REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 263 OF 2009

JULIUS MWANGI KAMAU ..... APPELLANT

VERSUS

REPUBLIC .....STATE

(Appeal from the Sentence of the Chief Magistrate's Court at Nakuru Hon. C. A Otieno - Resident Magistrate delivered on the 3rd day of September 2009 in CMCR Case No. 9 of 2009)

JUDGEMENT

The appellant herein in **JULIUS MWANGI KAMAU** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts.

The appellant was arraigned before the trial court on 9/1/2009 facing a charge of **DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(1) as read with SECTION 8(2) OF THE SEXUAL OFFENCE ACT, 2006**. The particulars of the charge were that

> ***"On the 2nd day of October, 2008 at [particulars withheld] Farm in Nakuru North District within Rift Valley Province, wilfully and unlawfully caused the penetration of his male organ into that of N N N"***

Additionally the appellant faced a Second Count of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006** as well as a Third Count of **BEING IN POSSESSION OF NARCOTIC DRUGS CONTRARY TO SECTION 3(2) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES CONTROL ACT, 1994**.

The appellant pleaded **'Not Guilty'** to Counts 1 and 2 but he entered a **'Plea of Guilty'** to the Third Count. The brief facts of the prosecution case were as follows

The complainant **N N N** was a child aged 7 years. She told the court that at the material time she was a class one pupil. On the material date the appellant lured the child into a maize plantation under the pretext that he was going to give her a sweet. Once there the complainant testified that the appellant laid her on the ground, lowered his trouser, removed her panty and proceeded to defile her. After the act the complainant returned home.

PW2 M N and **PW4 G W** the father and mother respectively of the complainant told the court that on 2/10/2008 the child returned home from school claiming to be unwell. They gave her panadol to relieve

her discomfort. The following day again the complainant came home from school complainant of having a headache as well as a stomach ache. In addition the child was walking with a funny gait.

The parents questioned the child further and she revealed that he had been defiled. The matter was reported to police and complainant was taken to hospital for treatment.

PW6 J N told the court that on 22/12/2008 he was with the complainant who was his cousin. He left with her going to the nearby shops to by the child a sweet. At the shopping centre **PW6** entered a butchery to drink soup. The complainant identified the appellant who was inside that butchery selling soup as he man who had defiled her. The appellant was then apprehended and taken to the police station. Upon completion of police investigations the appellant was taken to court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant opted to give an unsworn defence in which he denied having defiled the complainant.

On 3/9/2009 the learned trial magistrate delivered his judgment in which she convicted the appellant on the first count of Defilement and thereafter sentenced him to serve a term of life imprisonment.

Being aggrieved by both his conviction and sentence the appellant filed this appeal.

This being a first appeal the court is required to re-examine and re-evaluate the prosecution case and to draw its own independent conclusions on the same **[see AJODE Vs REPUBLIC [2004] 2 KLR 8]. In MWANGI Vs REPUBLIC [2004] KLR 28** the Court of Appeal held as follows –

> ***"1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.***
>
> ***2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions***
>
> ***3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness"***

In analyzing the evidence the High Court must satisfy itself that the appellant was properly convicted and/or acquitted by the trial court. As stated earlier the appellant did enter a plea of **'Guilty'** to the third count of Being in Possession of two (2) rolls of Bhang. On 14/5/2009 the facts in respect of this charge were read out to the appellant who maintained his plea of Guilty. The appellant was therefore convicted on his own plea of Guilty and was sentenced to serve six (6) months imprisonment.

Having perused the proceedings of 14/5/2009 I note that although two (2) rolls of plant material were presented to the court as exhibits **no** report from a Government Analyst was produced to prove that the two (2) rolls produced by the prosecutor did actually contain *cannabis sativa* a prohibited drug. Thus effectively this charge was not proved. The fact that the appellant pleaded guilty to the charge did not absolve the prosecution from their legal duty to prove each element of the offence beyond reasonable doubt. As such I find that the conviction of the appellant on this charge was erroneous and I quash that conviction.

Having been sentenced to serve six (6) months imprisonment for the offence on 4/5/2009, the appellant has already served the full sentence. As such I will make no orders in respect of the sentence imposed as the same has now been overtaken by events.

With respect to the charge of Defilement, the following key questions arise for determination

- Was the complainant defiled as alleged
- Is there a proper identification of the appellant as the perpetrator
- Has the age of the complainant been proved?

