REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 13 OF 2015

KSY …….....……. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 9 of 2013 of the Chief Magistrate's Court at Malindi – C.M. Nzibe, RM)

JUDGEMENT

The appellant was charged with the offence of defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on the 3.7.2013 at [particulars withheld] Village in Malindi District within Kilifi County intentionally and unlawfully caused his penis to penetrate the vagina of M.K., a child aged one and a half years.

The trial court convicted the appellant and sentenced him to life imprisonment. The grounds of appeal as amended are that: -

1. The trial court erred in law and fact by admitting the evidence of the doctor that the complainant's hymen was missing without considering what caused hymen to be broken.

2. The charge sheet was defective as it does not support the life imprisonment sentence.

3. The evidence of PW1 was contrary to the evidence of the doctor and section 179 (2) of the Criminal Procedure Code was applicable.

4. The trial court failed to consider that this was a made up case resulting from a land dispute.

5. The trial magistrate erred by failing to consider that section 36 of the Sexual Offices Act was applicable so as to determine whether the blood found on the complainant's clothes was that of the complainant.

6. The prosecution did not prove its case beyond reasonable doubt.

7. The trial court failed to consider the appellant's defence that was reasonable.

In his written submissions, the appellant submit that the conviction is not safe. The type of object used to penetrate the minor was not disclosed. The complainant's mother testified that the appellant tried to

insert his penis inside her vagina but was unable. He inserted his fingers severally inside her vagina. The witness further testified that the appellant folded the complainant's legs and ejaculated on her thighs. She alleged that she was given that information at the hospital. That evidence is doubtful as the doctor (PW6) received the victim on 7.7.2013. The minor could not express herself and her mother could not have come to that conclusion. It is also submitted that it is not possible for a minor of that age to be defiled and walk away from the scene of crime to her home.

The appellant further submitted that this was a made up case involving a plot. PW4 testified that the appellant had recently gone to live in that village at the plot of one K. The said K was chased away from the plot and it was only the appellant who was living there cultivating the maize, tomatoes and vegetables. The villagers plotted to chase away the appellant so that they could take the land and they used the small child. The appellant argues that there was evidence of blood on the complainant's clothes. That blood was not subjected to analysis contrary to the provisions of section 36 of the Sexual Offences Act. It is further submitted that PW1, PW2, PW3 and PW4 are all related and this was a conspiracy to take away the land.

According to the appellant the charge which is the back bone of the case was defective. The charge sheet indicate that the appellant was charged under section 8 (1) (4). Under section 8 (4) the minimum sentence provided is fifteen years. The appellant was sentenced to life imprisonment. The trial court failed to amend the charge by utilizing the provisions of section 214 of the Criminal Procedure Code. The anomaly cannot be cured by applying the provisions of section 382 of the same Act because it occasioned injustice. The trial court noted in its judgement that the prosecution had proved its case as per the charge sheet and the appellant was found guilty of the charges under section 8 (1) (4). The trial court ought to have applied section 179 (2) of the Criminal Procedure Code and reduce the charge to the minor one whereby the sentence would have been fifteen years imprisonment and not life imprisonment. Apart from that there is the evidence that the appellant used his fingers and failed to insert his penis. The appellant denies committing the offence but submit that the evidence ought not to have led to life imprisonment taking into account the fact that the charge sheet was defective. The case was not proved to the required standard and the appellant's defence was not considered.

State opposed the appeal and submit that the prosecution proved its case beyond reasonable doubt. The complainant was aged about 1 ½ years old. The mother of the victim testified as an intermediary under section 31 of the Sexual Offences Act. The evidence of PW1 was corroborated by the evidence of PW2 PW3 and PW4. The medical evidence confirmed that the complainant was penetrated. Section 382 of the Criminal Procedure Code is applicable to the effect that the finding of the trial court cannot be varied or altered on appeal on account of the error of omission on the charge.

This is a first appeal and the court is required to evaluate the evidence afresh and make its own conclusion. PW1 was the complainant's mother. She testified that on the 3.7.2013 at about 11.00 am she was in her house. She was leaving the house to go and fetch water. The appellant went there carrying maize on his bicycle. He called the victim and told her to go with him and cook maize. The appellant went with the child to his house. PW1 became nervous about the child being with the appellant. She went to fetch water and passed by the appellant's house. She returned home and started cooking lunch. She then saw the complainant being brought home by another child. The other child told her that it was the appellant who had asked her to take the complainant home. The complainant was walking with difficulty and also crying. PW1 was pregnant at that time and she could not bend properly to check on the complainant. She called her neighbours who checked on the child and was informed that the child's private parts were torn. They took the child to the prison hospital but were referred to Malindi police station. The case was reported and the child was taken to Malindi general hospital. She knew the appellant as a neighbor. The complainant was about 2 years old and was her second born. The child was traumatized and started diarrearing.

