REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 22 OF 2015

FRED CHACHA SINDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C. M. Kamau, Resident Magistrate in Kehancha Senior Resident Magistrate's Criminal Case No. 360 of 2014 delivered on 02/04/2015)

JUDGMENT

1. **FRED CHACHA SINDA**, the Appellant herein, was charged with two counts of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** No. 3 of 2006. He also faced an alternative charge on each of the counts. The alternative charges were committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. He denied all the counts and the case proceeded on for hearing.

2. The particulars of the offences of defilement were as follows:

> ***'On the 24th day of May 2014 at [particulars withheld] within Migori County, intentionally caused his penis to penetrate the vagina of N.G.D. a child aged 9 years.***
>
> ***'On the 24th day of May 2014 at [particulars withheld] within Migori County, intentionally caused his penis to penetrate the vagina of W.R.D. a child aged 7 years.***

3. After conducting a full trial, the appellant was found guilty and convicted on the main counts of defilement. He was accordingly sentenced.

4. Before I consider the appeal, it is prudent that I revisit both the prosecution's case as well as the defence. The prosecution called a total of seven witnesses. **N.G.D** testified as **PW2** and **W.R.D.** testified as **PW3.** The two were sisters whose mother was one **A.B.D.** who testified as **PW1. PW4** was a Clinical Officer from Kegonga Sub-District Hospital whereas **PW7** was a Nurse at the said Kegonga Sub-District Hospital. **PW5** was an administration police officer who was also the arresting officer from Chinato AP Post. **PW6** was **No. 49423 Sgt. Johana Jazrui** who was the In-Charge of Nyamtiro Police Post and the investigating officer in the matter. For ease of reference, I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court.

5. The prosecution's case was that in the evening of 24/05/2014 at around 06:30pm, PW1 sent her two daughters, PW2 and PW3 to buy some milk from a homestead in their neighbourhood. They lived at the [Particulars Withheld] Market. As PW2 and PW3 were talking long to return home, PW1 went to the

homestead she had sent them to and learnt that they had been served a while ago and left. PW1 rushed back to her home and secured her other children she had left behind and as she was ready to start the journey of searching for PW2 and PW3, PW1 heard some children running towards her home. She rushed to confirm whom they were. They were PW2 and PW3. PW1 asked them where they were and PW2 narrated the ordeal they had undergone in the hands of the appellant in a maize farm on their way back home. PW2 was carrying her underpant.

6. PW1 quickly took PW2 and PW3 into her house and examined their private parts. She saw was some blood oozing from the vagina of PW2 and her underpant was also blood-stained. PW3 also had blood oozing from her vagina which had stained her underpant which she still wore. PW1 and her husband (not a witness) took their two children to the nearby Chinato Health Centre where they were examined and treated. A high vaginal laboratory analysis was conducted on both PW2 and PW3 and yielded negative results. From the hospital, PW1 and her husband were accompanied by the Area Assistant Chief (not a witness) and reported the matter to PW5.

7. PW5 and his colleague officer were deployed that very night to search for and arrest the appellant. They began the search with the aid of PW1, PW1's husband and the Chief. That was around 08:30pm. As they walked on a road towards the direction of the home of PW1, they met a person who was running from the opposite direction, that is from the direction of the home of PW1. PW5 stopped him and the person obliged. They then realized that it was the appellant. PW5 arrested the appellant and later took him to Nyamtiro Police Post where he handed him over to the officers thereat.

8. PW6 escorted PW2, PW3 and the appellant to Kegonga Sub-District Hospital in the morning of 25/05/2014 where they were all examined and PW2 and PW3 treated. It was PW7 who received them and after administering what he described as 'first aid' on PW2 and PW3, he referred them to and were attended by PW4 who was the Hospital Clinician. PW7 prepared the Filter Clinic Attendance Cards for the three which he produced as exhibits before court. PW4 filled in the Post Rape Care Forms for PW2 and PW3 as well as the P3 Forms for all the three and produced them at the hearing. The medical evidence confirmed that there had been partial penetration of the vaginas of PW2 and PW3 by a pennis.

9. Upon concluding investigations, PW6 preferred the charges against the appellant. He produced several exhibits including the two blood-stained underpants for PW2 and PW3. At the close of the prosecution's case, the trial court placed the appellant on his defence. The appellant opted for and gave sworn defence and called a witness one **P.M.M. (DW2)** whom he described as his employer. The appellant denied any involvement in the commission of any of the alleged offences and stated that he had all along been in the company of DW2 from around 05:30pm up to 11:30pm as they were drinking at a bar in the Senta Market. As he later walked home, he was arrested by some police officers and taken into custody on allegations which he knew nothing about. He contended that the medical examination at Chinato Health Centre vindicated him.