The complainant in her evidence told the trial court that on the material day the appellant lured her into a maize plantation by telling her that he was going to buy her a sweet. The child being gullible fell for the trick and followed the appellant. In her own words the complainant went on to state at Page 9 line 3 as follows

> ***"At the maize plantation the accused person lied on top of me. The accused person removed his trouser. I was in my school uniform. The accused person removed his panty. He then put his penis in me. He told me not to tell anyone what happened when I go home..... I felt pain and cried when the accused person put his penis inside me. After he finished, the accused person put some medicine on my legs ....."***

The child here has given a clear, cogent and graphic account of what transpired. **PW2** and **PW4** the parents of the child noted some days later that the complainant was walking with a funny gait. They questioned her and the child revealed to them that she had been defiled. It is extremely unlikely that a child so young would claim to have been defiled unless the act really happened. I have no doubt that the complainant was telling the truth. The learned trial magistrate who saw and heard the child testify observed in her judgment

> ***"I note that the minor herein, PW2 and PW6 seemed to be truthful witnesses. PW1 the complainant herein was consistent, credible and convincing in her testimony on how the defilement took place where and by whom. The complainant's testimony was elaborate and clear and her demeanour was not that of a coached witness without feelings. She appeared traumatized as she recalled what had happened to her on the material day ....."***

These were the observations of the magistrate who actually saw and heard the child testify. I have no reason to doubt or challenge these observations.

Corroboration of the complainant's testimony on the fact of defilement is provided of **PW3 ISAAC GITONGA** who was the clinical officer who examined the complainant. **PW3** stated that when he examined the child on 6/10/2008 he noted that she had swollen labia majora and had bruises to the vaginal wall. He also noted blood stains in the urine. **PW3** noted that the injuries he saw on the child's private part were likely to have been caused by a blunt object like a male penis. The presence and nature of injuries seen on the complainant's private parts are proof that penetration (and therefore defilement) did occur.

The next question is whether there is sufficient evidence to identify the appellant as the man who defiled the complainant. The complainant herself identified the appellant in court as the man who defiled her. The incident occurred in the day time when the child had come from school. It was broad daylight and visibility was good. The complainant was alone with the appellant in close proximity with him for several minutes. She thus had ample time and opportunity to see him well.

The complainant went on to state in her evidence at Page 9 line 13

> ***"The person who did to me 'Tabia Mbaya' is in court. Accused person identified. The accused person is a neighbour where he stays is where we normally go to take soup. I used to see him in the plot..... "***

Clearly the appellant was not a stranger to the child. He was a neighbour whom she regularly saw within the plot and the child even knew where the appellant worked – in the place where soup was sold.

PW2 the complainant's father confirmed that **'The child told me she knew the person who had defiled her by appearance but did not know his name'**.

This proves that the complainant did from the very beginning insist that she knew and could identify her defiler. Therefore aside from visual identification there existed evidence of recognition since the appellant was a person the child knew before the incident. In **ANJONONI and OTHERS Vs REPUBLIC [1989] KLR** the Court of Appeal held that

> ***"..... recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"***

PW6 the complainant's uncle told the court that on 22/12/2008 about two months after the incident he was with the child and went to a nearby butchery to take soup **PW6** then stated as follows

> ***"On reaching the shopping centre, we entered a butchery. We drunk soup. When we left PW1 got hold of my trouser and told me that the person who had served us soup was the one who had defiled her earlier. The accused is the one who had served us with soup"***

PW6 stated that he had not even been aware of the defilement. However the child pointed out the appellant to him as the person who had defiled her. It is not lost on this court that the appellant was found in a butchery which sells soup – the complainant in her earlier testimony stated that she recognised the appellant as the man who worked in the place where soup is sold.

Based on the evidence I am satisfied that there has been a clear positive and reliable identification of the appellant as the man who defiled the complainant. I find that there was no possibility of a mistaken identity.

The final issue requiring proof in a case of Defilement is the **age** of the victim. Proof of age is important as it will determine the nature of sentence to be imposed if the accused is convicted. In the case of **ALFAYO GOMBE OKELLO Vs REPUBLIC 2010 eKLR** the Court of Appeal stated thus

> ***"In its wisdom, Parliament chose to categorise the gravity of that offence [Defilement] on the basis of the age of the victim and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt"***

Likewise in the case of **KAINGU ELIAS KASOMO Vs REPUBLIC [2010]eKLR** the Court held

> ***"Age of the victim of a sexual assault under the sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in cases of rape or defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim"***

In this case the complainant herself stated that she did not know her age. She did however state that she was in class one. **PW2** the father of the complainant told the court that his child was 7 years old. **PW2** was the parent of the child and who better than the parent to state the age of his/her child. The P3 form produced by **PW3** also gave the child's age as 7 years. From this I am satisfied that the age of the complainant has been proved to be 7 years.

I have considered the defence of the appellant. He concedes that the complainant did identify him by saying ***'Ndiyo huyu'*** but he denies knowing why the complainant so identified him. The defence basically amounts to a denial and did not in any was shake or cast doubt on the prosecution case. I would therefore dismiss this defence.

On the whole and on the basis of the evidence on record I am satisfied that the offence of Defilement has been proved beyond reasonable doubt. The appellant's conviction was sound and I do confirm that

conviction. The complainant being 7 years old the offence fell within the ambit of Section 8 (2) of the Sexual Offences Act. Section 8 (2) provides for a mandatory sentence of life imprisonment. The sentence imposed by the trial court was therefore lawful and I do uphold that sentence. This appeal therefore fails and is hereby dismissed in its entirety.

Dated and Delivered in Nakuru this 31st day of March, 2017.

Appellant in Person

Mr. Motende for State

Maureen A. Odero

Judge