Ag. SRM dated 9th July 2014 at the Chief Magistrate's Court at Mombasa in Criminal Case No. 2293 of 2011)

JUDGMENT

1. The appellant, **J G I**, faced two principal charges of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars of the first count were that on diverse dates between May 2009 and 6th July 2011 at [particulars withheld] Village in Kisauni District of Coast Province, he unlawfully and intentionally caused his penis to penetrate the vagina of KC, a child aged 14 years old. The particulars of the second count were that the appellant on diverse dates between October 2010 and 13th July 2011 at [particulars withheld] Village, in Kisauni District of Coast Province, he unlawfully and intentionally caused his penis to penetrate the vagina of NM, a child aged 13 years. The appellant also faced alternative charges to each count for committing an indecent act with a child contrary to **section 11(1)** of the ***Act*** based on the same facts.

2. As this is a first appeal, I am aware that it is the duty of this 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**). In order to fulfil this duty, I now set out the evidence as it emerged before the trial court.

3. The two complaints, KC (PW 1) and NM (PW 2) are the children of PW 3. According to PW 1, PW 2 and PW 3, the appellant was living with them in their one roomed home after PW 3 had separated from her husband. PW 4, a teacher where PW 1 and PW 2 were going to school, recalled that on 13th July 2011 at about 8.00am, he was teaching class when he noticed PW 2 looking uncomfortable. He became concerned when she started crying. After class, he approached her and she told him that the appellant, who was living with them, was having sexual intercourse with her whenever their mother would go out for overnight vigils. She told him that he had been sexually assaulting her since September 2010. PW 4 also called PW 1 who told her that the appellant also sexually assaulted her and assisted her in procuring an abortion. PW 4 reported the matter to the head teacher.

4. On the same 13th July 2011, PW 5, a teacher of PW 1 also testified that he noted that PW 1 looked sad and troubled. When he asked her after class what the problem was, PW 1 told him that the appellant had been sexually assaulting her since 2009. She told him that the appellant would have sexual intercourse with her on Wednesdays and Fridays when her mother would go out for vigils. She further told him that he had issued threats to her and that he had procured an abortion. He also summoned PW 2 who told her that the appellant would lie on top of her and touch her private parts. PW 5 consulted PW 4 and they reported the matter to the head teacher who summoned PW 3.

5. PW 3, recalled that on 14th July 2011, PW 1 and PW 2 gave her a note summoning her to their school. She proceeded there on the next day and met the school headteacher, PW 4 and PW 5 who informed her that her children had been defiled by the appellant. Thereafter they proceeded to report the matter to the police station. The investigating officer, PW 7, recorded the statements of the witnesses and issued the children with P3 forms.

6. PW 1 gave sworn testimony and explained that the appellant began to sexually assault her in 2009. She testified that PW 3 would go out for vigils to church on Wednesdays and Fridays and while she was away, the appellant would wake her up and demand sex while threatening to kill her. She explained that on one of the nights he stripped off her clothes and proceeded to have sexual intercourse with her. She feared to tell anyone about what had happened because he had threatened to kill her and her sister.

7. PW 1 testified that on one Friday when her mother had gone to the vigil, the appellant put her in her mother's bed and proceeded to penetrate her vagina twice causing her to feel pain and bleed. She did not tell her mother when she returned. She also saw the appellant atop PW 2 who remained silent. She was used to this routine every Wednesday and Friday while her mother was away. PW 1 told the court that in 2010, the appellant told her that she was pregnant. He called a person he said was a doctor who inserted a metal object in her vagina. She bled heavily and told her mother that she was having her menses. PW 1 further testified that the sexual assaults went on for a while until her teachers, PW 4 and PW 5 noticed her condition and disclosed to them what had transpired.

8. PW 2 also gave sworn testimony. She also told the court that the appellant would come where she and her sister were sleeping when their mother was away attending church vigils and proceed to have sex with them. She narrated how the appellant once removed his clothes and lay on top of her and when she tried to scream, he warned her. She told the court that he inserted his penis in her vagina. She stated that he continued to sexually assault them until 2011 when she reported the matter to her teachers after they inquired what was happening to her and her sister.

9. After the children were taken to the police station, they were referred to the Coast General Hospital for examination on 14th July 2011. PW 6 was the doctor who examined both PW 1 and PW 2 on 18th July 2011. According to the P3 medical report which he prepared, PW 1's hymen was not intact and was not freshly perforated. She was later found to be HIV+. When he examined PW 2, he observed that her hymen was intact and there was a laceration on the left labia. He concluded that both PW 1 and PW 2 were defiled.

10. The appellant in his sworn defence denied that he committed the offence and stated that the charges against him were malicious and fabricated by PW 3. He confirmed that he had married PW 3 and that he left her and the children to go to Kitui for a 3-day crusade as he was a pastor. When he returned, he was told that a man by the name Robert was seen in his house. After two days, he was called by a neighbour and told that the said Robert and his wife had locked themselves in the house. He rushed home and found the door locked from inside. After a while he came out and told him that they had been praying. Despite this incident, he did not do anything but when he discussed the matter with his wife, she became difficult so he slapped her one night. PW 2 woke up that night while his wife started screaming and promising him that he would teach her a lesson. He was later arrested and accused of defiling the children. He told the court that he was a pastor and that there was only a night vigil on Friday at the church they attended with PW 3 and they would attend together and return at 5.00am.