10. DW2 reiterated that the appellant had truly been in his company at the Mzalendo bar until 11:00pm. when the appellant left for his home. He also stated that the appellant was being fixed by his brothers over a parcel of land he is supposed to inherit. The appellant then closed his case and the matter was left for judgment.

11. By a judgment rendered on 02/04/2015 the trial court found the appellant guilty of the two main counts of defilement and convicted him. The appellant was then sentenced to life imprisonment on each count and the sentences are running concurrently.

12. Being dissatisfied with the convictions and sentences, the appellant timeously lodged an appeal and in his Petition of Appeal filed on 14/04/2015 challenged the convictions and sentences on grounds that he was not positively identified as the assailant, that a D.N.A. examination was not conducted, the medical evidence, as well as the other evidence, was contradictory, that the ages of the victims were not settled, that the alleged weapon was not produced in evidence, that the Area Chief who was part of the team that arrested him was not called as a witness and lastly that he did not understand the legal process and as such did not fully participate in the trial. The appellant prayed that the convictions be quashed and the

sentences be set-aside, alternatively a retrial be ordered.

13. Before the appeal was fixed for hearing, the appellant raised the land issue which had been raised by DW2 and contended that he was even arrested on allegations over the land matter and that the charges of defilement were only tramped up just to finish him. He prayed for, and this Court ordered that he be supplied with a copy of the OB No. 13 of 24/05/2014 which was availed by the OCS Ntimaru Police Station. The entry however was on allegations of defilement and not a land case.

14. The appeal was heard by way of oral submissions where the appellant, who appeared in person, expounded on the grounds of appeal and mainly prayed for a retrial. The State through Learned State Counsel Miss Owenga opposed the appeal and prayed that the same be dismissed.

15. The role of this Court as the first appellate Court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

16. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the parties' submissions.

17. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them.

(a) On the ages of PW2 and PW3:

18. The ages of PW2 and PW3 is one of the grounds relied upon by the appellant. It is contended that the same were not settled as the evidence tendered in proof thereof was inconclusive. In a bid to prove the ages of PW2 and PW3, the prosecution produced **Child Health Cards** which indicated that PW2 was born on 15/02/2006 and PW3 was born on 23/10/2008.

19. The Sexual Offences Act promulgated some rules towards the achievement of its objectives. Those rules came to be known as ***"The Sexual Offences Act (Rules of Court) 2014*** which came into force on 11/07/2014 under Legal Notice No. 101. Under **Rule 4 thereof**, the age of the complainant may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or **any other similar document**.

20. In this case I have no hesitation in finding that the **Child Health Cards** produced as exhibits fall under the category of '**any other similar document'** under Rule 4 aforesaid and that the same are in proof of the ages of PW2 and PW3. If one is still in doubt, there is the evidence contained in the **P3 Forms** at **pages 3** where the ages were approximated as 9 years and 7 years by the Medical Officer who filled in the same.

21. I therefore find that PW2 was born on 15/02/2006 and PW3 was born on 23/10/2008 and as such they were about **8 years 3 months old** and **5 years 7 months old** respectively when the offences were allegedly committed on 24/05/2014. The complainant was hence minors of tender years within the meaning of the law.

(b) On the issue of penetration:

22. **Section 2** of the Sexual Offences Act defines '***penetration***' as: -

'the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

23. This position was fortified in the case of **Mark Oiruri Mose vs R (2013)eKLR** when the Court of Appeal stated thus: -

'…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ….' (emphasis added).

24. Later the Court of Appeal, then differently constituted, in the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** held as such on the aspect of penetration: -

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

25. PW2 and PW3 gave unsworn testimonies and narrated the events as they unfolded between them and the appellant. They were waylaid by the appellant into a maize farm, laid on the ground, undressed their underpants and the appellant inserted his organ (Kidudu) he uses for urination into their private parts they as well use for urination. They felt pain in their private parts and cried. That description fitted sexual intercourses.

26. When the assailant had finished with PW2 and PW3, he ran away leaving them behind crying. The two then managed to find their way to their home and met PW1. They narrated the ordeal and PW1 immediately examined their private parts. PW1 saw was some blood oozing from the vagina of PW2 and her underpant, which she held in her hand, was also blood-stained. PW3 also had blood oozing from her vagina which had stained her underpant which she still wore.

