REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 299 OF 2009

DAVIS MUIRURI MAINGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against Judgement, conviction and sentence passed in Nakuru CMC Criminal Case Number 142 of 2008, R. vs David Muiruri Maingi, delivered by Tanui R.M. on 6.10.2009).

JUDGMENT

1. On 6th October 2009 the appellant, **Davis Muiruri Maingi** was convicted and sentenced to twenty years imprisonment in Nakuru CMCR case number **142 of 2008** for the offence of defilement contrary to Section **8 (1)** as read with Section **8 (3)** of the Sexual Offences Act.[1]

2. The particulars of the offence were that *"on the diverse dates between 15th day of July 2008 and 21th day of August 2008 in Nakuru District within the Rift Valley Province, intentionally and unlawfully had sexual intercourse with LNO, a girl aged 13 years."* (hereinafter referred to as the minor).

3. The appellant faced an alternative count of committing an indecent act with a child contrary to Section **11 (1)** of the Sexual Offences Act. [2] It was alleged that "*on 15th July 2008 and 21st day of August 2008 in Nakuru District within the Rift Valley Province, intentionally committed an indecent act with a child, namely LNO, aged 13 years by causing contact to the genital organs of the minor.*"

4. As a first appellate court, this court's duty[3] is to subject *"the evidence adduced in the lower court as a whole to a fresh and exhaustive examination[4] and to the render this court's own decision on the evidence."* Simply put, this court is required to weigh conflicting evidence and draw its own conclusions,[5] only then can it decide whether the Magistrate's findings should be supported. In doing so, this court should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.[6]

5. Upon conducting *voir dire* examination, the trial Magistrate was satisfied that the minor understood the nature of oath and allowed her to testify on oath. Her evidence is reproduced later in this judgement.

6. **Margaret Wairimu** testified that on 26th June 2008, at around 8.30pm her neighbours Mama Franco and Julia Wairimu knocked her door and told her about a girl who was in the appellant's house. She also stated that they told her that the girl has been entering his house every night and that they wanted to confirm who she was. She testified that they went to the appellant's house within their plot, knocked the door and he opened, and, Julia asked him about the small girl in house, but he kept quiet. Further, she stated that Julia entered the house and removed the minor out. She added that there were many people when the minor was removed from his house. Also, she stated that she had stayed in the same plot with the accused for about two years.

7. Julia Wairimu's evidence was that on 21st August 2008, she was in her house when a neighbour called her and told her of a small girl at the appellant's home. She stated that she called a one Margaret Wachio and together they went to the appellant's home, that she knocked the door and called out his name and asked him to open the door. She said upon opening, he removed the girl outside. She further stated that some other women beat the girl for her bad manners and took her to her father's home, and, that the accused took off. She also stated that they recorded statements the following day at Njoro Police Station.

8. Jacob Chelule, a clinical officer formerly at Njoro Health Centre testified that the complainant was brought to the facility on 21 st August 2008, with a history of having been defiled by someone known to her. He stated that she had changed her clothing. He gave her age as 10 years. He stated that she had no injuries on her body, and that, the incident was one month old. He further testified that the hymen was perforated, there was no discharge and HIV and urinalysis tests were negative. On cross-examination he stated that the main cause of perforation is sex.

9. Cpl. Irene Matu, the investigating offer stated that she recorded the witness statements, and took the minor and the complaint for medical examination and charged the appellant with the offence. Administration Police Officer Ekedang testified that he was at Chokerio Trading Centre when the appellant was brought by members of the public with allegations of defiling a girl. He arrested him and took him to Njoro Police Station.

10. L M testified that on 21st August 2008, she was at Chokerion Estate and at around 9.00am she heard people screaming outside, then, she met women who alleged that her niece, the minor, aged 13 years, had been defiled. She stated that she notified the minor's parents and took her to hospital the next day.

11. At the close of the prosecution case, after evaluating the evidence, the trial Magistrate ruled that a *prima facie* case had been established and put the appellant on his defence. He complied with the provisions of Section **211** of the Criminal Procedure Code.[7]

12. In his defence, the appellant stated that on 21st August 2008, at around 7.00pm, he heard a commotion outside his rented house, he got outside, to find out what was happening, but before he could open he heard a knock on his door. He stated that he opened the door and found PW1, PW2 and PW3. Further, he stated that they asked him whether he knew the minor, and he answered that he buys milk from their homestead. He also stated that they asked about his relationship with the minor, and he replied that there was none at all. He also stated that they asked him what the minor comes to do in his house and he replied that she had never entered his house. He further stated that they started coercing her to say what she comes to do in his house and she said that she has never entered his house.

