REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 62 OF 2014

ZNM …….....……APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 53 of 2012 of the Chief Magistrate's Court at Malindi – C.M. Nzibe, RM)

JUDGEMENT

The appellant was charged with two counts of defilement under section 8 of the Sexual Offences Act. Each of the two counts had an alternative charge of indecent act with a child. The appellant was also charged with a separate count of sexual assault. The particulars of the offence for each count are as follows: -

> Count I: The appellant on unknown dates between October 2011 and April 2012 in [particulars withheld] Village in Malindi District within Kilifi County intentionally and unlawfully caused penetration of his male genital organ namely his penis into the female genital organ namely the vagina of M.K.K. a girl aged 17 years.
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> Count II: The appellant on unknown dates between October 2011 and April 2012 in [particulars withheld] Village in Malindi District within Kilifi County intentionally and unlawfully caused penetration of his male genital organ namely his penis into the female genital organ namely the vagina of L.S.K. a girl aged 15 years.
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> Count III: The appellant on unkown dates between October 2011 and April 2012 in [particulars withheld] Village in Malindi District within Kilifi County intentionally and unlawfully used his fingers to penetrate the vagina of L.A.K. a girl aged 12 years.

The trial court convicted the appellant on all three counts and sentenced him to serve twenty five (25) years imprisonment for the first count. Thirty (30) years imprisonment for the second count and Thirty (30) years imprisonment for the third count. The sentences are to run consecutively.

The grounds of appeal are that the charge sheet was defective. That the minor's evidence was unreliable and could not have led to the conviction. That the evidence of the government analyst was contradictory and did not add any weight to the case. That the charging section does not disclose the offence of defilement. That the prosecution did not prove its case beyond any reasonable doubt and that the trial magistrate did not consider the appellant's reliable defence.

In his submissions, the appellant states that the trial court errored by ordering the sentence to run consecutively. Since the counts were together then the sentence should have run concurrently. Further the charge sheet was defective and the trial court did not order for its amendment. The first complainant was punished by the appellant for having refused to go and collect the appellant's phone and that is why the case was framed and the appellant charged with the offence. The grandmother to the complainants chased them away as it was a framed case. The complainant's mother allegedly reported to their uncle who was not called to testify.

The appellant further submit that his blood sample was taken for analysis but the report does not indicate his blood group. The medical evidence does not incriminate the appellant. The analyst simply stated that there was a 99.99% chance that the appellant is the father of PW1's child. The manner in which the DNA was conducted was unprocedural. PW8 produced the DNA report yet he was not an expert. The maker of the P3 form was not called to testify. The evidence of the minors was unreliable. The only issue in relation to the evidence of PW1 is her pregnancy. There was no evidence that the appellant inserted his fingers on the pirate parts of the other complainant. The second and third complainants raised their complaints after PW1 had complained. Penetration can be caused by several other things. The contention that the appellant defiled the minors was a mere assumption.

It is further submitted that the charge sheet was defective as it referred to section 8 (4) of the Sexual Offences Act. Sexual Offences depend on the sentence imposed by the Act and section 8 (1) creates the offence of the defilement. This section was not utilized and therefore the charge sheet was defective both in substance and form. PW7 WANGECHI did not conclude in her evidence as to who the biological father of the child was. PW7 and PW8 produced the same documents. The prosecution did not discharge the burden of proof. The appellant was entitled to the benefit of doubt.

The State opposed the appeal. It is submitted that in the case of **ALPHONCE KONDI V REPUBLIC**, Miscellaneous Application Number 72 of 2012 the court noted that in the case of **PETER OCHIENG V REPUBLIC (1982 – 88) 1 KAR 832**, the Court of Appeal recommended a maximum of twelve counts in a charge sheet so as not to prejudice an accused person. The appellant faced only three counts.

It is further submitted that the DNA report was produced by PW7 who a government analyst and the maker of the report. Further, the State maintains that even if the first count referred to section 8 (4) only, the offence of defilement was disclosed. The age of the victim was established.