11. DW 2, a businessman testified that the he knew the appellant in 2007 as they were neighbours and he was a pastor in their church. He recalled that in 2011, the appellant came home from church appearing disturbed. His house had been locked and he was standing outside. When PW 3 opened the door, a man came out and left and a quarrel ensued between the appellant and PW 3. After 3 days, the appellant was arrested.

12. The appellant contested the conviction and sentence on grounds set out in the petition of appeal, the amended grounds of appeal and written submissions. The thrust of his appeal is that the prosecution failed to prove the offence beyond reasonable doubt. He contended that the charge sheet was defective and that the evidence was full of contradictions and discrepancies.

13. The respondent took the position that the prosecution proved all the elements of the offence beyond reasonable doubt.

14. Before I deal with the main issues in this appeal, I propose to deal with the issue of the charge sheet which was raised extensively by the appellant in his written submissions. I perused the record of appeal and it only contained one charge sheet which reflected the first count against the appellant in respect of NM. However, upon perusal of the original file, the full charges containing both counts against the appellant were in the file. In any case, the record shows that on 14th September 2011, the charge sheet with the two principal and two alternative charges was read to him and he pleaded not guilty and the trial proceeded on that basis. I therefore do not find any prejudice in the inadequacy of the record as concerns the second charge.

15. The main issue for determination in this appeal is whether the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant. In order to prove its case under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must show that the appellant 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."*

16. The appellant was a person well known to PW 1 and PW 2. All the parties agree that at the time material to the case, he was residing with PW 3 and her children therefore the issue of mistaken identity does not arise. The main issue is whether the prosecution proved penetration. PW 1 and PW 2 gave detailed testimony on how the appellant would sexually assault them when PW 3 was away on prayer vigils. Their testimony was detailed and was firm on cross-examination. All this evidence is sufficient and was not required to be corroborated in law under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which states as follows:

> *Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.*

17. The trial magistrate stated that from her demeanour, he had not reason to doubt the testimony of PW 1. He further noted that PW 1 had withstood vigorous cross-examination. There was however, sufficient corroborative evidence to support the testimony of PW 1 and PW 2. First, both children narrated their ordeal to their teachers, PW 4 and PW 5, who had noticed that they were in a state of distress. Second, the medical evidence established that there had indeed penetration. Although the trial magistrate found that there was no penetration in respect of PW 2, I would disagree with that finding. Under **section 2** of the ***Act***, as I have quoted above, penetration does not have to be complete to amount to penetration and the laceration on the vagina without perforation of the hymen would still amount to penetration. Since the State did not cross-appeal on this point, I will not belabor the point.

18. At this stage I would also point out the issue raised by the appellant that the HIV test he was subjected to and which confirmed he was HIV+ was fake. In my view, the fact that both PW 1 and the appellant were HIV+ would only be corroborative evidence. In this case though,

the evidence against the appellant was already sufficient without any recourse to this issue of HIV infection.

19. The appellant's defence in light of the prosecution case was that the charges were fabricated by PW 3. The evidence and indeed PW 1 and PW 2 admit that the relationship between the appellant and PW 3 was a difficult one. However, PW 1 and PW 2 gave clear and consistent evidence which was corroborated. That they did not disclose what happened to them is because they were threatened by the man who was for all intents and purposes their father and they could not even disclose what they underwent to their mother. As the trial magistrate pointed out, the issue of a frame-up was discounted because it is PW 4 and PW 5 who unearthed the incident, informed PW 3 who then reported to the police. There is no evidence that PW 3 colluded with PW 4 and PW 5 to fix him. I therefore dismiss the appellant's defence.

20. The final issue in proving a charge of defilement is the age of the child. Proof of age is a question of fact and the court in determining the age may have recourse to an array of evidence including testimony of the victim, parents, birth certificate, clinic and immunization cards, medical age assessment reports and observation by the trial magistrate. For purposes of the offence, the issue is whether the child is below 18 years old and the real or apparent age comes into play when determining the appropriate sentence (see ***Moses Nato Raphael vs Republic*** **[2015] eKLR**). In this case the prosecution produced not only the clinic cards for each child but also the birth certificates proving that PW 1 was 14 years old and PW 2, 13 years old.

21. For the reasons I have stated, I affirm the appellant's conviction in respect of the first count of defilement and on the second alternative count of causing an indecent act to a child. The minimum sentence under **section 8(3)** of the ***Act*** where the child is aged 14 years is 20 years' imprisonment. It is not clear from the sentencing notes why the trial magistrate enhanced it to 35 years' imprisonment. I accordingly set aside the sentence and substitute it with a term of **twenty (20) years imprisonment**. I affirm the sentence on the second count. Both sentences shall run concurrently.

22. Save for the issue of the sentence on the first count, this appeal is now dismissed.

DATED and DELIVERED at MOMBASA this 7th day of *September* 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

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