REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 154 OF 2017

(Appeal originating from the conviction and sentence by Hon. E.MBICHA SRM in Meru Law Court, in criminal case No. 31 of 2016)

DAVID NJOROGE.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

J U D G M E NT

The Appellant was charged with the offence of defilement contrary to Section 8(1) of the Sexual Offences Act No.3 of 2006. The particulars were that on on 27th day of October 2016 at [Particulars withheld] village in Imenti North Sub County Meru County the Appellant intentionally caused his penis to penetrate the vagina of T.W a child aged 5 years.

The alternative charge was the offence of indecent act contrary to section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars were that on 27th day of October 2016 at [Particulars withheld] village in Imenti North Sub County Meru County the Appellant intentionally and unlawfully caused his penis to come into contact with the vagina of T.W a child aged 5 years.

The Trial Court convicted the Appellant after full hearing. The prosecution availed 6 witnesses. In defence, the Appellant gave unsworn Statement.

The grounds of appeal are as hereunder:-

1. That the Trial Magistrate erred by failing to note that the prosecution failed to produced complainant's pant;

2. That the erred by failing to note that there was a grudge between complainant's relatives as it was alleged that the Appellant was a member of mungiki sect;

3. The learned Trial Magistrate erred by rejecting the Appellants defence;

4. The learned Trial Magistrate erred by failing t note that there was no independent witness.

In submissions filed, the Appellant restated the above grounds. He argued that the Trial Magistrate failed to note that the evidenced was inconsistent and conflicting.

The Appellant argued that the evidence adduced by the medical officer contradicted Pw1's evidence as Pw1 claimed not to have noted blood on complainant's vagina.

He submitted that the Court ought to have resolved the inconsistencies as benefits of doubt in favour of the Appellant.

Appellant further submitted that the complainant never screamed during and after the alleged defilement and that on being asked by Pw3 and Pw4, the complainant denied occurrence of the offence. He urged Court to scrutinize evidence adduced and come up with its own finding.

The State opposed the appeal. Mr. Namiti for the State submitted that all ingredients of defilement were proved. He submitted that according to Birth Certificate the minor was born on 29th July 2011 and at the time of the offence, she was 5 years old. He added that she vividly explained what she underwent in the hands of the Appellant; and immediately after the incident Pw4 examined the complainant and found that her private parts were badly damaged and Pw6 the Medical Officer confirmed that her private parts were swollen and the hymen was broken, the medical officer concluded that the minor was defiled.

Mr. Namiti submitted that the complainant knew the Appellant as she Stated that she was defiled by one Njoroge, was able to give description of the Appellant, and identified him. He added that the testimony of Pw1 and Pw3 placed the Appellant on the scene of crime corroborating evidence of Pw2.

He argued that the issue raised by the Appellant in his defence was an afterthought, as it never came out during examination of all witnesses; and even the issue of natural hatred by witness, calling him mungiki never came up in cross-examination. He urged Court to uphold conviction and sentence.

This being the first appellate Court I have a duty to reevaluating the evidence on record and come up with my own decision. I however note that the Trial Court had the advantage of taking evidence first hand and observing the demeanor of witnesses, which I do not. I am guided by the principles set out in the case of ***OKENO VS REPUBLIC [1972] EA 32*** as set out hereunder:- where it was Stated as follows:-

> **"The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"**

From record, I note that the complainant who testified as Pw2 met the Appellant while going to the shop. In her testimony, she gave Appellants name. She said Njoroge who was digging Susan's land called her. Ongoing to where he was, the Appellant took the complainant to a bathroom, removed his penis and inserted into the child's vagina.

The child said she used to see Njoroge work in Susan's land.

Pw3 said she saw the Appellant whom she also named Njoroge coming out of the toilet with the complaint. She confirmed that she had seen the Appellant work in Susan's land. Pw3 said she called her Aunt and they followed the child. She confirmed seeing whitish mucus on the child's private part despite the fact that she denied that she was defiled. Pw4, who is complainant's Aunt, confirmed her evidence.

Evidence of Pw3 and Pw4 was corroborated by evidence of Pw6, the medical officer who confirmed that the child was examined and found that her private parts were swollen, outer genitalia had 2 visible lacerations and that the child was bleeding from her private parts. He concluded that the child was defiled.

From evidence on record, the Appellant was known to the complaint prior to the incident. The incident occurred during the day thus ruling out issue of mistaken identity. Pw3 and Pw4 who knew both the child and the Appellant testified that they saw the Appellant come out of the toilet with the child. The child was examined shortly after the incident and whitish mucus found on her private parts.

From the foregoing, I find that evidence adduced by prosecution is watertight. The Appellant was rightly convicted.

In so far as sentence is concerned, I note that the child herein was 5 years old at the time of defilement. Section 8 (2) of the sexual offences Act provide a mandatory sentence of life imprisonment for a person found guilty of defiling a child under the age of 11 years. The sentence imposed is therefore legal and I will not disturb it.

FINAL ORDER

Appeal dismissed on both conviction and sentence.

Judgment Dated and **Signed** at **Nairobi** this**19th** day of **November 2018.**

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RACHEL NGETICH

HIGH COURT JUDGE

Delivered at **Meru** this **23rd** day of **November 2018.**

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JUDGE

IN THE PRESENCE OF

…….....COURT ASSISTANT

…….COUNSEL FOR APPELLANT

……..STATE COUNSEL