It is the evidence of PW1 that she was told at the hospital that the appellant tried to insert his penis inside the complainant's vagina but was unable. He then inserted his fingers severally inside her vagina. Once he finished he folded her legs and he ejaculated on her thighs. The complainant told her that the appellant closed her mouth using his hand. PW1's husband was working in Meru at that time.

PW2 is the father of the complainant. He is a mason. He produced the complainant's clinic record which indicate that she was born on 25.4.2011. By the time she was defiled she was about 2 years old. On the material day, he was in Meru working as a mason. His wife called him and revealed the incident. He travelled home. On 9.7.2013 in the company of neighbours he was able to arrest the appellant and take him to the police station. The appellant had been their neighbor for about 5 months. He had no grudge with him. The child was not able to communicate well at the time of the incident. The appellant used to be friendly with the children in the neighbourhood. The victim used to call the appellant **"Babu"**.

PW3 RASHID CHENGO TSUWI is a resident of [particulars withheld] Village. He is a neighbor to PW1. He knows the complainant who is a young child who cannot communicate well. On 3.7.2013 at about 11.00 am he was resting in his house. PW1 went there and asked him to check on the complainant. PW1 told him that the complainant was with the appellant roasting maize and was returned by a boy to PW1. The child was crying and holding her panty in her hand that is why PW1 wanted him to check on the child. PW3 examined the child and noted her private parts was swollen. He told PW1 to take the child to hospital. He went with PW1 to Malindi police station where the matter was reported. They were referred to Malindi District hospital. He also assisted in having the appellant arrested. He spoke to the complainant who could not express herself but would say **"Babu K"** while pointing to her private parts.

PW4 KAHINDI MKARE KALAMA is a neighbor to PW1. On 3.7.2013 at about 11.00 am he heard PW1 saying that the complainant had been defiled the by the appellant. He went to PW1's house and PW1 told him that the appellant had gone with the child and had defiled her. He knew the appellant who had lived on the plot for 2 months. He used to see the appellant engaged in faming on the plot. He used to see children going to the appellant's house and they would call him **"Babu"**. He went with PW1 with the child to prison dispensary and they were referred to Malindi police station. The child's clothes had blood stains. He went with PW1 to the police station. The appellant was later arrested but he denied defiling the child. When the appellant went to live in the village he was asked to produce a letter from his area chief but he did not. PW4 had no grudge with the appellant.

PW5 P.C. ANDREW WEKESA was stationed at the Malindi police station and he investigated the case. On 3.7.2013 he was at the station when PW1 went there with the complainant. He saw the blood stains on the complainant's dress. He tried to talk to the complainant who was crying saying **"Babu "** had beaten her. The child could not express herself well. There was a threat to kill the appellant. On 9.7.2013 members of the community arrested the appellant and took him to the station. The appellant denied committing the offence. The child's age was assessed and found to be 2 years old.

PW6 IBRAHIM ABDULAHI is a clinical officer who was based at the Malindi District hospital. He examined the complainant on 7.7.2013 and filled the P3 form. The child had been treated previously and a post rape care form had been filled. The child was stable. Vaginal examination showed the labia were swollen, her hymen was broken and her vagina was swollen. He concluded that the complainant was likely to have been defiled as her vagina is not expected to be swollen at that age. Her clothes were blood stained. The child's age was assessed.

In his unsworn defence the appellant testified that he is a mason. On 3.7.2013 at about 6.30 am he went with his workmate to look for work but they did not get any. They left heading home but decided to go through his farm and harvest his maize. He loaded his maize on his bicycle and went home. He passed by PW1's house. PW1 asked him to go with the child as she was going to fetch water. The child was crying. He told her that he could not go with the child as he was hungry. They parted ways and he went home. He did his work until that evening. A friend of his went to visit him and he gave him a jembe to take to PW1. The following morning, he went to his farm to harvest maize. On the day he was arrested he went to look for work and then passed through his farm. He met people who told him that he was not required to be on that farm. He was escorted to the police station where it was claimed that he had defiled the complainant. That allegation was not related to the issue of the land. He was framed by the neighbours due to the land and they didn't want him to live in that area.