13. The appellant also stated that they started pinching he minor who was then crying insisting that she tells them what she was doing in my house, but she insisted that she had never seen him. He stated that he managed to escape to avoid being beaten, and the following day as he proceeded to report the incident at the police station, he was confronted by a hostile mob and arrested. He stated that he surrendered himself to administration police officers who took him to Njoro Police Station.

14. In his judgement, the learned Magistrate analysed the prosecution evidence and the defence. He observed that the prosecution relied on both direct and circumstantial evidence to establish the guilt of the appellant. He further pointed out that the direct evidence was tendered by the minor while the circumstantial evidence was tendered by PW2 & PW3. The learned Magistrate noted that the defence tendered by the appellant to the effect that PW2 & PW3 brought the minor to fix him did not cast doubts on the prosecution case. He also noted that the age of the minor was not disputed. Consequently, the learned Magistrate found that the prosecution had established its case beyond reasonable doubt and concluded that the appellant was guilty on the main count and sentenced him to **serve 20 imprisonment.**

15. Dissatisfied with the said verdict, the appellant appealed to this court seeking to quash the conviction and sentence citing the following grounds in his supplementary grounds of appeal:-

a. That the trial Magistrate erred in law and fact by convicting the appellant in a defilement charge without an age assessment report.

b. That the learned trial Magistrate erred in law and fact by failing to consider that the prosecution's evidence was highly inconsistent and contradictory hence, unsafe to rely on to secure a conviction.

c. That the learned trial Magistrate erred in law and fact by accepting an equivocal voir dire conducted by the prosecutor.

d. That the learned trial Magistrate erred in law and fact by failing to consider that the charge sheet was defective in form and particulars.

e. That the learned trial Magistrate erred in law and fact when she failed to note that a grudge was established in the case.

f. That the learned trial Magistrate erred in law and fact when she convicted the appellant on a defilement charge when there was no medical evidence connecting the appellant with the alleged offence.

g. That the learned trial Magistrate erred in law and facts by failing to consider that the prosecution did not prove its case beyond any reasonable doubt.

16. The appellant filed written submissions which he adopted, while counsel for the DPP submitted orally.

Determination.

17. Upon evaluating the evidence and the parties submissions, I find that the following issues distil themselves for determination, namely:-

a. Whether the appellant was convicted on a defective charge sheet.

b. Whether the age of the minor was established.

c. W*hether the learned Magistrate erred by allowing the minor to give sworn evidence.*

d. Whether the offence of defilement was proved to the required standard.

a. Whether the appellant was convicted on a defective charge sheet.

18. The appellant submitted that the charge sheet is defective since it does not disclose a key ingredient, namely, *penetration.* Counsel for the DPP did not submit on this issue.

19. The statement of the offence is clearly states *"Defilement, contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act."* The particular as per the charge sheet are that *"on the diverse dates between 15th day of July 2008 and 21th day of August 2008 at Njokierio Estate, Njoro, in Nakuru District within the Rift Valley Province, intentionally and unlawfully had sexual intercourse with LNO, a girl aged 13 years."*

20. The appellant argues that the charge sheet is defective because the word *penetration* does not appear in the charge sheet. It is pertinent to recall the provisions of Section **134** of the Criminal Procedure Code[8]which provides that:-

> *"Every charge or information shall contain, and it is sufficient if it contains a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence"*

21. It is trite law that an accused person must be charged with an offence known to the law, including the correct particulars in the charge sheet, so that the accused person is informed of the offence with which he is charged, and the likely sentence that he would receive if convicted. In this regard, I adopt, with approval, the sentiments expressed by the court in *Sigilani vs Republic*[9] where it was held that:-

> *"The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence to the charge."*

22. Section **8(1)** of the Sexual Offences Act[10] provides that "*A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."* This section provides the key elements of the offence of defilement. These are *"Penetration,"* and *"Child."* The act defines *"penetration"* as partial or complete insertion of the genital organs of a person into the genital organs of another person. Therefore, an important element of defilement is penetration. The other element is that the person must be a child. The act defines a child as *"child"* has the meaning assigned thereto in the Children's Act.[11] The Children's Act defines a *"child"* as any human being under the age of eighteen years.

