REPULIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 215 OF 2015

P K M……..…APPELLANT

VERSUS

REPUBLIC .....STATE

(Appeal from the Judgment of the Chief Magistrate's Court at Molo Hon. J Wanyaga –Resident Magistrate delivered on the 6th October, 2015 in CMCR Case No. 3345 of 2014)

JUDGMENT

The appellant **P K M** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Molo Law Courts.

The appellant was arraigned before the trial court on 29/12/2014 on a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"On the 22nd day of December, 2014 in Molo County, intentionally and unlawfully caused his penis to penetrate the vagina of C W a girl aged 8 years"***

In addition the appellant faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant pleaded **'Not Guilty'** to both charges and his trial commenced on 12/1/2015. The prosecution led by **INSPECTOR TANUI** called a total of five (5) witnesses in support of their case.

The complainant **C W**told the court that she was aged 8 years. On the material date the appellant whom the child refers to as her small father *ie* ***'baba mdogo'*** told her to put their baby to sleep. He then called the complainant to his house. He undressed her and laid her on the bed. The appellant then proceeded to defile the child.

PW2 J M was the 12 year old brother to the complainant. He stated that on 22/12/2014 he was at home with his siblings. The appellant who he identifies as his uncle – his father's younger brother, called the complainant to his house. Shortly thereafter **PW2** heard his sister screaming. He rushed to the appellant's house and found the door locked form inside. **PW1** peeped through the window and saw the appellant lying on his sister defiling her. He collected a *panga* and forced open the door. He then pulled the appellant off the complainant and took her home.

PW3 A W is the mother to both the complainant and **PW2**. She told the court that on 22/12/2014 she left her home at 9.00 am to go to work. She left her children with her the appellant who was her brother-in-law. **PW3** returned home at 7.00pm and was informed that her daughter had been defiled. **PW3** took her child to hospital for examination and treatment. The matter was reported to police. The accused was later 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. He opted to make an unsworn defence in which he denied having defiled the complainant. On 2/10/2015 the trial magistrate delivered his judgment in which he convicted the appellant on the main charge of defilement and thereafter sentenced him to serve life imprisonment. The appellant being aggrieved by both his conviction and sentence filed this appeal.

The appellant who was unrepresented during the hearing of this appeal relied on his written submissions which had been duly filed in court. **MR. MOTENDE** learned State Counsel opposed the appeal.

This being a first appeal this court is required to re-examine and re-evaluate the prosecution case and draw its own conclusions on the same (**AJODE Vs REPUBLIC [2004] KLR 83)**. Likewise in **MWANGI Vs REPUBLIC [2004] 2 KLR 28.** The Court of Appeal held that

> ***"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 courts own decision on the evidence.***
>
> ***2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions"***

In this written submissions the appellant faulted the charge sheet in two aspects. Firstly the charge sheet quoted Section 9(1) of the Sexual Offences Act instead of Section 8(1) of the Act. It is not in dispute that Section 9(1) does not relate to the offence of defilement.

The correct citation is Section 8(1). Did this misquotation of the Section render this charge sheet fatally defective? I think not. The charges as read out to the appellant referred to the Offence of Defilement. The particulars of the charge related to defilement. The appellant was under no misapprehension at all regarding what charge he faced. This is evident by the fact that the appellant participated fully in the trial and mounted a vigorous defence to the charge. The learned trial magistrate in his judgment at page 20 line 16 noted this anomaly and corrected the same by rendering a conviction under the correct section being Section 8(1) of the Act.

The second challenge to the charge sheet was that the charge was cited as Section 8(1) of the Sexual Offences Act. The correct citation ought to have read Section 8(1) **as read with Section 8(2)** of the Sexual Offences Act. Once again this constituted a mis-citation of the charge which did not in my view render the charge fatally defective. The particulars of the charge were clear and the age of the child was quoted in those particulars. These were but inadvertent errors which did not affect the substance of the charge. These were **'mere technicalities'** which Article 159(d) of the Constitution exhorts courts to ignore in the administration of justice. I therefore find that the errors in the charge sheet were curable errors and I dismiss this ground of the appeal.

In order to prove a charge of defilement the prosecution must tender evidence to prove the following beyond reasonable doubt-

i. The age of the child

ii. The fact of penetration

iii. The identity of the offender

On the question of age the complainant told the court that she was 8 years old. **PW3** the mother of the complainant confirmed to the court that her daughter was 8 years old having been born on 17/12/2006. **PW3** produces as an exhibit the child's Immunization Card **P. exb 2**. This is a government issued document and the same confirms that the child was born on 27/12/2006. Having been born in December, 2006 the complainant was aged 8 years in December, 2014. I am satisfied that the age of the complainant has been proved beyond reasonable doubt.

