**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 75 OF 2017**

**JAMES KIPRUGUTT ARAP TELE...........APPELLANT**

**VERSUS**

**REPUBLIC..................................................RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in **Molo Chief Magistrate's Criminal Case No. 3480 of 2015** by **Hon. R. Amwayi R M** on **04/09/17**).*

**J U D G M E N T**

1. **James Kiprugutt Arap Tele,** the Appellant, was charged as follows:

**Count 1: Defilement** contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **4th** day of **November, 2015 in Nakuru County** intentionally caused his penis to penetrate the vagina of **SN** a child aged **7 years.**

**Count 2: Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **4th** day of **November, 2015 in Nakuru County** intentionally touched the vagina of **SN** a child aged **7 years** with his penis.

2. Facts of the case were that the Complainant, a child of tender age was inside their house when their neighbor, the Appellant called her and took her inside his house. He threatened to throw her inside a pit latrine if she screamed. He undressed her and used his genital organs to penetrate her genitalia. Subsequently she informed her mother PW1, **LWM** who reported the matter to the police. The child was subjected to medical examination. The Appellant was arrested and charged.

3. When put on his defence the Appellant stated that on the fateful date he was on duty at **Salgaa** where he had been sent by his boss. He returned home after **5.30 p.m.** when the Complainant's mother alleged that he had denied her a chance to pick firewood and also fetch water from his well. He denied the allegation that he had committed the offence.

4. The learned trial Magistrate considered evidence adduced, convicted the Appellant on the main Count, treated the 2nd Count as an alternative Count and made no finding on it. She sentenced him to life imprisonment.

5. Aggrieved, the Appellant appealed on grounds that: The age of the Complainant was not proved, the case was not proved to the required standard and his defence was dismissed for no apparent reason.

6. The Appellant canvassed the Appeal by way of written submissions. He urged that although the Complainant was shown to be a minor, nothing was produced in Court to support the allegation. He cited the case of **Peter Maina Njeri vs. Republic (2016) eKLR** where it was held that:

***"The question of age is a fact requiring concrete and tangible proof. Age is a fact in issue in sexual offences thus the age of the victim must be proved beyond reasonable doubt. A mere declaration by the complainant that she is 15 years will not suffice. No document was produced in court to prove the age and/or date of birth of the complainant. No Birth Certificate, Vaccination Card, Baptism Card, school enrolment form or age- assessment was produced in court."***

7. He contended that PW1 said that he did not remove her panty therefore he could not have committed the act of penetration. That there was presence of non-mobile spermatozoa which were not examined to establish if they belonged to him and that his alibi defence was not considered.

8. The State though the Senior Assistant Director of Public Prosecutions, **Mr. Kemo,** opposed the Appeal. He argued that the age of the Complainant and act of penetration were proved as the Complainant's hymen was freshly torn and the Complainant identified the Appellant

as the perpetrator of the act.

9. This being the first Appeal, I am duty bound to re-evaluate and reconsider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusions with that in mind ***(see Okeno –vs- Republic [973] E.A. 32).***

10. This being a case of **defilement** the crucial ingredients that were to be proved were:

(i) Age.

(ii) The act of penetration; and

(iii) The perpetrator of the act.

11. Age is indeed critical in such a case as it was appreciated in the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

12. To establish the age of the Complainant herein, the prosecution tendered in evidence a Health Child Card that was issued to the Complainant at birth. She was born on the **23rd December, 2007.** PW1 her mother stated that at the time of testifying her daughter was **9 years old.** Similarly when being taken through *voire dire* examination the Complainant told the Court that she was **9 years old.** In the case of **Mwalongo Chichoro Mwajembe vs. Republic, Criminal Appeal No. 24 of 2015 (UR)** it was stated that:

> ***"….the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See*** *Denis Kinywa-Vs- Republic, Criminal Appeal No.19 of 2014* ***and*** *Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015****. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in*** *Francis Omuroni -Vs- Uganda, Criminal Appeal No. 2 of 2000****. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…"***

13. Evidence adduced herein was sufficient and it did prove the age of the child beyond any reasonable doubt. At the point of the incident she was **eight (8) years old.**

14. After the incident the child was examined by a medical officer. It was found that her vagina was injured. It was swollen, the hymen was freshly torn and with blood. There was presence of non-mobile spermatozoa. This was not just evidence that there was penetration into her genitalia but that the organ which penetrated her did spew spermatozoa and therefore the chances of it being a male genital organ were high and exact.

15. According to evidence adduced by the Complainant, the act of penetration was committed by the appellant and inside his house. There was no eye-witness to what happened.

16. Prior to the child testifying she was taken through *voire dire* examination. The learned trial Magistrate found her intelligent enough to make an unsworn statement. After her testimony she was subjected to cross examination and she answered questions appropriately.

17. **Section 124** of the **Evidence Act** provides thus:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

18. It is argued by the Appellant that his alibi defence was not considered. In **Karanja vs. Republic (1983) KLR 501** the Court of Appeal held that:

> ***"The word 'alibi' is a Latin verb meaning 'elsewhere' or at another place. Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said the accused has set up an alibi. The appellants story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and furthermore, it was not raised at the earliest convenience, i.e. when he was initially charged".***

19. In his defence the Appellant alleged that he could not have committed the offence because he was not at **Sachangwan** but **Salgaa** where he had been sent to collect cement by his boss. That he returned to **Sachangwan** after **5.30 p.m.** The Complainant stated that she was

violated sexually in the evening. She had been playing at the home of **Bery.** It was about to rain and she was returning home when the Appellant called her. Therefore if the Appellant reached home at **5.30 p.m.** the child was not mistaken as to the identity of the person she saw that evening. The Appellant was known to the Complainant. They were neighbours and he was popularly referred to as "grandfather". The learned trial Magistrate observed the demeanor of the Complainant and reached a finding that she was truthful. She remarked that the Complainant was consistent in her testimony. She recognized her attacker and identified her. Having complied with the provisions of **Section 124** of the **Evidence Act,** the alibi defence put up by the Appellant was not cogent enough to dislodge evidence adduced by the Prosecution. In the premises the Prosecution disapproved the defence put up as having been untruthful and the learned Magistrate did not fall into error by disregarding it.

20. A re-consideration of the case in its entirety clearly shows that the learned Magistrate's finding could not be faulted. She reached a correct finding and imposed a sentence prescribed in law. In the premises I affirm both the conviction and sentence. Therefore the Appeal lacks merit and is dismissed in its entirety.

21. It is so ordered.

**Dated, Signed** and **Delivered** at **Nakuru** this **13th** day of **December, 2018.**

**L.N. MUTENDE**

**JUDGE**