REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 55 OF 2015

JOSEPH KIPKOECH RUTO …….……..……. APPELLANT

VERSUS

REPUBLIC ……. STATE

(Appeal from the Sentence of the Chief Magistrate's Court at Molo Hon. J. Wanyaga (Mr.) – Resident Magistrate delivered on the 11th March 2015 in CMCR Case No. 2641 of 2013)

JUDGMENT

The appellant **JOSEPH KIPKOECH RUTO** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting as Molo Law Courts.

The appellant had been arraigned before the trial court on 27/12/2012 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"On the 22nd day of December, 2013 at [Particulars withheld] Village in Kuresoi District within Nakuru County did cause your penis to penetrate the vagina of S C a child aged 8 years"***

The appellant pleaded **'Not Guilty'** to the charge and the matter proceeded to a full trial. The prosecution called a total of seven (7) witnesses in support of their case.

The complainant **S C** who testified as **PW2** was a child aged 8 years. She told the court that on the material day the appellant came to their home when her mother was away. He pulled the child into a nearby shamba and defiled her. The next day when the complainant's mother returned the child told her what had happened.

PW1 N C was the complainant's mother she told the court that on 22/12/2014 she left her home at 6.00pm to attend a circumcision ceremony. **PW1** left her six children in her home. She returned the next morning and woke up her children for breakfast.

However, the complainant refused to get up. She informed her mother that the appellant whom she referred to as **'Jose'** had defiled her. **PW1** checked the child's private parts and noted bruises as well as traces of blood and seminal fluid. She took the child to Kuresoi Hospital where she was treated. The matter was reported to Kuresoi Police Station.

Police commenced investigations into the matter and the appellant was eventually arrested 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 accused gave an unsworn defence in which he denied having defiled the complainant. On 13/2/2015 the learned trial magistrate delivered his judgment in which he convicted the appellant on the charge of Defilement and thereafter sentenced him to serve life imprisonment. Being aggrieved the appellant filed this appeal.

This being a first appeal this court is obliged to re-evaluate the entire prosecution case and draw its own conclusions on the same. In the case of **AJODE – Vs REPUBLIC [2004] KLR** it was held

> ***"In law it is the duty of the first appellant court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that"***

Before I begin to analyze the merits or otherwise of their case I do note that the complainant was a child of tender years. As such the court needed to conduct an enquiry before recording her evidence with a view to deciding whether the child was capable of giving sworn evidence.

Section 19 of the **Oaths and Statutory Declarations Act Cap 15 Laws of Kenya** deals with the manner in which evidence is to be procured from a child of tender years. Section 19(1) provides

> ***"Where in any proceedings before any court or person having by law or by consent of parties authority to receive evidence, any child of tender years called as a witness does not in the opinion of the court or such person understand the nature to an oath, his evidence may be received, though not given upon oath, if in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth and his evidence in any proceedings against any person for any offence, though not given on oath but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure Code (Cap 75), shall be deemed to be a deposition within the meaning of that section"***

The nature of the enquiry to determine if the child is capable of giving sworn evidence is commonly done by way of a **'voire dire'** examination. The term **'voire dire'** is a French phrase which literally means **'to speak the truth'** The court must conduct an enquiry to satisfy itself that the child comprehends the nature of an oath and also comprehends the importance of telling the truth as well as the consequences of not telling the truth before accepting such a child's evidence on oath.

In this case before recording the evidence of the child the record indicates

> ***"Voire dire statements taken"***

I take this to mean that such **'voire dire'** examination was conducted by the court although the formal question and answers were not recorded. Evidently the trial court concluded that the child did not understand the nature of an oath as she ultimately gave unsworn evidence.