27. PW2 and PW3 were that night taken to Chinato Health Centre where they were examined and treated. That was before the arrest of the appellant. They were also taken to Kegonga Sub-District Hospital in the morning of 25/05/2014 together with the appellant. The three were all examined and Post Rape Care Forms filled for PW2 and PW3. P3 Forms for all the three were filled by PW4. When PW4 examined PW2, he found that her hymen was intact but noted traumatic marks (*echymosis*) on the *labia minora* and on the left vaginal wall further to a perineal tear with blood stains. He also noted blood stains on the perineum. He concluded that there had been a partial penile penetration into the vagina of PW2. On examining PW3, PW4 found that her hymen was also intact but noted a minor perineal tear with blood stains on the *labia majora*. He also noted blood stains on the perineum. He also concluded that there had been a partial penile penetration into the vagina of PW3. PW4 also noted the bloodstains on the two underpants for PW2 and PW3.

28. There was also the evidence of PW7 who received the three, examined them and filled in the Filter Clinic Attendance Cards before they were seen by PW4. On examining PW2, he found a tear around the perineum as well as *echymosis* and that the perineal region was stained with blood. PW3's perineal region was stained with blood and there was a genital tear around the perineum. It was PW7 who prescribed drugs to PW2 and PW3. Just like PW4, PW7 found nothing abnormal on examining the appellant's private parts.

29. When PW7 testified before court, he instead stated that the hymens for PW2 and PW3 were torn. That position was however not captured in the notes he prepared and since there was no basis laid for such a serious allegation, I find that the same is for rejection. I will instead stand guided by the evidence of PW4 that the hymens were intact.

30. Having scrutinized all the medical documents and reconsidered the evidence of PW1, PW2, PW3, PW4 and PW7, this Court is satisfied that there were partial penile penetrations into the vaginas of PW2 and PW3. The contention by the appellant that there was need to carry out a D.N.A. examination is

therefore misplaced. The evidence on record was enough to prove the ingredient and that examination was not a necessity. Further, the appellant is reminded that a case of defilement can be proved by any other evidence and not necessarily by conducting a D.N.A. examination. This ingredient is hence answered in the affirmative.

c) <u>On whether the appellant was the perpetrator:</u>

31. The appellant vehemently denied any involvement in the alleged offence. From the record, the evidence touching on the appellant was mainly by PW2, PW3, PW5 and PW6.

32. The incident happened around 06:30pm. It was not yet dark. PW6 visited the scene which was in a maize farm but under a tree. He noted that it was disturbed in a manner suggesting that someone had laid there. He was led there by PW2. PW6 also noted that the road which the victims used had a sharp corner and it was at that corner where PW2 and PW3 were intercepted and led into the farm. When PW2 and PW3 met the assailant on the road, he stopped them and talked to them. He asked them the name of their mother and they answered. The assailant then got hold of their hands and led them into the farm. The assailant dealt with one after the other. In such a case, both PW2 and PW3 had ample time to see what was happening and who the assailant was whom they even knew by name.

33. When PW2 and PW3 went home, they reported that it was the appellant whom they met on the road and who waylaid them. They gave his name to PW1. They also gave the name of the appellant to the police. PW2 and PW3 also identified the appellant in court during the hearing of the case as the assailant. (See the Court of Appeal case of **<u>Simiyu & Another vs. Republic (2005) 1 KLR 192</u>** where the Court re-emphasized that there can be no better way of recognizing someone you know than by giving the name).

34. PW5 then set out to search for the appellant in the company of PW1 and others. He had known the appellant before. As they were on the road, they found someone who was running away from the direction of the home of PW1 and stopped him. That person happened to have been the appellant and PW5 arrested him. That was around 08:30pm. The appellant however denied that he was arrested at that time as he alleged to have been in the company of DW2 and that they were drinking in a bar at [Particulars Withheld] Market. According to the appellant, he was instead arrested at around 11:30pm.

35. The incident between the assailant and PW2 and PW3 did not take long. They were then rushed to Chinato hospital and thereafter PW1 and her husband reported the matter to PW5 who immediately began the search.

