REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 176 OF 2014

PIUS KIPLAGAT ARUSEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable S. Mokua in Eldoret Criminal Case No. 1735 of 2013 dated 7th November, 2014)

JUDGMENT

PIUS KIPLAGAT ARUSEI, the appellant herein, was charged in the main count with the offence of defilement, contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that on the 13th day of May 2013 within Uasin Gishu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of *R C T*, a girl aged 6 years.

In the alternative, the appellant faced a charge of Indecent Act with a child, contrary to *Section 11(1)* of the *Sexual Offences Act No. 3 of 2006.* The particulars hereof being that on the 13th day of May 2013 in Uasin Gishu County, the appellant intentionally and unlawfully caused his penis to come into contact with the vagina of *R C T,* a girl aged 6 years.

The prosecution case is that the complainant in this case, one *R C T*, was born on 31st August 2006. Her child Health Card was produced by PW-5, the investigating officer, and shows the said date as her date of Birth. Her mother gave evidence as PW-1 and stated that she lives in [Particulars withheld]. On 13th May, 2013 at 6.00 a.m she woke up the complainant and prepared her for school.

She left for the school. In the evening, she slept. On the following morning she told her mother that she had been hurt on her private parts. The mother left for her place of work and was called by *David.* She examined the complainant and noted that her left thigh was swollen. She decided to take her to Moi Teaching and Referral Hospital. Nurses interviewed her and stated that a man took her into his house. He undressed and then undressed her. She alleged the man was their neighbor. She was examined and treated. The mother informed the village elder about the incident. The child led them to where the incident took place at 10.00 p.m. They found three people in the house and the girl said the assailant was not amongst them. One occupant had gone to watch football. The village elder went for him. He was availed and the girl said he was the one. The area chief arrived and contacted Kapsoya Police officers. The appellant was then arrested. *Nicholas* and *Silus* are the two men who were staying with the accused in the house.

PW-2 said on 14th May, 2013 at 10p.m he was in the house with *Wilson Kogo* and two others. PW-1 went in company of the complainant. She alleged that they knew all that they did to her daughter. Others entered and demanded to see *Brian*. The daughter stated that the one who defiled her was not present. The accused was availed from where he was watching football. The girl pointed at him as the culprit.

PW-3 stated on 13th May, 2013 she was at her brother's place in Huruma, Eldoret. Her brother's young daughter went to the place. As they were playing, one of the girls was said to be unwell. She explained to PW-3 that she had pain on her thighs. She said she was injured by some man. The girl stated she'll take PW-3 to where the man lives. She was not walking straight. PW-3 was taken to the place the incident allegedly took place and realized that one of the girls had been defiled. PW-3 later met the girl's mother and urged her to take the daughter to the hospital. While at the scene it was alleged that one of those who had defiled her was away.

PW-4 examined the complainant. She noted that the hymen was reddish and there was bruising of her private parts. There was no discharge. HIV test was negative. Syphilis was also negative. Urine had pus cells and no spermatozoa were seen. The P3 was filled and signed on 15th May, 2013.

PW-5 was the investigating officer. He was called by the area chief and told about the incident. He proceeded to the scene and found members of the public who were inclined to lynch the suspect. He re-arrested him. He took him to Kapsoya police station. The P-3 form

was issued to the complainant. Her child Health card was also availed. The appellant was then charged.

The appellant in his sworn testimony denied the offence. He alleged that someone else committed it and he was wrongly pointed to as the suspect.

The trial court evaluated the evidence, found the appellant guilty of the offence in the main count, convicted him and sentenced him to serve life imprisonment.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on the following grounds:-

(1) The evidence was not properly weighed.

(2) Hearsay evidence of PW-1 and PW-2 was relied on and it's uncorroborated and incredible.

(3) Identification of the appellant was not properly handled.

(4) The complainant was directed to identify the appellant by some other person.

(5) Identification was at night and in front of a mob and complainant could have made a mistake.

(6) P3 form was filled 7 days after the alleged incident and treatment notes were not availed.

(7) The evidence by prosecution witnesses was contradictory.

(8) The defence was not considered.

(9) The complainant was not called to offer evidence.

Mr. Nyamweya, the learned counsel for the appellant, in submissions averred that the complainant was found unsuitable to testify and was not called as a witness. The court did not consider appointing an intermediary under *Section 31* and *32* of the *Sexual Offences Act* to assist her offer her evidence. The court was hence left with no eye witness to the incident. What the complainant allegedly told PW-1 and PW-3 is hearsay of which the court ought not to have considered. The court therefore erred in fact when it observed that *"the minor consistently said a man had taken her to his house and defiled her"*. On this he relied on the case of ***John Kinyua Nathan –vs- Republic Criminal Appeal No. 52 of 2015.***

On identification of the appellant as the culprit, the counsel submitted that the evidence of PW-2 shows that complainant had not known the appellant before then. Identification was at night and there were 3 other inhabitants of the house in which the offence allegedly took place. On cross examination PW-2 said, ***"I don't know the name of the fellow who assisted the child in identifying you"***. The trial court failed to address this issue.

The P3 form was challenged in that it is not connected to the rest of the evidence. There is no evidence that the complainant went to hospital on 20th May, 2013 when it was filled.

The defence that the offence was committed by another person was also not weighed.

Madam Kagali, appearing for the Republic, opposed the appeal on the grounds that all the ingredients for the offence of defilement were established by the 5 prosecution witnesses beyond reasonable doubt. On age of the complainant, she submitted that the child health card shows she was born on 31st August 2006 and given that the offence took place on 13th May, 2013, she was then 6 years old.