I must emphasize that it is desirable that before admitting the evidence of a child, a trial court must conduct and record the **'voire dire'** examination as well as the conclusion made thereafter. Having said that I find that failure to do so in this case is not in any way fatal to the trial. The accused suffered no prejudice. The child gave unsworn evidence and the appellant was accorded an opportunity to cross examine her. The omission to record the entire question and answer **'voire dire'** session would in my view amount to a technicality. The nature of which court are exhorted do have undue regard for by Article 159(d) of the Constitution of Kenya, 2010.

Having determined that point I will now proceed to analyze the evidence on record. In cases of Defilement the main issues which require determination are

(1) Was the complainant actually defiled?

(2) Identity of the perpetrator of the offence.

(3) Is there proof of the victim's age?

In this case the complainant told the court that she was taken to a nearby shamba and defiled by the appellant. In her testimony at page 7 line 13 she stated

> ***"At the shamba he removed by pants. I was lying down. I screamed but he blocked my mouth. The accused then did tabia mbaya in my private part. The front one (points to her vagina region) I felt pain. He lied on me and after he finished he ran off……."***

The complainant here has given a vivid account of what transpired. She was a young child and I do not expect that she would have fabricated such a tale – indeed she had no reason to do so. This court takes judicial notice of the fact that young children who lack the proper vocabulary to describe the act of sexual intercourse invariably refer to that act as ***"tabia mbaya".***

The complainant reported the incident immediately it had occurred. She reported both to **PW5 SIMON CHERUIYOT** a neighbor and also to her elder sister **MERCY CHEPKORIR PW6.** The complainant also immediately reported the incident to her mother **PW1** the next day when the mother returned home. The fact that the complainant reported the incident immediately it happened and the fact that she remained consistent in her account persuades me that she was telling the truth.

PW1 the complainant's mother stated that as soon as the child told her that she had been defiled she examined her private parts. She noted that the child's genitals were bruised and bleeding and had seminal fluid oozing out. **PW1** was an adult woman whom I have no doubt was sure of what she had seen.

PW7 MARGARET GATHONGO a nurse who at the time was working at the Kuresoi Health Centre told the court that on 24/12/2013 she examined the complainant. **PW7** told the court that upon examination of the child's private parts she noted bruises in the vagina and a broken hymen. **PW7** filled and signed the P3 form which she produced in court as an exhibit **P.exb 1**. The evidence of **PW7** as well as the finding of a broken hymen is conclusive proof that penetration had occurred. I therefore find that the complainant was indeed defiled as she has alleged.

The next question requiring determination is whether there has been a clear identification of the appellant as the man who defiled the complainant. In her testimony before the court the complainant stated with certainty at page 7 line 11

> **"I know the accused, he is called Jose"**

She identified the appellant in the court. Throughout her evidence, the child referred to the appellant by name when she reported the incident to the neighbor **PW4** her sister **PW6** and her mother **PW1**, the child maintained her stand that it was **'Jose'** who had defiled her. The complainant's mother **PW1** confirmed that

> ***"Jose is my neighbor. His name is Joseph Bii and he is here in court"***

All these other witnesses knew the appellant and they all identified him in court. It is instructive that at no time did the complainant waver in her identification of the appellant. The incident occurred at about 6.00pm. It was still daylight and visibility was good. Further the child spent much time in close proximity with the appellant as he took her to the shamba and as he lay atop her defiling her. She had ample time and opportunity to see him well.

The appellant was not a stranger to the complainant. He was a neighbor and a fellow villager whom she knew well. In the case **ANJONONI and OTHERS Vs REPUBLIC [1980] KLR 59** 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 another".***

The fact that the appellant was a man whom the complainant knew well leaves little room for a mistaken identity. Further **PW5** confirms in her testimony that on the material day when the children came home from hearing cattle she found that the complainant and others had left with the appellant to get onions from the shamba.

The child eventually returned crying. This evidence shows that the appellant was in the company of the complainant on the evening in question.

In his defence the appellant denied having defiled the complainant. He claimed that the charge had been fabricated due to a land dispute he had with some fellow villagers. The appellant claimed that he was involved in a dispute with some of the witnesses. He names **'Geoffrey'** and **'Simon' PW5** as the persons whom he had a land dispute with.