The offence of defilement requires that there exist proof of penetration. The complainant in her evidence stated at Page 3 line 5

> ***"He (appellant) then told me to go to his house, and when I reached in his house he held me on my hand and took me to his bed after removing my shoes and all my clothes made me to lie on his bed. He also removed his clothes and then he started doing 'Tabia Mbaya' to me (points to her vagina region) on the place I use to urinate".***

Later on the same page at line 18 the child states

> ***"The accused also removed his trouser but left his top sweater. I felt pain when he was defiling me but he did not tell me anything. I screamed. He used his penis (kitu yake ya kukojoa)".***

The complainant though a young child has given a clear and a graphic explanation of what happened to her. I take judicial notice of the fact that young children who lack the proper vocabulary to describe the act often use the term ***'tabia mbaya'*** to describe the act of sexual intercourse. A child so young would not claim to have been defiled if no such act actually occurred.

Ordinarily sexual offences are committed in secret and there are no witnesses to the act. However this is one of the few rare cases where there was an eye witness to the defilement.

PW2 was an elder brother to the complainant. He stated that he heard his sister screaming from the appellant's house. When **PW2** went to that house he found the door locked from inside. **PW2** peeped in the window and in his own words he stated at page 7 line 3.

> ***"When I heard Cs screams I went to check and found the accused door locked from inside and the window was left open so, I went and checked through the window and I saw Baba Mdogo doing tabia mbaya, he was lying on C while C had no clothes on and he was lying on top of her and he had also removed his trouser and he had his coat on. C had no skirt on at the time and was only left with her blouse on. The accused had put his penis into C's vagina C was screaming…."***

Again here **PW2** has given a clear graphic account of what he saw. His uncle lying on top of his younger sister in the very act of defiling her. The child was screaming and this is what alerted **PW2**. The incident occurred in broad daylight and visibility was good. I have no doubt that **PW2** was telling the truth regarding what he saw. His evidence corroborates that of the complainant.

PW2 went and got a panga which he used to push open the door. He then pulled the appellant off the complainant collected her clothes and shoes and took her home.

PW3 the complainant's mother confirmed that when she returned home her children informed her that the complainant had been defiled.

PW6 DR. GEORGE BIKETI was the doctor who produced the P3 form on behalf of **'Dr. Valentine Bosibori'** who was at the time attending a training court in Nairobi. The accused objected to the production of the P3 by a doctor who was not the maker but the court overruled his objection placing reliance on Section 77 of the Evidence Act. The appellant did not specify why he objected to the production of the P3 by **PW6.** The witness stated his qualifications and confirmed that he was familiar with the hand writing and signature of his colleague. The P3 form was properly produced as an exhibit

P.exb 1.

The doctor's examination revealed that the complainant's hymen was broken and her external genitalia bruised. The child was also found to have a bacterial infection. All these are evidence that penetration had occurred while the bruises indicate that the penetration was forceful. This was expert medical evidence which was neither controverted or challenged effectively by the defence. On the basis of the evidence I find that the act of penetration has been proved to have occurred.

The last issue requiring proof is the identity of the defiler. The complainant identified the appellant who was her ***'baba mdogo'*** (uncle) as the man who defiled her. The child spent ample time in close proximity with the appellant. She was able to see him well.

PW2 confirms the identification of the appellant. He stated that it was appellant who called the complainant to his house. He also told the court that it was their uncle whom he saw defiling the complainant. Both children knew the appellant very well. He was a close relative and lived close to them. Thus there was clear evidence of recognition. In the case of **ANJONONI & OTHERS Vs REPUBLIC [1989] KLR** the court held that identification 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'**

PW3 the children's mother confirms that both **PW1** and **PW2** told her that it was the appellant who had defiled the child. Thus the children did not waver in their evidence of identification. **PW3** confirms that the appellant was her brother-in-law and that it was he who remained with the children when she left to go to work.

In his defence the appellant claims that this charge is the result of a disagreement he had with the mother of the complainant after her children destroyed his crops. The appellant never raised the issue of any disagreement with **PW3** while cross-examining her. This is clearly an afterthought. The appellant claimed in his defence that the children's mother did not testify. This was totally incorrect. **PW3** was the child's mother and she testified in open court. The appellant cross-examined her and at no time did he suggest that she was an imposter. I find the defence had no merit and the same was rightfully dismissed by the trial court.

On the whole I am satisfied that the prosecution proved the charge of defilement beyond reasonable doubt. The appellant's conviction was sound and I do uphold that conviction. Since the child was 8 years old Section 8(2) of the Sexual Offences Act provides for a mandatory minimum sentence of life imprisonment. I therefore confirm as lawful the sentence imposed upon the appellant.

Finally this appeal is found to have no merit and the same is hereby dismissed in its entirety.

Dated and Delivered in Nakuru his 5th day of May, 2017

Appellant in person

Mr. Motende for DPP

Maureen A. Odero

Judge