The appeal raises two issues.

i. Whether the complainant was defiled; if so;

ii. Whether it was the appellant who defiled her.

The record shows that the complainant did not testify. The child was about two years old and could not express herself well. It is indicated at page 8 of the record that the prosecutor applied to have the child testify through the mother as an intermediary. The trial magistrate granted the request under section 31 of the Sexual Offences Act. In view of the fact that the child could not talk, no questions were put on the child. The mother simply told the court her own evidence and what the child told her.

Section (2) of the Sexual Offences Act defines an intermediary as follows: -

> **"intermediary" means a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker"**

Article 50 (7) of the Constitution states that in the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court. The child could not testify. PW1 testified on what transpired before the incident and what the complainant told her. PW1 was therefore an independent witness and not an intermediary as provided under section 31 of the Sexual Offences Act. An intermediary is supposed to be communicating with the witness (vulnerable witness) and then convey the answers or response from the witness to the court. Where the witness does not testify, then there is no intermediary. That is my understanding of Article 50 (7) and section 31 of the Sexual Offences Act. The vulnerable witness must be having difficulties in communicating in court and feels comfortable communicating through another person who would be well positioned to understand the vulnerable witness's inhibitions. In the current case, the child could not have been expected to testify given her age. The mother was therefore the proper person to testify. She was an independent witness.

According to PW1, the child went with the appellant. The child was returned shortly and had difficulties in walking. The child was crying. PW3 checked on the child's private parts and noted that her private parts were swollen. PW4 saw blood on the child's clothes. The medical evidence of PW6 is that the child's vagina was swollen and her hymen was missing.

No one witnessed the incident. It could have been easy to know what happened to the child if the child was able to testify. However, the circumstances of the case show that the child could not testify. Whether the child was defiled or hands were used to penetrate her vagina cannot be concluded with finality. The evidence show that the child's vagina was penetrated. Her hymen was broken. Taking into account her age, one cannot conclude that the child's hymen was broken through physical exercise.

The circumstances of the case point to the fact that the child was defiled. The evidence of the mother to the effect that she was told at the hospital that a hand was used to penetrate the child is not supported by the evidence of PW6 who is the expert who examined the child. I do find that the child was defiled and not sexually assaulted. PW6 testified that the child was likely to have been defiled.

The other issue is whether it is the appellant who defiled the child. The evidence of PW1 is that the child went with the appellant to his house. The child was returned shortly by another child. Within that short time, the child's condition had changed. She was bleeding from her vagina and her vagina was swollen. The child who took the complainant to PW1 informed PW1 that it was the appellant who had asked him to take the child to PW1. PW3 and PW4 saw the child and observed that her clothes had blood and her vagina was swollen. The medical evidence is to the effect that the complainant was defiled.

The defence evidence is that the appellant did not go with the child to his house. He left the child with her mother and went home to prepare his maize.

The evidence is circumstantial. As indicated hereinabove, I do find that the child was indeed defiled. The circumstances of the case indicate that the appellant was at his house at the time the child was defiled.

The evidence of PW1 to the effect that the child went with the appellant is quite reliable and direct. There was no good reason for PW1 to have pointed at the appellant as the one who went with her child instead of another person. There was no other person. I do find that the inculpatory facts point at the appellant's guilt. The child went with the appellant and was taken to PW1 while she had been defiled. The child who took the complainant to PW1 could not have been the defiler. The evidence of the investigating officer is that the child who took the complainant to PW1 was a boy aged about six (6) years old. PW5 met the boy when he visited the scene. I do agree with the investigating officer and the trial court that all the evidence points at the appellant as the defiler. I am satisfied that it was the appellant who defiled the child. The issue of land was considered by the investigating officer. There is no proof that the allegation of defilement is made up. The prosecutor did prove its case beyond reasonable doubt. The missing hymen of the complainant was caused by the defilement by the appellant.

The appellant contends that he was charged under section 8 (1) (4) of the Sexual Offences Act. Under section 8 (4) the sentence provided is fifteen years. It is his submissions that section 179 of the Criminal Procedure Act ought to have been applied and he benefit from the lesser sentence. The evidence show that the complainant was two years old. Section 8 (4) provides for defiled victims aged between sixteen (16) and eighteen (18) years old. The appellant cannot benefit from that section. The victim does not fall within that specific age bracket. Section 179 of the Criminal Procedure Code cannot be applied to the appellant's benefit.

In the end, I do find that the appeal lacks merit and is hereby disallowed.

Dated and delivered in Malindi this 13th day of February, 2017.

S.J. CHITEMBWE

JUDGE