This is a first appeal and the court is called upon to evaluate the evidence adduced before the trial court and make its own conclusion. PW1 was the complainant in the first count of defilement. She testified under oath and informed the court that she was seventeen years old having been born on 13.1.1995. A notification of birth was produced. Her evidence was that she used to live with the appellant who is their grandfather together with her two young sisters. Sometimes in October 2011 she was sleeping with her sisters when the appellant had gone fishing. He came back and removed her clothes and had sex with her. He held her mouth. The appellant told her that she was a mature girl and left after having sex with her. She woke up her sisters and told them what the appellant had done. She was bleeding from her private parts. She did not go to school that day. Her other sister went to school and PW1 sent her to notify her mother.

PW1 further testified that two days after the first incident the appellant went fishing at night. He came back that night and tried to force her into sex. He did not defile her that night. The following morning, they went to their mother's place but she was not there. They went back to the appellant's place. At night, the appellant tried to force her into having sex with him but PW1 resisted. The appellant continued to go to the house where the complainant was sleeping but found them awake. At one time the appellant beat PW1 with a stick and broke her thumb because she had refused to go and pick his phone. Their mother went to the appellant's home at 9.00 pm and informed him that she wanted to go with them. The appellant agreed on condition that he was to be paid Kshs.85/=. He was paid and they left with their mother the following day. They narrated what used to happen to their mother. She was taken to Mambrui Dispensary and was found to be pregnant. She was referred to Malindi District hospital. The

case was reported at the Malindi police station. She had not had sex before the appellant defiled her. She delivered on 18.9.2012.

PW2 is the mother to the complainants. She testified that PW1 was born on 13.1.1995. Her other child (PW3) who was the second complainant was born in 1996. The third child (PW4 was 11 years old. The appellant is her uncle, a brother to her mother. She used to live with her children but her first born child Z was sick. The appellant offered to stay with the children in Malindi. PW2 was not of the idea but her mother convinced her. This was in January, 2011. The children stayed with the appellant until 2012 when the children started complaining that the appellant was defiling them. She went there one day at 9.00 pm and found the appellant making his fishing net. She told him that she wanted to take her children. The appellant asked for Kshs.85/= which she paid. PW1 told her that the appellant defiled her repeatedly. The other child told her that the appellant used to insert his fingers into her vagina. PW2 informed her brother by the name K and also her mother. Her mother promised to confront the appellant who is her brother. After four days, her mother asked her to drop the complaint. The children were taken for medical examination and PW1 was found five months pregnant. PW3's hymen was found to be broken but she was not pregnant. The matter was reported at the Malindi police station and the appellant was charged with the offence.

PW3 was the complainant in the second count for defilement. She testified under oath. Her evidence is that she was 14 years old and a class six pupil. PW1 is her elder sister. They were living with the appellant in Malindi who is their grandfather. Their sister Z was unwell. The appellant used to sleep in a different house. The appellant did bad manners to her and she bled from her private parts. Their mother went and took them. The appellant used to molest them. PW4 is the third complainant in the charge for sexual assault. She testified under oath. She told the court that she was 13 years old and a class four pupil. They used to live with the appellant between September 2011 upto May 2012. Their grandfather would return from fishing and enter PW1's room. She would see what the appellant would be doing to PW1. The appellant also did bad manners to her and PW3. They told their mother what the appellant used to do to them. PW1 became pregnant and gave birth. It is her evidence that the appellant did bad manners to her.

PW5 IBRAHIM ABDULLAHI is a clinical officer who was based at the Malindi hospital. He filled the P3 forms for the complainants. PW3 had her hymen broken. She was not pregnant. There was penetration on a fifteen (15) year old girl. PW4 alleged to have had fingers inserted into her vagina. Vaginal examination showed that her hymen was broken. PW1 alleged to have been impregnated by a person known to her. Her hymen was broken and she was pregnant. He concluded that there was penetration on a seventeen (17) year girl. The P3 forms were filled on 4.5.2012.

