**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL CASE NO. 155 OF 2015**

***[From original Sirisia Magistrate's court criminal case no. 1061 of 2014 by Hon. K. Mukabi (RM) on 4th September, 2015]***

GODFREY WANYONYI BUKANYA …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

**JUDGMENT**

1. The appellant **GODFREY WANYONYI BUKANYA** was convicted on a charge of defilement of a girl contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No. 3 of 2006.

The prosecution case as stated in the particulars was that on the 15th day of December, 2014 within Bungoma County, he intentionally and unlawfully caused penetration by inserting his male genital organ namely penis into the female genital organ namely vagina of **MNM (Initials used to protect identity of the minor)** a girl aged 13 years. The appellant denied the charge.

**2. MNM (PW3)** told the trial court that on 15.12.14 while walking to **RWANDA** village in the company of her sibling named **K**, she began feeling sick and tired, so she told **K** that she would return home. However, she lost her way so she approached a certain man and informed him about here predicament. She gave him her mother's telephone number and he called to inform her that **MNM** had lost her way. It was then that the appellant joined them saying he knew **MNM's** home so she joined him so that he could escort her home.

They proceeded to a bush along a footpath, and the appellant removed her underpant and his, then inserted his penis into her vagina and defiled her. She raised an alarm but no one came to her and having satisfied himself, the appellant abandoned her saying that she knew her way home.

3. It was her evidence that when she first encountered the appellant it was 6.00 p.m, and there was enough light to enable her see him, but by the time they got into the bush, it was 7.00 p.m. She later met a woman who took her to her house to spend the night.

4. Her brother **K M (PW4)** aged 15 years confirmed that indeed **MNM** turned to go back home when they were on their way to visit their uncle in **RWANDA** village. He returned home at 6.00 p.m but she never got back that evening.

**5. PW1 S N (MNM'S** mother) confirmed she had sent **MNM** and **K** to **LWANDA** village to deliver some money to a women's group. At 4.00 p.m she received a phone call from one Noor that **MNM** had

been seen at **CHELEBI.**

She went to see the said **NOOR**, in **CHELEBI** but she did not find her daughter. The information **NOOR** gave was that he had dispatched **MNM** to go with **GEORFREY BUKANYA** to the farmer's home. **NOOR** directed her to **GEOFFREY**'S house, but **MNM** was not there although he said she'd get home the next day.

6. The matter of the missing girl was reported to **AP NAMWELA** camp and subsequently **GEOFFREY** was arrested. **PW1** also received information that **MNM** had spent the night at another woman's home, so she went to fetch her the following day. **MNM** informed her what had happened and she was taken to hospital at **MALAKISI HEALTH CENTRE.**

**7. ANTHONY WASWA (PW6)** is the clinical officer at the Health Centre who examined **MNM** and found that there was inflammation of the labia minora, the hymen was partially broken and there was a whitish discharge. There were also bruises on the vagina and urinalysis revealed the presence of moderate pus cells indicating a prior sexual activity. He concluded that the girl had been defiled. He also assessed her age based on the dental formula to be 13 years.

8. The appellant in his sworn defence explained that he indeed met Mzee Noah (also referred to elsewhere as Noor) who told him that a child who had been in the company of her sibling – one **K,** was abandoned and had departed for **NAMWELA.** Mzee **NOAH** told them that since they were heading towards the same direction, they would find the child and they should request her to return home.

He confirmed meeting the child who he claimed told them she was going to **RWANDA** to deliver some money and not to **NAMWELA** and that he concluded that it was perhaps not the child **MZEE NOAH** had mentioned.

9. He was thus surprised when at 9.00 p.m two strange women went to his door demanding for the child yet he wasn't with her. Mzee **NOAH NABIYE WOKON**O testified as **DW2** and confirmed encountering **MNM** who had lost her way and making a call to her mother to alert her thus. He also confirmed instructing the appellant to catch up with **MNM** who was ahead and to ensure that she reached home – however he did not hand over **MNM** to the appellant. **DW3 MARY WANJALA** who was in the company of the appellant stated that they met the girl who refused to accompany them saying she wanted to go to her uncle's home. However on cross examination she clarified that she parted ways with the appellant at 4.00 p.m and assumed he had gone home.

10. The trial Magistrate in his judgment was satisfied that the victim's age was sufficiently proved by way of medical age assessment as 13 years. He also found that there was ample opportunity for identification as the victim saw the appellant "in broad day light from the time he first encountered her, until after the commission of the offence", and the appellant did not deny meeting the minor or being with one Vincent.

11. The trial Magistrate also held that the medical examination clearly confirmed that there was penetration of **MNM's** genitalia and that coupled with the identification and other extraneous evidence pointed to the appellant as the culprit.

12. His defence was considered and rejected and his witness **DW3** was described as lacking integrity with her back and forth stand on issues put to her in court.