Penetration was well established by the evidence of PW-1 and PW-3 who examined the complainant's private part. They noted of injuries. PW-4 corroborated the evidence when she said the hymen was reddish and bruised. The produced P3 form was to the said effect.

On identification, the Republic submitted that the complainant led witnesses to the home where the incident took place. They found 3 occupants to whom the complainant indicated were not the assailants. When the assailant was got to the house she said he was the one. PW-2 corroborated this evidence. *Madam Kagali* further submitted that the complainant knew her attacker very well and the identification was proper.

The defence, was submitted by the Republic side, was weighed and did not shake prosecution case. I was urged for the given reasons to dismiss the appeal.

I have considered the evidence on record, the judgment passed, sentence metted, grounds of the appeal and submissions by both sides.

To start with the court conducted a voir dire on the minor (the victim). What is recorded is only the answers she gave and not the questions put to her by the court. This was not right as it was held in the case of ***Kivevelo Mboloi versus Republic, Criminal Appeal No. 34 of 2013***, it's important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions.

From the given answers it is clear the child understood the questions put and gave valid answers. However, the court ruled that,

"I notice that the witness is not knowledgeable to testify". The finding was wrong. The purpose of voir dire is to find out whether the child is intelligent enough to offer evidence, and whether he or she understands the meaning and nature of oath. On the first consideration the child had passed. She was intelligent enough to offer evidence though probably did not understand the meaning and nature of oath. She should therefore have been allowed to give unsworn testimony either by herself or through an intermediary. Disqualifying her as a witness not capable of offering evidence served a big blow to the prosecution case, given that she was the only eye witness to the incident.

What she allegedly told PW-1 and PW-3 is only admissible to the extent that she told them that, and not that what she told them took place, as that would be hearsay. Prosecution in absence of her evidence required other evidence, direct or circumstantial to establish it. This is the essence of the finding in the case of ***John Kinyua Nathan –vs- Republic, Criminal Appeal No. 52 of 2015***. If the child was able to tell PW-1 and PW-3 what happened, she could as well have been able to tell it to court.

The evidence of PW-1 and PW-3 do not connect anywhere. PW-1 does not mention PW-3 anywhere. When she went to her place of work she was called by a person called *David* and not PW-3. PW-3 herself does not say she went to the home of the appellant in company of PW-1. She states, ***"She took me to a place where she was allegedly taken to. I realized that one of the girls had been defiled. I later met her mother. I urged her to take the daughter to hospital".*** The evidence by these two witnesses does not agree which makes it credibility questionable.

The appellant was horribly identified if what happened can be referred to as identification. The minor (complainant) had not described him to any of the prosecution witnesses before he was *"identified"*. The only lead given was of where the incident took place. The alleged identification was at night 10.00p.m. We are not told the source of light at the place then. The said house had other occupants who were allegedly exonerated by the complainant. What PW-2 said on cross examination shows the complainant was assisted by someone to identify the appellant. PW2 said,

> ***"I don't know the name of the fellow who assisted the child in identifying you".***

On re-examination it was even made clearer that she was assisted as the witness said,

> ***"I cannot remember the name of the man who assisted the child to point at the accused".***

Given the foregoing evidence, which is well on record, I do not understand how it was found that the identification was proper. It forms the most unreliable form of identification.

On penetration, the trial magistrate got the facts wrong when she observed that ***"Regarding penetration PW-1 and PW-3 testified that they observed the complainant's private parts. There were injurie***s".

The word penetration under *Section 2(1) (d)* of the *Sexual Offences Act*, means the partial or complete insertion of the genital organs of a person into the genital organs of another person. As this court found in the case of ***Johnstone Kipyego -vs- Republic, Criminal Appeal No. 7 of 2017,*** *"genital organs"* for purpose of the Sexual Offences Act are a male penis and a female vagina, and also includes anus.

PW-1 in her evidence in chief said, ***"I looked and saw the left thigh swollen"***. "Thigh" is not a genital organ capable of penetrating or been penetrated.

PW-3 on her part said, ***"The child was not walking straight……".*** She never observed her private parts as urged by the trial court.

"Private parts" is also a term not used in the *Sexual Offences Act No. 3 of 2006,* and in my opinion the courts should avoid using it not to cause confusion.

The evidence of PW-4, the witness who filled the P3 form shows that the complainant's hymen was reddish and there was bruising on her private parts. HIV and Syphilis tests were negative. Urine had pus cells and spermatozoa was not seen. The witness after noting that did not make an opinion regarding penetration. PW-3's evidence is that on 13th May. 2013 the complainant and other children were playing and one of the girls was said to be unwell. PW-4 did not also state what could have caused the alleged injuries.

In absence of spermatozoa one cannot conclude that a male was involved and the injuries were caused by a penis. Given the available evidence it is hard to exonerate the cause of injuries noted from other causes other than in defilement. The games she was playing could as well have caused such injuries.

"Penetration" was therefore also not proved by the prosecution beyond reasonable doubt. The only element of the offence which was proved by the prosecution was that the alleged victim was aged 6 years and not any other.

I, for the reasons find the appeal merited and it is allowed. Conviction and the sentence passed are quashed. The appellant is set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 11th day of October, 2018

In the presence of:-

1. Mr. Nyamweya for the appellant

2. Ms. Mokua for State/prosecutor

3. Mr. Mwelem Court assistant