I fail to see how a dispute with a witness would influence the complainant to implicate the appellant as the person who defiled her. The complainant was a mere child who could not possibly have had any interest or involvement in land disputes. Further the two persons named by the appellant are not in any way related to the child. **PW5** was but a neighbor who could not have influenced the complainant or her family in any way.

The appellant does not claim to have had any disagreement with the complainant's family. This defence is but a **'red herring'** and is basically irrelevant to the present charge. In his judgment at Page 27 line 1 the learned trial magistrate observed that

> ***"The minor victim though was of tender age, her testimony was very explicit and no special relationship was confirmed in evidence on the victim and PW5"***

He went on to dismiss the appellants defence as **"a sham and holds no water".** I could not agree more.

Based on the evidence on record I find that there has been a clear, positive and reliable identification of the appellant as the man who defiled the complainant.

The final component of a charge of Defilement requiring proof is the age of the victim. The age of the victim in cases of defilement has been held to be a critical ingredient one requiring proof beyond reasonable doubt. In **ALFAYO GOMBE OKELLO Vs REPUBLIC [2016]eKLR** the Court of Appeal sitting in Malindi in commenting on this question of age of the victim in cases of sexual assault stated that

> ***"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences follow from proof of the offence under Section 8 (1) ……"***

In this case the complainant herself said she was 5 years old. **PW1** the complainant's mother told the court that her child was born on 16th August 2005. **PW4 CORPORAL JOHN GIKONYO** produced as evidence the complainant's immunization card **P. exb 2**. This document indicates that the child was born on 30th June, 2005. It would seem that like many rural mothers **PW1** was not certain about the precise **date** of her child's birth. They are more likely to refer the age in terms of the season rather than a precise date. Given that the immunization card is an official government issued document, I will take it as the correct and more reliable indicator of the child's date of birth. Having been born in June, 2005 the

complainant was aged about 8½ years in December, 2013 when this incident occurred. I am satisfied that the age of the complainant has been satisfactorily proved.

In his submissions the appellant queries why the age-assessment report ordered by the court was not filed. He also queries why neither **PW1** nor the complainant referred to the Immunization Card. As stated earlier an immunization card is a document officially issued to young mothers by the Ministry of Health. An age-assessment report would serve the same purpose and where alternative proof of age is presented to court there would be no need to insist on an age assessment report. The same just like a birth certificate is sufficient proof of age. Despite no reference to it by **PW1**, the investigating officer being the one investigating the case properly produced it as he must have obtained it from the child's mother. The appellant does not in any way challenge the validity or the authenticity of the document.

Finally on this point I note that **PW4** was re-called to produce the document after the accused had given his defence. Section 150 of the Criminal Procedure Code provides

> ***"150 A court may at any stage of a trial or other proceeding under this code summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or re-call and re-examine a person already examined and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case…"*** (my own emphasis)

The terminology used in section 150 **'is at any stage of the trial'**. A trial is not complete until judgment has been rendered. In this case the court was at liberty to and did exercise its discretion under Section 150 to re-call a witness who had evidence which was necessary for the just determination of the case. Thus I find that it was in order for **PW4** to be re-called to the stand even after appellant had given his defence. No prejudice was suffered by the appellant as he retained the right to and was indeed permitted to cross-examine **PW4** regarding any fresh evidence adduced.

Finally I find no merit in this appeal. The appellant's conviction on the charge of Defilement is upheld. Since the complainant was aged 8½ years at the time of the offence Section 8(2) of the Sexual Offences Act provides for a mandatory sentence of life imprisonment. The sentence imposed by the trial court being lawful is hereby confirmed. In a nutshell this appeal fails in its entirety and is hereby dismissed.

Dated and Delivered in Nakuru this 20th day of March, 2017.

Appellant in person

Mr. Motende for State

Maureen A. Odero

Judge