REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 73 OF 2015

PETER KINYUA MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original and conviction in Mukurweini Principal Magistrates' Court Criminal Case No. 6 of 2015 (Hon, V. Chianda) on 14th September, 2015)

JUDGMENT

The appellant was charged with the offence of defilement contrary to **section 8 (1)(3)** of the **Sexual Offences Act, No. 3 of 2006** the particulars being that on the 14th day of March 2015 at [particulars ***withheld***] in Mukurweini sub County within Nyeri County, he intentionally caused his penis to penetrate the vagina of L K G, a child aged 14. He was charged with an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the same Act. The particulars here were that on the 14th day of March 2015 at [particulars ***withheld***] in Mukurweini sub County within Nyeri County, the appellant touched the vagina of L K G, a child aged 14 with his fingers. He was convicted of the principal count and sentenced to serve 20 years imprisonment. Being dissatisfied with both the conviction and sentence he appealed to this honourable court on the following grounds:

1. The learned trial magistrate erred both in law and in fact in failing to note that the age of the complainant which is a major element in an offence of defilement was not properly established;

2. The honourable trial magistrate erred in law and in fact when he based the conviction of the appellant on the evidence which was fraught with malice and inconsistencies;

3. The learned trial magistrate erred in law and in fact when he relied on medical evidence which was not sufficient to link the appellant with the alleged offence; and,

4. The learned trial magistrate erred both in law and in fact in dismissing the appellant's defence which was not challenged by the prosecution.

According to the complainant, the appellant sexually assaulted her while she was on her way from her grandmother's shamba. He abandoned her in the bush where he allegedly committed the act but she was rescued by **J N M (PW2)**, a motor-cyclist. The appellant is a person she knew before; she identified him as a labourer who used to work at one M's homestead. On the material day, he had been digging at her grandmother's shamba.

The motorcyclist, **J N M (PW2),** testified that on 14th March, 2015 at about 7:30 PM, he spotted the

complainant on the road; the complainant stopped him and asked to be taken home. According to this witness she looked "agitated". She told him that the appellant "had done bad" manners to her. He then took her to Ngamwa Administration Police post; he also informed a Mr M, a teacher at a special school where the complainant attended. Indeed, Mr M came to the police post and identified the complainant as one of his pupils. Together they took the complainant to her parents.

M (PW3) himself testified that he was in fact a teacher at [particulars ***withheld***] School special unit where the complainant was a pupil and that on 14th March, 2015 at about 8 PM **M (PW2)** called and informed him that he had met one of his pupils at [particulars ***withheld***] shopping centre and had taken her to Ngamwa police post. He went to the police post where he found the complainant; he described her as a child who had mild mental retardation. He called the child's mother (PW4) and the village headman; he handed over the child to the mother.

The complainant's mother herself, **I W M (PW5)** testified that on 14th March, 2015, she returned home at about 8 PM and found the complainant missing. She later learned that the child was at Ngamwa police post. She took the child to Mukurweini police station where she was issued with a P3 and proceeded to hospital where she was examined and treated. The complainant told her that the appellant had defiled her; like her daughter, she also knew the appellant before.

Dr Lucy Wamuyu (PW7) testified that upon examination of the complainant, it was established that her hymen was broken and there was a foul-smelling discharge from her vagina. Besides the P3 form, she also produced medical notes showing that the complainant went to hospital for treatment on 14th March, 2015 which is the same day she is alleged to have been defiled.

The Chief, Githumu location, **Ephantus Wanjohi Ngumi (PW4)** and Administration Police **Constable Langat (PW6)** who was then based at Giathugu Administration police post arrested the appellant on 21st March 2015 and handed him over to the police at Mukurweini police station.

Police constable **David Muniki (PW8)** who investigated the case confirmed that indeed the report of defilement of the complainant had been received at Mukurweini police station and after carrying out investigations he came to the conclusion that the appellant had committed the offence with which he was charged.

