REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 1 OF 2016

AUGUSTINE MWENDWA PASCAL……………..…APPELLANT

VERSUS

REPUBLIC …………………………………......RESPONDENT

(Being an appeal against the original conviction and Sentence of the Senior Resident Magistrate's Court at Tawa by Hon. M.M. Nafula (SRM)) in Criminal Case No. 10 of 2015 dated 21st December, 2015)

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JUDGMENT OF THE COURT

Brief facts

1. This appeal emanates from the decision of Hon. M.M. Nafula the Senior Resident Magistrate dated, signed and delivered on 21st December, 2015 at Tawa in SRMCCRC (S.O) No. 10 of 2015 wherein the appellant herein was charged with the principal offence of defilement and an alternative charge of committing an indecent act with a child. The appellant was convicted of the principal charge and sentenced to life imprisonment by the said court. Unsatisfied by the decision of the lower court, the appellant appealed seeking to have both the conviction and sentence quashed. The appeal is based on two grounds that is, whether the charge sheet was defective and whether the prosecution proved its case beyond reasonable doubt. As to whether the charge sheet was fatally and incurably defective, the appellant submitted that no proper conviction and sentence would have arisen from the said charge sheet. Notably, the principal charge reads as follows;

> ***"Defilement of a child contrary to section 8(1) as read with subsection 2 of the Sexual Offences Act No. 3 of 2006"***

2. The defence submitted that the aforementioned sub-section 2 does not originate from any section of the said Act. ***It therefore begs the question, sub- section 2 of which section?*** The defence submitted that because the accused person was principally charged in the lower court with the offence of defilement contrary to **Section 8(1)** as read with **sub section 2** of the **Sexual Offences Act, No. 3 of 2006,** the charge sheet was therefore incurably defective.

3. In response to the first ground of appeal, the prosecution rightfully, in the view of this court, submitted that the same must fail. The charge as framed is proper and as by law required, the same reads**…** ***"defilement of a child contrary to section 8(1) as read with sub-section 2 of the Sexual Offences Act No. 3 of 2006."*** Sub section 1 of the said section defines the offence itself while subsection 2 is the penal

section, the two must go in tandem, the charge as framed is therefore proper and within the law.

4. This is a preliminary issue which I wish to determine at this stage. **Section 8(1) & (2)** of the **Sexual Offences Act, No. 3 of 2006** provides as follows:

> ***8. Defilement***
>
> ***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***

5. I do not understand the submissions, that the charge sheet was defective. In any event, if it is a matter of construction of the entire section, the issue is not one that can be allowed to affect substantive justice. This court clearly understands that the appellant was charged under **sections 8(1) and 8(2) of the Act.** The fact is clear and begs no doubts.

6. On the second ground as to whether the prosecution proved its case beyond reasonable doubt, the appellant cited the ***locus Classicus case of Woolmington v. DPP (1935) A.C 462*** where ***Lord Sankey*** stated that, throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. In this regard, the defence submitted that the evidence of PW1 who is the victim and/or complainant was not corroborated. Additionally, the blood-stained clothes alleged to belong to PW1 (the complainant) were not subjected to any examination by the Government Analyst. It was submitted that these glaring inconsistencies ought to have been resolved in favour of the accused person since it was clear that the case by the prosecution was incompetent and premised on conjecture, fabrications and hearsay. Further, the defence submitted that the documents provided as exhibits by the prosecution to prove its case were of no probative evidential value. The prosecution produced as exhibit number one, a copy of the Age Assessment Report as proof of the victim's age. The appellant submitted that the said copy was not the best evidence especially because it is not a primary document which could be relied upon to determine the age of the victim and further because no explanation was made to the court on the whereabouts of the original Birth Certificate. It was hence unsafe to convict the accused person based on a secondary document and accordingly, this appeal ought to succeed. The appellant relied on the case of ***Kenneth Kiplagat Rono v. Republic (2010) eKLR*** where E.O. O'kubasu JA, P.N. Waki JA & D.K.S Aganyanya JA stated that, in the circumstances of that case, they thought it was possible for the state to verify the age of PW1 medically or by other means as it was an element of the offence charged.

7. In response to ground two of the appeal, the State submitted that the evidence of the minor complainant was vivid and clear. She did not break the chain of events and showed reasonable understanding of what transpired. She narrated how the accused took her to his house, threw her on the bed and then defiled her. She also produced the two 50 bob notes that she was given by the accused to silence her.

8. What the prosecution has submitted is correct according to the record. This being the first appeal, I have reviewed and re-evaluated the evidence before the trial court, and I am able to make my own independent conclusions. The appellant has raised the issues that the prosecution did not prove its case beyond reasonable doubt. However, the record shows that the minor gave cogent evidence. Further, the minor complainant's testimony was corroborated by that of a doctor who testified as PW5 in this matter. He told court that he saw and examined the child, and that at the time of examination her clothes being the dress and her pants were blood stained. That the minor was still bleeding from her vagina, her vulva was swollen, hymen broken, that her vagina was lacerated and bleeding an indication that indeed there was penetration. In fact he further notes that as at that time of examination there was actual bleeding from the hymen and vagina.

9. The appellant contends that the blood stained clothes were not subjected to any examination by the government analyst and that for that he should be exonerated. However, the evidence of the minor was

cogent; she confirmed that she knew the appellant and that the appellant even first greeted her and refused to let her hand go. Being a neighbor and from the same village, she knew the appellant by name and was not a stranger to her, and that the incident occurred in broad daylight. Worth noting is that when she was questioned by the teacher, she forthwith gave the name of the appellant and in no time did she shift to someone else. Throughout the trial, it came out clear that there did also not exist any grudge between the appellant and the minor or rather her family that could make her/them implicate accused to this heinous crime. As for the victim's age, the minor was seen by PW5 who is an expert for purposes of assessing her age and the same was assessed and found to be about 8 years. It is clear to this court that the same was proved as by law required which evidence was not shaken in any way by the appellant.

10. Further, **Dr. Patrick Mutinda** who testified as PW5 was an independent witness who saw and examined the child the same day. His evidence was that he saw and examined the minor's clothes, that is, the pant and dress which were blood stained. The minor was still bleeding from her vagina, the vulva was swollen, hymen broken vagina lacerated and bleeding, an indication that there was penetration. He further confirmed that in fact there was actual bleeding from the hymen and vagina. The doctor being an independent witness had no reason to lie to the trial court, his evidence was not challenged in any way and the same was candid.

11. From the foregoing, the prosecution case was proved beyond reasonable doubt and this court finds that the conviction was safe. As for sentence, there is only one sentence provided for under **Section 8(2)** and that is life sentence.

12. Pursuant to the foregoing, the appeal is dismissed, and the conviction and sentencing is upheld.

That is the judgment of the court.

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E.K.O. OGOLA

<u>JUDGE</u>

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 14TH DAY OF FEBRUARY, 2017

………………….

DAVID KEMEI

<u>JUDGE</u>

<u>In the presence of:</u>

Tamata – for Kimeu for Appellant

Machogu - for Respondent