23. In my view, the word "*penetration"* is one of the key ingredients that must be established by way of evidence. Failure to include it in the charge does not make the charge sheet defective in law. Even where a defect is established, it must be of such an irregularity so as to cause failure of justice. This position was well stated in *Mwasya vs Republic*[12] where the court authoritatively held that the charge was defective, *but not of such an irregularity or error as had occasioned a failure of justice under section **382** of the Criminal Procedure Code*.

24. In *Avone vs Uganda*, the court held that where the mis-descriptions in the charge sheet had not prejudiced the appellant, the convictions ought to be allowed to stand. I am fully alive to the fact that it is an established position that where a charge sheet does not allege an essential ingredient of [13]the offence, then it is defective. But in the instant case the charge sheet states clearly that the appellant *"intentionally and unlawfully had sexual intercourse with the minor."* To prove the offence, the evidence must establish *penetration*. There lies the difference. Penetration is a matter to be established by way of evidence.

25. In the case of *Sigilani vs Republic*[14] it was held that the principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence. In my view, the charge sheet as drawn discloses an offence known to the law, the appellant pleaded to it and participated in the trial and knew the charges he was facing.

26. This court takes the view that from the onset, the appellant knew the charge facing him. The particulars were carefully spelt out and the appellant has not demonstrated that he suffered any prejudice as a result of the charge sheet. He fully participated in the trial and the trial process was fair.[15] The charge sheet outlines the essential ingredients and particulars of the offence. The evidence adduced was geared to establish the said offence. The defence offered was clearly a direct response to the allegations made against the appellant. Thus he fully understood the nature of the offence and the evidence against him. No prejudice is alleged to have been caused. There is nothing to show that the charge sheet is out rightly defective or ambiguous. I find no merit in this ground of appeal and I hereby dismiss it.

27. True, the law contemplates that there may be occasions when there will be an error, omission or irregularity in a charge. And there will be errors, omissions or irregularities that will defeat a charge. However, whether such an error, omission or irregularity is incurable will depend on whether it occasions a failure of justice. This is the foundation of Section **382** of the Criminal Procedure Code[16] which provides:-

> *"382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*
>
> *Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."*

28. Discussing the above proviso, **Rudd J** in the case of *Mwasya vs Republic*[17]stated that *"as regards the proviso to this section, no objection to the charge has been raised at all to this very moment by the appellant. On the other hand if the appellant in the said case had objected to the charge at any proper time in the lower court the charge could have been amended to fall within the proper provisions."* I have diligently searched the entire record and I find that no objection to the charge sheet was raised at all through-out the proceedings.

b. Whether the age of the minor was established.

29. The appellant submitted that the age of a victim is very critical and has to be proved beyond reasonable doubt. He argued that the credibility of a girl of tender age can only be affirmed if its corroborated by another evidence from a credible source. He stated that PW1 gave her age as 13 years but could not tell when she was born. He cited absence of birth certificate or age assessment report.

30. Counsel for the DPP submitted that her age was 13 years, and in any event, age was not in doubt.

31. It's true the onus of proving the age of the victim lies on the prosecution[18]and that in defilement cases, age of the victim is crucial.[19] In the case of *Hilary Nyongesa vs Republic*[20] the court stated that:-

> *"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved…and this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."*

32. In *John Cardon Wagner –vs- Republic*,[21] the court held that:-

> *"In defilement cases, the age of the complainant is proved by either medical evidence or through other evidence since the sexual offences act have different categories of ages and sentences of different ages…"*

33. In *Musyoki Mwakavi –vs- Republic*[22] held that:-

> *"…apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense…".*

34. In the case of *Francis Omuroni vs Uganda*,[23] it was held thus:-

> *"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...".*

35. The minor's mother gave her age as 13 years. In the charge sheet the charge sheet the age is shown as 13 years. In her evidence, the minor gave her age as 13 years. PW3 also gave her age as 13 years. Jacob Chelule, the Clinical Officer gave her age as 10 years while PW7 gave the age as 13 years. The P3 form indicates that her age is 13 years. The learned Magistrate in her judgment stated that the minor was aged 13 years.