In his defence, the appellant gave sworn testimony and denied having committed the offence; in particular, he stated that on 4th March, 2015 he was at his home until 3 PM when he proceeded to the shamba. He then went to a bar at [particulars ***withheld***] shopping centre at 5:30 PM; he was there until 10 PM when returned home. The appellant was surprised when he was arrested on 21st March, 2015 on allegations that he had defiled the complainant.

J K (DW2) testified that the appellant was his brother and that they had been drinking together on the material evening. E N a bartender **(DW3)** also testified that the appellant had been drinking at her bar between 5 PM and 10PM on 14th March, 2015.

That is all there was in evidence.

Section 8 (1)(3) of the **Sexual Offences Act** under which the appellant person was charged reads as follows:

> ***8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2).…***
>
> ***(3) 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.***

(4) 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.

"Penetration" as a term of art is defined in **section 2** of the Act to mean "*the partial or complete insertion of the genital organs of a person into the genital organs of another person*".

The evidence of the complainant together with that of the doctor leaves no doubt that the complainant was sexually assaulted; considering that her hymen was established to have been broken and there was a foul discharge from her vagina soon after the assault, there was sufficient evidence to support the learned magistrate's conclusion that the complainant had been defiled and an offence under **section 8(1)(3)** of the Act had thereby been committed, if at all she was within the age bracket of 12 and 15 years.

Talking of the complainant's age, she testified that she was aged 14 and apparently this is the age given in the medical records in respect of her treatment. These records were admitted in evidence; as far as I can see, there was no contrary evidence with regard to their contents. At the very least, there is nothing that casts their authenticity in doubt. Although the appellant has alleged that the complainant's age was not proved, he did not, in the course of his cross examination of the complainant or the doctor, or any other prosecution witness for that matter, question the medical records and in particular raise any issue concerning the complainant's age. I agree with the learned magistrate that the complainant's age was proved to the required standard. It follows that the charge, the particulars thereof and the evidence were consistent in this respect.

The final question is whether the complainant was defiled by the appellant. In considering this question, it is worth noting that apart from the complainant herself, there was no independent eyewitness who saw the complainant being defiled. The complainant's evidence was that it was the appellant who defiled her; on the other hand, the appellant denied having defiled the complainant. Since it was the complainant's word against that of the appellant, it was left to the learned magistrate to assess the evidence of both of them and come to the conclusion as to who between them was telling the truth. In doing this, the trial court had the advantage, which this court does not have, of seeing and hearing both the complainant and the appellant firsthand.

In reaching his conclusion, the learned magistrate no doubt considered the demeanour and the disposition of all the witnesses and as far as the complainant is concerned, it was his assessment that he found her clear and coherent in her testimony. Among other things, he established that the appellant was somebody the complainant knew well and therefore there was no possibility that she may have probably been mistaken as to his identity. Again, her evidence in this regard was not controverted. With all these facts, I cannot find anything on record that would lead me to the conclusion that the learned magistrate ought not to have believed the complainant.

It is appreciated that the appellant offered what in effect was an alibi and called his brother with whom he had allegedly been drinking and a bar owner in whose bar the two of them had allegedly been drinking on the material day. Contrary to the appellant's submissions, the learned magistrate considered this line of his defence and rejected it.

An alibi is a viable and a sustainable defence if it creates a reasonable doubt that an accused person was at the scene of crime at the time the offence is alleged to have been committed. Looking at the evidence in its entirety, all I can say about the appellant's alibi is that it did not cast such doubt or displace the evidence of the complainant that the appellant had defiled her in some bush and was therefore at the *locus in quo*. Here again, I would agree with the learned magistrate's decision to dismiss the appellant's defence.

For the reasons I have given, I do not find any merit in the appellant's appeal and it is hereby dismissed.

Signed, dated and delivered in open court this 16th June, 2017

Ngaah Jairus

JUDGE