REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 220 OF 2014

SIMON WANDERI MWANGI.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. H. M. Nyaga –Senior Principal Magistrate delivered on the 27th August, 2014 in CMCR Case No. 1098 of 2013)

JUDGMENT

The appellant **SIMON WANDERI MWANGI**, has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at the Molo Law Courts.

The appellant had on 19/6/2013 been arraigned before the trial court on a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) (2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"On the 15th day of June 2013 in Molo District within Nakuru County intentionally and unlawfully caused the penetration of his genital organ penis into the genital organ vagina of L N a girl aged 8 years"***

The appellant also 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. His trial commenced on 29/8/2013. The prosecution led by **CHIEF INSPECTOR MUTETI** called eight (8) witnesses in support of their case.

The complainant **L N** testified as **PW1**. She told the court that she was 8 years old. The complainant stated that on the material day she went to the house of the appellant who used to repair sufurias. She took a sufuria for repair. When the child arrived the appellant told her to enter his house. The child complied. The appellant then took her to his bed and defiled her.

After the act the child went home and informed one **'c k'** what had happened. The chief was called in. The complainant's mother who was away at work was informed about the incident when she returned home. The matter was reported to police who commenced investigations. The child was taken to Molo District Hospital for examination. Finally the appellant was arrested and charged with the offence of Defilement.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant opted to make an unsworn statement in which he denied having defiled the child. On 27/8/2014 the learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of Defilement and thereafter imposed a sentence of life imprisonment. Being aggrieved the appellant filed this appeal.

The appellant who was not represented by counsel during the hearing of his appeal opted to rely on his Amended Grounds of Appeal as well as his written submissions which had been duly filed in court. **MR. CHIGITI** learned State Counsel opposed the appeal.

This being a first appeal this court is obliged to re-examine and re-evaluate the evidence on record and draw its own conclusions on the same. In the case of **MWANGI Vs REPUBLIC [2013] eKLR** the Court of Appeal held as follows

> ***"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 court's own decision on the evidence.

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions"

I have carefully perused the submissions filed by the appellant. He raises the following grounds of appeal

- Failure to prove the age of the complainant
- Failure to prove penetration
- Failure to consider his defence

As rightly pointed out by the appellant in his written submissions the age of a complainant in a charge of Defilement is a critical factor. In the case of **ALFAYO GOMBE OKELLO Vs REPUBLIC [2010]eKLR**, the Court of Appeal commented this on the question of age in defilement cases

> ***"In its wisdom, Parliament chose of categorise the gravity of that offence [Defilement] on the basis of the age of the victim and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt".***

Similarly in **KAINGU ELIAS KASOMO Vs REPUBLIC Malindi Criminal Appeal No. 504 of 2010**, it was held that

> ***"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim".***

In this case the complainant herself gave her age as 8 years. Indeed the trial magistrate observed that the child was aged between 7-8 years and for this reason conducted a ***'voire dire'*** examination before recording her testimony.

Ordinarily age is proved by way of either a Birth Certificate, Immunization Card, Age Assessment report, Baptism Card or some other such official document. In this case no document was produced to prove the age of the child. Does this mean that her age was not proven? I think not.

In the Ugandan case of **FRANCIS OMUROMI Vs UGANDA COURT OF APPEAL [2000] EALR** the Court held that

> ***"In defilement cases medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate the victims parents or guardian and by observation and common sense".*** (Own emphasis)

Similarly in **FAUSTINE MGHANGA Vs REPUBLIC [2012] eKLR**, Nzioka J observed that

> ***"Age may be proved by a birth certificate or particularly in the case of Africans by the evidence of a person present at birth"*** (own emphasis)

Therefore the failure to adduce medical evidence of age or to produce a birth certificate is not fatal. In this case **PW5 G W** the biological mother of the victim stated this in her evidence.