36. One thing is clear from the foregoing, that the minor was a child within the definition given under the act. I find no evidence to suggest the contrary. The age given falls within the definition of a child as defined in the Children's Act.[24] The drafters of the Children's' Act[25] seem to have been alive of situations whereby difficulties may arise in determining the actual age of a child. In its wisdom, Parliament adopted the following of age in the definition section at section 2 of the act, *"age' where actual age is not known means apparent age.*

37. I am reinforced by the recognition that the trial Magistrate had the advantage of examining her at the time she testified and he gave her age as 13. The Clinical Officer who examined her also gave her age as 13 years. It is my finding that the age of the child was sufficiently proved.

c. Whether the learned Magistrate erred by allowing the minor to give sworn evidence.

38. The appellant submitted that "the kind of *voir dire* that PW1 was taken through was not unequivocal." He argued that the prosecutor failed to ask her whether she had knowledge of what oath is about. I understand this submission to mean that the minor did not appreciate the nature of oath, hence, her evidence should not be given appropriate weight or ought to be excluded. Differently put, my understanding is that the appellant attacking the credibility of the minor's evidence on grounds that she did not appreciate the nature and meaning of oath.

39. Before addressing this issue, it's important I address the question *"what is the purpose of voir dire examination*?. The learned Magistrate recorded the following words:-

> *"The complainant child answers to question put to her by the court as follows:- I am LNO. I am aged 13 years. I am a student at Wegito Primary School in class 6. I go to SDA Church. I have been taught that those who lie will burn in hell.*
>
> *Court- The witness understands the nature of oath, she is allowed to testify on oath."*

40. The purpose of *voir dire* examination *is for the court to form an opinion, on whether the child understands the nature of an oath in which event his sworn evidence may be received.* This was the holding in *Peter Kariga Kiume vs Republic.*[26]Differently stated, the purpose of

voir dire examination is not to establish the credibility of the witness.

41. **Lord Justice Bridge** put it in a more subtle manner in *R vs Lal Khan**[27]*** when he said:-

> *"The important consideration…when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct"*
>
> *There were therefore two aspects when considering whether a child should be sworn-: first that the child had sufficient appreciation of the particular nature of the case and, secondly a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life"*

42. In *Gabriel Maholi vs R,**[28]*** the East African Court of Appeal said that even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.

43. The foregoing authorities summarize the purpose of *voir dire* examination. The learned Magistrate formed an opinion that the child understood the nature of oath, which is the correct function and purpose of *voir dire* examination. I find no reason to fault her finding. The appellants argument on this ground fails.

d. Whether the offence of defilement was proved to the required standard.

44. The appellant's contention is that penetration was not proved, implying that the offence was not proved to the required standard.

45. Learned counsel for the DPP argued that the evidence was overwhelming. He submitted that that PW3 saw the minor entering into the appellant's house and that the identity of the appellant was not in doubt. He also argued that the clinical officer's evidence proved penetration. He stated that her hymen was perforated. He also argued that at page 38, the court found that the minor was 13 years, hence the issue of age was not in doubt. He also submitted that from the judgment, the defence was considered.

46. As stated earlier, section **8(1)** of the Sexual Offences Act[29] provides that "*A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."* The section provides the key elements of the offence of defilement. These are *"Penetration,"* and *"Child."* The act defines *"penetration"* as partial or complete insertion of the genital organs of a person into the genital organs of another person.

47. Therefore, an important element of defilement is penetration. The other element is that the person must be a child. The act defines a child as *"child"* has the meaning assigned thereto in the Children's Act.[30] The Children's Act defines a *"child"* as any human being under the age of eighteen years. I have already herein held that age of the minor was established.

48. It is important we bear in mind the category of persons defined in Section **2** of the act as **'vulnerable person'** which *means a child, a person with mental disabilities or an elderly person and 'vulnerable witness'* shall be construed accordingly.