PW6 P.C. SAMUEL MUTURI was attached to the Malindi police station. On 20.4.2012 he was instructed to investigate the case. He talked to the three complainants. He was informed that the appellant used to have sex with PW1 and PW3 and used to insert his fingers inside the vagina of PW4. The complainants informed him that the appellant threatened to kill them if they spoke out. They finally informed their mother and PW1 was found to be 33 weeks pregnant. All the complainants had their birth notifications. The first complainant was born on 13.1.1995. The second complainant was born on 9.2.1997 while the third complainant was born 22.3.2000. PW6 investigated the case and was later transferred to Nairobi. He handed over the file to his colleague P.C. Keter. P.C. Keter informed him that the first complainant delivered on 17.9.2012 and samples were taken for DNA testing. An exhibit memo form dated 20.3.2013 was prepared by PC. Keter and taken to the government chemist Mombasa. A DNA report was prepared on 28.5.2013.

PW7 ANN WANGECHI NDERITU is a government analyst. On 25.3.2013 she received the exhibit memo from P.C. Keter together with blood samples of the appellant, PW1 and the child. She analysed the blood and prepared her report which she produced in court. PW8 P.C. JOHN KETER was attached to the Malindi police station. He received an order of the trial court requiring blood samples to be taken for DNA testing. PW1 went to his office on 18.3.2013 together with her child. He went to the to Malindi District laboratory where blood samples were taken. He marked the appellant's blood samples as "A". The blood samples of PW1 as "B" and the blood samples of the child as "C". He sent the exhibit

memo to the government analyst with a request that they establish if the appellant was the father of the child. He handed over the samples to Mr. Oguda who is a government analyst. Mr. Oguda informed him that the samples were to be taken to Nairobi for analysis. He later received a report from Ann Wangechi who had analysed the samples.

In his unsworn defence the appellant testified that he is a farmer. He denied committing the offence. The children went to his home with their mother. It was difficult for them to travel to school as their home was far and he did not have bas fare. They asked if he could live with them. He decided to assist since it was a family issue. He lived with them for about two months. He discovered a problem with one of the children. The mother decided to beat up the daughter. She told him that if observes bad behavior he should correct it in her absence. Whenever he noticed bad behavior he would beat the children. He disciplined PW1 and she ran away to her mother. He later received information that the police were looking for him. He decided to wait for the police. Two police officers went to his place and arrested him. He was later charged with offence.

The issues for determination by the court are whether the complainants were defiled, whether the charge sheet was defective and whether the prosecution proved its case beyond reasonable doubt.

The appellant maintains that the charge sheet was defective. The first charge provides for the offence of defilement contrary to section 8 (4). This charge relates PW1. The second charge indicate that the appellant was charged with defilement contrary to section 8 (1) (3) of the sexual Offences Act. This charge relates to PW3. The third count of sexual assault involves PW4. The charge cites section 5 (1) (a) (i) (2) of the Sexual Offences Act. Relating to the first count it is true that section 8 (1) of the Act was not cited. Section 8 (1) is the section which provides for the offence of defilement. Section 8 (4) is the section which provides for punishment if the victim is between the age of sixteen and eighteen years old. The appellant all along knew that he was charged with the offence of defilement. The section under which the penalty is provided if he were to be found guilty was stated on the charge sheet. It is therefore clear that the appellant knew the charges he was facing. It was a charge of defilement and the punishment is stated. It is not fatal to a charge sheet if section 8 (1) of the Sexual Offences Act is not cited. What is important is for the accused to know which offence he is alleged to have committed. The ages of the complainants are clearly stated on the charge sheet. There was no miscarriage of justice and the appellant was not prejudiced. The charges as drawn for the second and third counts clearly cites the charging section as well as the punishing sections of the Sexual Offences Act. There is no defect on the charge sheet for the second and third count.