> ***"L N is my child. She was born on 4/5/2015".***

The mother here has stated with clarity the date when she bore this child

In **RICHARD WAHOME CHEGE Vs REPUBLIC [2014] eKLR** the Court of Appeal sitting in Nyeri held that

> ***"What better evidence can one get than that of the mother who gave birth".***

The mother here has stated that she bore her child on 4th May, 2005. She was present at the birth. This coupled with the complainant's own statement that she was 8 years old and the observations of the trial magistrate who saw the child provides sufficient proof of her age. Having been born in May, 2005 I find that by June, 2013 when this defilement allegedly occurred the complainant was 8 years old.

The second ground of appeal raised by the appellant was that the fact of defilement was not proved, specifically the appellant submits that the fact of penetration was not proved as required in law.

The complainant told the court that on the material day she had taken a sufuria to the appellant for repair. Whilst there the appellant told her to enter his house. The child then proceeds to narrate at page 5 line 20 that

> ***"He [the appellant] took me to his bed. He told me to keep quiet. He lifted my dress and removed my pants. He unzipped his trouser and then he slept on me. He did tabia mbaya to me (touches her crotch). I felt pain. A liquid came out of his 'thing'. He then told me to out. He threatened to kill me if I told anyone…"***

The child has given a graphic account of what occurred. It is unlikely that a child so young would be fabricating such a tale. This court note that young children who lack adequate vocabulary to describe the act of sexual intercourse invariably refer to the act as ***'tabia mbaya'***.

PW5 the complainant's mother told the court that when she returned home that evening she found her child walking with her legs apart. **PW5** checked the child and noted that her private parts were swollen. This evidence is corroborated by **PW6 MARGARET WAIRIMU NDUNGU** who was the area chief. **PW6** told the court that she received news that a child in her location had been defiled. She went to the home stead where she found the complainant walking with her legs apart. **PW6** who was a female chief also examined the child and she too noted that her private parts were swollen. The gait of the child and the swollen private parts were all evidence that the child had been sexually assaulted.

The offence of Defilement requires proof that **'penetration'** had occurred. The appellant submitted that the finding of the doctor that the complainant's hymen was still intact shows that no penetration had occurred, thus he submits that the fact of defilement remains unproven.

Section 2(1) of the Sexual Offences Act, 2006 defines penetration in the following terms

> ***"'Penetration' means the partial or complete insertion of the genital organs of a person into the genital organs into the genital organs of another person"*** (my own emphasis).

Therefore it is not necessary to show that there was complete penetration but a partial insertion of the male organ into the vagina will suffice as proof of defilement.

PW8 DR. DENUER MARIGA KAMAU was the doctor who examined the child at Molo District Hospital. He filled and signed her P3 form which he produced as an exhibit in court **P.exb 1**. The doctor upon examining the child found that here hymen was intact. **PW8** stated that

> ***"In my opinion there was an attempted defilement"***

As stated earlier the legal definition of **'penetration'** does not require that there be a complete insertion of the penis into the vagina. A partial insertion such as in the case of an attempted penetration will suffice. I could not have put it better than the learned trial magistrate who in his judgment at page 3 line 4 stated thus

> ***"The term penetration under the law may not mean the same as penetration in medical terms. The hymen may be intact hence no medical penetration but there is legal penetration".***

PW8 did observe that the child walked with an unsteady gait and could not sit properly. **'She sat on her side'**. The doctor said that **'The girl had obvious pain on her genitalia'**. The obvious discomfort of the child coupled with her unsteady gait all point to a sexual assault. Under cross-examination by the appellant the complainant stated

> ***"A liquid came out of your 'thing' and poured on me".***

This is obviously a reference to the act of ejaculation. A child so young could not have fabricated this type of detail.

Therefore notwithstanding the fact that child's hymen was found to be intact. I am satisfied from the evidence that the appellant did partially penetrate her vagina using his penis. This satisfies the act of penetration as per the Sexual Offences Act. As such I find as a fact that penetration did occur and that the complainant was indeed defiled on the material day.