49. The following excerpts from the minor's evidence is worth reproducing verbatim. She stated:-

> *"... I am...in class 6. On 21/8/2008 I was taking milk from home to Mama Joy. I had been send by grandma called Malkia and while coming back I met the accused called Davis Mairuri whom I knew before. He was a customer, who used to buy milk from our house. He was beside the road. He pulled me to his house which was beside the road. He threatened me with a stab by a knife if I dare screamed. (sic) He placed me on his bed and then removed my clothes. He removed my pant and then unzipped his long trouser and then proceeded to have sexual intercourse with me. I did not agree. He forced me. He said he will stab me with a knife which was on the table. I therefore did not scream but I made a lot of commotion when Mama Dicky came and knocked the door and the accused took off. I told my auntie, Lilian Masei about the incident...I was taken to Njoro Police Station, after being taken to Njoro Health Centre, I was treated and discharged. Lilian took me to hospital. The Police issued me with a P3 Form which is in court today....While we were making a report at Njoro Police Station, we received a call that the accused had been arrested by Boda Boda Cyclist. The accused had sex with me several times before at his place at 7.00pm in the evening, but the accused had warned me against reporting him. The accused lives alone without a wife nor children."*

50. The minor's testimony reproduced above is that the appellant had sex with her. This evidence was not rebutted. Her evidence was that "*he placed me on his bed and then removed my clothes. He removed my pant and then unzipped his long trouser and then proceeded to have sexual intercourse with me. I did not agree. He forced me. He said he will stab me with a knife which was on the table. I therefore did not scream but I made a lot of commotion when Mama Dicky came and knocked the door and the accused took off. I told my auntie, Lilian Masei about the incident...I was taken to Njoro Police Station, after being taken to Njoro Health Centre, I was treated and discharged. Lilian took me to hospital. The Police issued me with a P3 Form which is in court today...".*

51. The above evidence is supported by the testimony of PW2 and PW3 discussed earlier. Further corroboration was provided by the evidence of PW4, Jacob Chelule the clinical officer discussed earlier who stated that the minor had a history of defilement and upon examination, the she was found to have a perforated hymen.

52. The above evidence weighed against the appellant's defence leaves me with no doubt that the appellant did not rebut the allegations against him. His defence did not address these key allegations. The learned Magistrate weighed his defence that he opened the door and found PW1, PW2 and PW3 against the prosecution evidence and did not believe it. It is my finding that the evidence tendered by the

prosecution sufficiently proved the offence and irresistibly pointed to the appellant's guilty.

Conclusion.

53. Upon re-evaluating the evidence, I am satisfied that the prosecution proved the offence to the required standard. It is my finding that the learned Magistrate correctly analysed the evidence and properly convicted the appellant. In the circumstances, I find no reason to fault the learned Magistrates findings.

54. Regarding the sentence, Section **8 (3)** of the Sexual Offences Act[31] provides that *"a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of less than twenty years."* The sentence imposed is the mandatory sentence provided under the law, hence, this court has no discretion to interfere with it. It follows that this appeal on both conviction and sentence fails and the same is hereby dismissed.

55. Right of appeal explained.

Signed, Delivered and Dated at Nakuru this 4th day of October 2018.

John M. Mativo

Judge

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[1] Act No 3 of 2006.

[2] Ibid.

[3] *Okeno vs. R* {1972) E.A, 32at page 36.

[4] See *Pandya vs Republic* {1957}EA 336.

[5] See *Shantilal M. Ruwala vs Republic* {1957} EA 570.

[6] See *Peter vs Sunday Post* {1958}EA 424.

[7] Cap 75, Laws of Kenya.

[8] Cap 75, Laws of Kenya.

[9] {2004} 2KLR 480.

[10] Supra.

[11] Cap 141, Laws of Kenya.

[12] {1967} EA 345.

[13] See *Yosefu and Another vs Uganda* {1960} EA 236.

[14] {2004}2KLR 480.

[15] See *Fappyton Mutuku Ngui vs Republic* CA Cr app no. 32 of 2013-Kiahar Kariuki, Maraga & J. Mohammed.

[16] Ibid.

[17] {1969} EA 280.

[18] Citing *Dominic Kibet Mwareng vs Republic*, Kitale High Court Appeal No. 155 of 2011.

[19] Citing *Eric Nyaga Shanjera vs Republic*, Nakuru HCCR Appeal No. 263 of 2013.

[20] High Court Cr Appeal No. 123 of 2009, Eldoret.

[21] High Court Criminal Appeal No. 404 of 2009 (Nairobi).

[22] High Court Criminal Appeal No. 172 of 2012.

[23] Criminal Appeal no 2 of 2000- Court of Appeal.

[24] Ibid.

[25] Cap 141, Laws of Kenya.

[26]Criminal Appeal No. 77 of 1982 (unreported).

[27]{1981} 73 Cr App R 190.

[28] {1960} EA 86.

[29] Supra.

[30] Cap 141, Laws of Kenya.

[31] Supra.