36. PW5 took the appellant to Nyamtiro Police Post and handed him over to the officers thereat. PW6 who was the In-Charge of the Police Post had earlier on been called by the In-Charge of Chinato AP Post and informed that a suspect had been arrested and was been taken to the Police Post. The suspect was booked into the police cells at the Nyamtiro Police Post at 11:40pm. Going by what the appellant alluded, it means that it took about 10 minutes from his arrest to the Nyamtiro Police Post. I find it hard to believe the appellant's side of the version on the time of his arrest. I say so because when PW5 arrested him, he must have taken time to interrogate him and possibly find out where he was from and why he was running in the night. It is worth to note that PW5 was in the company of his colleague officer, the Chief and the parents of the victims. There definitely must have been some discussion and reasonably the appellant must have sought to clear himself of any wrongdoing. After that encounter and upon PW5 deciding that he was arresting the appellant, he had to liaise with his In-charge before he was given a go-ahead to take the appellant to the Police Post. Further, the appellant was escorted to the Nyamtiro Police Post on a motor cycle meaning that time was spent on getting the motor cycle before they set out to the Post. The journey also took time.

37. Before I conclude the issue of when the appellant was arrested, I wish to refer to ground 5 in the Petition of Appeal where the appellant contended that ***'the trial magistrate erred in both law and fact……in that if the complainants were defiled on 24/5/2014 at 0700pm how comes now I stayed hanging around the scene up to 2100hrs when the administration police officers arrested me…..'***

38. By taking all the foregone into account, it is not reasonably possible that the appellant was arrested at 11:30pm as he alleged. He must have been arrested much earlier. That is why I find the testimony of PW5 that the appellant was arrested at 08:30pm to be credible, reasonable and believable, just like the trial court.

39. The appellant and DW2 confirmed that they were in a bar at [Particulars Withheld] Market as from 05:30pm up to late in the night. It is not in dispute that PW1, PW2 and PW3 also lived at the [Particulars Withheld] Market as well. That being so, the possibility of any of them meeting within the Market cannot be said to be far-fetched or remote.

40. There was also the issue raised by DW2 that the appellant was being framed up by his brothers because of a parcel of land he is entitled to inherit. That aspect was not taken up by the appellant as part of his defence and one wonders where DW2 picked it from. I find that line of defence to be inconsequential.

41. I have carefully revisited the evidence of PW1, PW2, PW3, PW5 and PW6 and how the trial court analysed the same. I understand the trial court had an opportunity to observe the demeanor of the witnesses and it so stated in the judgment. I am equally and in agreement with the prosecution's version of the events as they unfolded. I find no reason to differ from the finding of the trial court on this aspect. In buttressing that finding, I note that the evidence of PW2 and PW3 was not controverted at all as the appellant opted not to cross-examine them. That should however not be understood to mean that I am shifting the burden of proof to the appellant.

42. Having re-evaluated the evidence on record and the defence put forth I am not persuaded that the defence casts any reasonable doubt on the prosecution's evidence to warrant any interference. The appellant was hence so properly placed as the perpetrator. The appellant was properly found guilty and convicted of the offences of defilement.

43. As to whether the appellant should be retried, I do not find any merit on that prayer. The appellant fully and actively participated in the trial and examined witnesses. He never raised any complaint like not understanding the court processes or that he was too unwell not to be able to follow up the proceedings. In a further confirmation that the appellant knew what was happening with precision, he even availed a witness, DW2. The request for a retrial is hence an afterthought.

44. The appellant also argued that the case was not well investigated at all as crucial witnesses including the Area Chief who was present during his arrest did not testify in court. The prosecution has a duty to prove its case but not necessarily that it avails all the people mentioned during investigations. Evidence which tend to prove the charge as required in law is but sufficient. I have perused the evidence tendered before the court and I have no doubt that the same was enough to find convictions even without the evidence of the other potential witnesses. That is why **Section 143** of the **Evidence Act**, Chapter 80 of the Laws of Kenya gives the prosecutor the discretion to choose the witnesses to testify. (Also see the cases of **Bukenya & Others -versus- Uganda (1972)EA 549** and **Nguku -versus- Republic (1985)KLR 412).** Therefore the usual inference that evidence of crucial witnesses who fail to testify without any justification meant that such evidence would have been adverse to the prosecution's case does not apply in the circumstances of this case.

45. On sentence, as PW2 and PW3 were children of tender years, the appellant was sentenced to the only prescribed sentence under **Section 8(2)** of the Sexual Offences Act. The concurrent life sentences remain legal.

46. This Court now finds that none of the grounds of appeal put forth and supported by the submissions is successful. The decision of the trial court is hereby affirmed and the appeal is accordingly dismissed.

DELIVERED, DATED and SIGNED at MIGORI this 6th day of June 2017.

A. C. MRIMA

JUDGE