REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 76 OF 2013

THOMAS MOMANYI OYUGI.....APPELLANT

VERSUS

REPUBLIC.....….....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Molo Senior Principal Magistrate's Criminal Case No. 997 of 2008** by **Hon. H. M. Nyaga S P M** on **29/04/13).***

J U D G M E N T

1. **Thomas Momanyi Oyugi,** the Appellant was arraigned in Court having been charged with the offence of **Defilement** of a child under the age of **fifteen (15) years.** After full trial he was convicted and sentenced to serve **twenty – one (21) years imprisonment.**

2. Aggrieved, he appealed on grounds that: The age of the victim was not proved, medical evidence adduced was insufficient, the case was riddled by contradictions and inconsistencies and the learned Magistrate erred in failing to appreciate that written submissions were not permissible during final submissions.

3. Facts of the case were that on the **5th** day of **July, 2008** the Complainant **JNM,** PW1, was alone at home when the Appellant their neighbor called her. He locked the door and placed a panga near it and asked her not to scream. He removed her clothes and violated her sexually. The matter was reported to the police who investigated and caused the Appellant to be charged.

4. When put on his defence the Appellant denied having committed the offence. He stated that on the material date he was at home when the Complainant went with a friend and asked for a rope but he advised them to ask his wife. At about 4.00 p.m. the Complainant and his father arrived and alleged that he had committed the offence. He was arrested the following day.

5. The Appellant canvassed the Appeal by way of written submissions. He urged that there was no tangible proof of age in respect of the Complainant. That a crucial witness namely the aunt of the child who examined her was not called as a witness and the pants alleged to have been worn by the child were not tendered in evidence. That the spermatozoa found in the genitalia of the Complainant were not subjected to further tests to confirm if they came from him (Appellant).

6. The State through Senior Assistant Director of Prosecutions, **Mr. Kemo** opposed the Appeal. He urged that when the offence was committed the parents of the Complainant were away having travelled. That the sister of the Complainant saw her being pushed out of the house of the Appellant. That the Clinical Officer examined the Complainant and found that there was penetration as there was a tear in the labia majora and minora. Pus cells were noted in the urinalysis and there was spermatozoa. Therefore the conviction was based on weighted evidence. That the defence was considered and rejected and the sentence passed was lawful.

7. This being a 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).***

8. The contention of the Appellant is that the age of the victim was not proved. Age is an important ingredient of the offence of defilement. **(See Charles Wamukoya Karani vs. Republic Criminal Appeal No. 72 of 2013).** In **Francis Omuroni vs. Uganda C.A. No. 2 of 2000** 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."***

The Complainant told the Court that at the point of the incident she was 13 years old. PW3, **KNM** the father of the Complainant gave her

age as 14 years. The P3 form that was adduced in evidence indicated the age of the Complainant as 14 years.

9. In the Court of Appeal case of **Stephen Nguli Mulili vs. Republic (2014) eKLR** the Court stated thus:

> ***"In the case of Kaingu Elias Kasomo vs. Republic, Malindi Criminal Appeal No. 504 of 2014 the Court of Appeal stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts of failing to prove the offence. However, as the court clarified in Tumaini Masai Mwonya vs. Republic MSA CR.A No. 364 of 2010, proof of age for purpose of establishing the offence of defilement which is committed when a victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age.***
>
> ***From the facts of the present case we note that the complainant gave testimony that she was 13 years at the time of the offence. PW2 and PW3 corroborated the same. The "Diagnostic HIV Testing and Counseling Patient/Clinic Card", the "General Outpatient Record" and the P3 form, which were all presented as exhibits, stated the complainant's age as 13 years. Therefore, applying the law to the facts of the present appeal, we are satisfied that the complainant's age was proved to the required degree. This view is fortified by the fact that during trial the defence did not question the age of the complainant as offered before court."*** (Emphasis mine).

10. This is a case where no document of birth was adduced in evidence to establish the birth of the Complainant however, in addition to what she (Complainant) told the Court, her parent PW3 gave her age as 14 years. The Clinical Officer who examined her having observed her and filled a P3 in her respect also gave her age as 14 years. The Appellant was their neighbor who appreciated what they stated such that he did not dispute it at trial and he was represented by Counsel. Having not questioned her age at trial, it was proved beyond any reasonable doubt.

11. The Complainant told the Court that the Appellant removed her clothes and did "bad manners" to her. She went on to state thus:

> ***"I felt pain when he f****d me. I bled a little."***

This meant that he had sexual intercourse with her. She was subjected to medical examination. Per the medical examination report (P3) the Complainant sustained a tear on the labia minora. Discharge was noted, pus cells were noted and so were spermatozoa. The P3 form was adduced in evidence pursuant to the provisions of **Section 77** of the **Evidence Act.**

12. A basis was laid by an officer who had worked with the author of the document who was deceased. She was conversant with her handwriting and signature. The document was duly stamped by the medical practitioner and no objection was raised by the defence. Consequently, the Court presumed the signature to the document to have been genuine and that of the signatory. **(See Section 77(2) of the Evidence Act).** That was procedural.

13. With such evidence, the Complainant having been penetrated by an organ that spewed spermatozoa, it could only have been a male organ.

Further, it is urged that the spermatozoa noted in the genitalia of PW1 were not subjected to further tests. In the case of **Mark Oiruri Mose vs. Republic (2013) eKLR** the Court of Appeal stated that:

> ***"…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed so long as there was penetration whether only on surface the ingredient of the offence is demonstrated and penetration need not be deep inside the girls organ….."***

It was therefore not necessary for the spermatozoa to be examined.

14. It is urged that the case was riddled with contradictions and inconsistencies. In the case of **Twehangane Alfred vs. Uganda Criminal Appeal No. 139 of 2001 (2003 UG CA 6)** it was stated that:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

PW3 has been faulted for stating that he saw the pant that the Complainant had which he described as having been mud stained and on cross examination having stated that it was 'milkfish'. He denied having seen any blood on it. PW1, the Complainant stated that she bled a little but she did not say that she wore the pant after the act. The pant was not adduced in evidence and it was not demonstrated that PW3 lied as to his description of the pant that he saw. This was therefore not a grave contradiction.

15. Although the Appellant denied having defiled the Complainant PW2 the Complainant's sister saw her coming out of the house having been defiled therefore her evidence corroborated that of the Complainant as to who the perpetrator of the act was.

16. The Appellant faults the Court for having accepted written submissions at the close of the defence case. He cited the case of **Akhunya vs. Republic (2003) KLR page 14 – 19** where it was held that:

> ***"Trial procedures before the court are covered under part six of the Criminal Procedure Code which gives the prosecution and the defense the right to address the court by way of written submissions. A careful examination of the provision shows that the submission must be made in open court in the presence of the accused person. A presiding officer of the court is expected to hear such submissions as both sides in a criminal case wish to make and seek clarification of such submissions as found necessary in order to appreciate each sides case before delivering its opinion. The accused person is also expected to hear the submission and has the right to clarify any point raised or objected to it being raised where he considers it necessary for his benefit."***

This is now bad law as it is the Accused's right to file written submissions and seek to expound on them by submitting orally if necessary.

17. From the foregoing, I am satisfied that the learned Trial Magistrate properly convicted the Appellant and I affirm the conviction. On sentence, the minimum prescribed sentence for the offence is twenty (20) years imprisonment. Therefore I set aside the sentence imposed and substitute it with **twenty (20) years imprisonment** to be effective from the date of conviction by the trial court.

18. It is so ordered.

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

L.N. MUTENDE

JUDGE