The next question requiring proof is the identity of her defiler. Has there been a clear and positive identification of the appellant as the perpetrator of the offence.

The incident occurred during the daytime. The complainant had gone to the appellant's home where he used to repair sufurias. **PW1** spent ample time alone and in close proximity with the appellant. She was able to see him well.

Aside from visual identification **PW1** told the court that she knew the appellant well before the incident. She stated in her evidence at page 5 line 18.

> ***"I know the accused. He is a neighbour. He repairs umbrellas and sufuria at Kibunja".***

Thus there is a clear evidence of recognition which was held by the Court of Appeal in **ANJONONI & OTHERS Vs REPUBLIC [1980] KLR 59** to be **'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 other'.**

Following the defilement and despite the appellant having warned her not to reveal the incident, the child did report the defilement. **PW3**

HASSAN OMAR WAWERU the Assistant Chief at the time told the court that the child led them and showed then the house in which she had been defiled. She identified the appellant as the man who defiled her. **PW4 APC JOHN MWANGI KIARIE** confirms that the complainant led them to the appellant's house and identified him.

PW5 the complainant's mother told the court that the child told her that she had been defiled by **'Njira Wega'**. **PW5** stated that **'Njira Wega'** is the nickname by which the appellant was known in the area. At no time did the appellant ever deny that this was his nickname. **PW6** the area chief also confirmed that when she questioned the complainant the child told her that **'Njira Wega'** was the man who had defiled her. Under cross-examination by the appellant **PW6** stated at Page 15 line 4

> ***"N mentioned you, using the name 'Njira Wega' which is your nickname".***

Finally on this point **PW7 PC JOEL KOSKEI** who was the investigating officer also confirmed that the complainant named **'Njira Wega'** as the man who defiled her.

At no time did the complainant waver in her identification of the appellant, she identified him both in person and by name. The child remained steadfast in her evidence and was unshaken under cross examination. The trial magistrate in his judgment stated that he believed the complainant. This was the magistrate who saw and heard the child testify. I have no reason to dispute his findings on her demeanour.

From the evidence, I am satisfied that there has been a clear, positive and reliable identification of the appellant by the complainant. Sexual Offence are normally committed in secret. The only witness would the child herself. There is unlikely to have been any other person present. The complainant evidence was cogent, clear and believable.

The appellant submitted that the trial court failed to give due regard to his defence. The appellant made an unsworn statement in defence. He denied having defiled the child. He suggested that the allegation of defilement was fabricated because the complainant's mother felt slighted since he had chosen one **'Mama Michael'** as his lover over her. The appellant also claimed that the chief took his Ksh 43,000/- and his identity card.

I have carefully perused the judgment. The learned trial magistrate did consider the appellant's defence but dismissed the same as baseless. I am in full agreement. The fact that the child's mother may have been involved in a lovers tiff with the appellant does not in my view explain why the complainant a mere child would fabricate evidence against him. Further when the appellant put to **PW5** that they were friends she categorically denied it. As pointed out by the trial magistrate in his judgment Ksh 43,000/= is not a sum to sneeze at. If indeed the chief had truly taken this amount from the appellant, I have no doubt that he would have reported that fact to the police or to some other authority. In any event the appellant never raised this issue of Ksh 43,000/= when cross examining **PW3** and **PW6**. This is clearly an afterthought. I find the appellant's defence to have been a mere tale which was rightfully dismissed by the trial court.

Based on the foregoing I am satisfied that the charge of Defilement was proved beyond reasonable doubt. The appellant's conviction was sound and I do uphold that conviction. The sentence of life imprisonment is the mandatory sentence for defilement of a child aged 11 years or below (the victim here was aged 8 years).

I therefore confirm that sentence. The upshot is that this appeal fails and is hereby dismissed in its entirety.

Dated and delivered in Nakuru this 2nd day of June, 2017.

Appellant in person

Mr Motende for State

Maureen A. Odero

Judge