The trial Magistrate pointed out that whereas the appellant had denied being given custody of the victim to walk her home, **DW3** confirmed that he had actually taken temporary custody of the child, but stuttered on this and back- tracked on the same in the course of her testimony. In dismissing the version offered by the defence the trial Magistrate relied on the case of ***Ndungu Kimani Vs. Republic [1979] KLR 282*** which stated that;

> ***" ……. the witness in a criminal case upon whose evidence it is proposed to rely, should***

***not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness or say something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."***

13. In contesting these findings the appellant states that the trial Magistrate erred in law by relying on evidence which was full of contradictions, and without analyzing the same. Further that the medical report did not prove it was the appellant who committed the offence and in any case he was never medically examined.

14. The appellant presented written submission in which he stated that the charge sheet was defective because Section 8 (1) of the Sexual Offences Act, which was cited in the charge sheet creates the offence whilst Section 8(4) is in reference to victims aged between 16 and 18 years, yet in this instance the victim was 13 years and therefore ought to have been in the category provided for under Section 8(3) of the Sexual Offences Act. It is his contention that this anomaly offended the provisions of Section 214 of the Criminal Procedure Code as the essential ingredient in the charge is the age of the victim, so he ended up not being accorded a fair trial and was convicted for an offence he was never charged with.

15. The appellant submitted that although the charge sheet gives the victim's age as 12 years, the evidence presented in court indicated that she was 13 years, and that this was a contradiction which ought to have been resolved in his favour as it destroyed the value of the evidence visa vis the charge.

16. The appellant contends that the trial Magistrate failed to objectively and rationally analyze the evidence tendered saying PW1 and PW3 contradicted each other, and that it was dangerous to rely on the evidence of the minor without the court duly warning itself and recording reasons as to why it believed the minor.

He complained of not being given a copy of the ruling to enable him prepare his defence and also lamented that his alibi defence was unreasonably rejected.

17. In opposing the appeal, **MR. AKELLO** on behalf of the State pointed out that the trial court could not have given out a copy of the ruling at its own whim without the appellant making such request.

However he was given copies of witness statements to enable him participate in the trial and prepare his defence.

18. On this point I have perused the trial court's record and confirm that after the court made its ruling that the appellant had a case to answer, there was no request to be supplied with a copy of the said ruling. In any event what fatality would it have occasioned the appellant when all it stated was that

***"I have carefully examined the evidence presented by the prosecution case and it is my finding that a prima facie case has been established against the accused in accordance with section 210 of the Criminal Procedure Code. The accused is called upon the defend himself against the charges."***

The appellant has not demonstrated what prejudice he suffered by not getting a copy of that brief paragraph, and that would not warrant inference with the trial courts findings.

19. Mr. Akello also pointed out that contrary to the appellants contention the medical report did support the charge and confirmed that there was penetration. Indeed the evidence of the Clinical Officer and the contents of the P3 form confirm that **MNM's** labia minora was inflamed, and the hymen was partially broken with severe tenderness and bruises and his conclusion was that there was obvious evidence of rape. This indeed confirmed what MNM had stated in the evidence that the appellant inserted his male organ into her female organ and defiled her. The penetration was proved courtesy of the injuries observed by the Clinical Officer. The appellant admitted encountering the minor, indeed his own witness confirmed that they parted ways at 4.00 p.m and she assumed he had gone home. This

gave him the opportunity to be alone with the minor and sexually abuse her. That limb of the appeal has no leg on which to stand.

20. The appellant also argued that there was contradiction between the evidence of **PW1** and **PW3**. As Mr. Akello submits, he however did not specify the contradictions. I have read through the evidence of the two witnesses referred to and fail to detect any material contradiction which would materially have affected the outcome of the case.

21. The other issue is with regard to the defect on the charge sheet- which Mr. Akello did not respond to. Indeed the appellant correctly pointed out in his submissions that Section 8(1) of the Sexual Offences Act provides that,

> ***"A person who commits an act which causes penetration with a child is guilty of an act of defilement"***

This provision creates the offence of defilement.

Section 8 (4) provides,

> ***"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years".***

The evidence presented in court indicated that MNM was 13 years. The charge sheet referred to her age as 12 years. This means she fell within the category envisaged by Section 8 (3) of the Act which provision provides that,

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

"It is apparent that the trial magistrate did not notice this anomaly and proceeded to convict the appellant but passed sentence as contemplated under Section 8(3). Was this an incurable fatal defect? I think the answer lies with the provisions of Section 382 of the Criminal Procedure Code which states that

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

22. I find no prejudice occasioned- and that anomaly is easily cured by the provisions cited.

Indeed the trial Magistrate considered the defence offered and the alibi,and analyzed the same and gave a rational explanation as to why it was discredited.

The upshot is that the conviction was safe and is upheld. The sentence meted was legal and is confirmed. The appeal is dismissed.

DELIVERED and DATED this15th day of June, 2017 at BUNGOMA.

**H.A OMONDI**

**JUDGE.**