The appellant argues that the DNA results was not conclusive. The blood group for the appellant is not stated and the medical evidence does not implicate the appellant. The medical evidence was that of the clinical officer PW5. According to PW5 he examined all the three complainants. He observed that PW1 was pregnant and her hymen was broken. PW3 had her hymen broken but she was not pregnant. PW4 also had her hymen broken. It is the evidence of PW6 the investigating officer that blood samples were taken to the government chemist for DNA testing. This related to the first count. It is on record that PW1 delivered while the case on going. PW7 ANNE WANGECHI NDERITU is a government analyst who conducted the DNA test. She produced her report in court. The report clearly tabulates the blood samples that were received from the appellant, PW1 and the child. She concluded that the appellant is 99.99% the father of the child delivered by PW1. The blood was given out not for purposes of sampling the blood group. It was for purposes of DNA testing. The appellant raises the issue that the report was not produced by an expert. The investigating officer only introduced the report but did not produce it. The expert was PW7 who testified and was cross-examined. The report does not give the appellant's name and only used the labeling of the blood samples. It cannot be said that there was a plot to implicate the appellant through bangled DNA tests.

The other issue raised by the appellant is that the prosecution did not prove its case beyond reasonable doubt and that the appellant's defence was not considered. The evidence on record indicate that the appellant was living with the three children from September 2011 upto around May 2012. According to PW1 the appellant used to go to the room and force her into sex. It is her evidence that she had not had sex with any other person before. PW4 used to see the appellant entering PW1's room and she could see

what the appellant used to do to PW1. PW3 simply stated that the appellant used to do bad manners to her. According to PW4 the appellant also did bad manners to her. According to their mother, the complainants informed her that the appellant used to defile them. However, PW4 was not defiled but fingers were inserted in her vagina. The defence evidence is to the effect that the appellant is being implicated because he disciplined PW1. The other two children never complained until when PW1 complained. He is being punished for disciplining the children. It is also submitted that hymen can be broken by other causes and not necessarily through sexual penetration. There is the evidence of the clinical officer which confirms that the three complainants were penetrated.

The court has to weigh the prosecution evidence against that of the defence. The totality of the prosecution evidence does prove that PW1 and PW3 were indeed defiled. The results of the defilement of PW1 is the pregnancy and the ultimate delivery of the child. PW3's hymen was broken. The same applied to PW4. There is no reason as to why all the three children would implicate the appellant. The appellant had all the time as he was living with the children. PW1 testified that the appellant used to go to her room when he came from fishing at night. The evidence of PW1 is corroborated by the fact that she became pregnant and delivered a child. The DNA test confirms that the appellant is the father of the child. This is not a made up case or a case created because PW1 was disciplined. As regards the other complainants, it is clear to me that PW3 suffered the same fate although she was lucky not to become pregnant. I am satisfied that the prosecution proved its case beyond reasonable doubt. The evidence is direct and touches on the appellant.

There is the issue of the sentence. The appellant contends that since the charges were together then the sentence ought to run concurrently and not consecutively. I do agree with that contention. I saw the appellant and he appeared to me to be an old man. It would be unfair for him to serve a total of 85 years imprisonment. That will give him a period of over 130 years by the time he is released from prison considering his current age of over fifty years. The effect of the sentence is that the appellant was sentenced to life imprisonment. Under section 8 (4) of the Sexual Offences Act, the minimum sentence is 15 years. The other charge for PW3 provides for a minimum sentence of not less than 20 years imprisonment. With regard to the charge of sexual assault under section 5 of the Sexual Offences Act the minimum sentence is 10 years but can be enhanced to life imprisonment. The appellant was convicted and sentenced to serve 25 years for the first count and 30 years each for the second and third counts. The sentence is to run consecutively.

In the end, I do find that the appeal on conviction is not merited and is hereby disallowed. I do set aside the sentence and replace it with the minimum for each count. The appellant is sentenced to serve fifteen (15) years imprisonment for the first count. He is sentenced to serve twenty years (20) imprisonment for the second count and ten (10) years imprisonment on the third count of sexual assault. The sentence shall run concurrently from the date of conviction.

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

S.J. CHITEMBWE

JUDGE