REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 57 OF 2016

EDWARD MOKAYA SIRO ....APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

*(Being an appeal from the Sentence and conviction of Principal Magistrate's Court at Mavoko delivered by **Honourable L. A. MUMASSABBA, (Resident Magistrate)** on 18th September, 2015 in **MAVOKO P.M.CR. S. O. No. 32 of 2015***

JUDGEMENT

1. The Appellant herein **EDWARD MOKAYA SIRO** had been charged before **Mavoko Principal Magistrate's Court** vide **Criminal Case Number 32 of 2015 (SOA).** He faced a Principal charge of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006 as well as an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006.

2. The particulars of the principal charge were that on the 14th December, 2014 in Athi River District within Machakos County, intentionally and unlawfully caused his male genital organ (penis) to penetrate into the genital organ (vagina) of C K (name withheld) a child aged 12 years.

3. The particulars of the alternative charge were that on the 14th day of December, 2014 in Athi River District within Machakos County intentionally and unlawfully caused his male genital organ (penis) to come into contact with the female genital organ (vagina) of C K (name withheld) a child aged 12 years.

4. The Appellant was found guilty, convicted and sentenced to serve twenty (20) years imprisonment.

5. Aggrieved by the said conviction and sentence the Appellant lodged the following grounds of appeal:-

> ***(a) The learned trial magistrate erred in matters of law and fact by holding that the case was proved beyond reasonable doubt whereas the Appellant was not properly identified as the perpetrator of the crime.***
>
> ***(b) The learned trial Magistrate erred in matters of law and fact by basing the Appellant's conviction on the single evidence of PW.1 who was an incredible witness thereby contravening Section 124 of the Evidence Act.***
>
> ***(c) The learned trial Magistrate erred in matters of law and fact by not finding that the evidence failed to link the Appellant with the penile penetration of the Complainant's genital which was***

not recent.

(d) The learned trial magistrate erred in matters of law and fact by not finding that essential witnesses necessary to prove basic facts were not produced.

(e) The learned trial Magistrate erred in matters of law and fact by making inferences on theories not supported by evidence.

(f) The learned trial Magistrate erred in matters of law and fact by not complying with Section 50 as read with 72 of the Evidence Act in relation to the administration of PW.4's testimony.

6. As this is a first appellate Court, it is its duty to re-evaluate and re-examine the evidence adduced before the trial Court and to come to its own independent conclusion bearing in mind that it neither heard nor saw the witnesses testify and to make an allowance for that (see **OKENO =VS= REPUBLIC [1972] EA 32, PANDYA =VS= REPUBLIC [1957] EA 336, PETERS =VS= SUNDAY POST [1958] EA 424).**

7. Summary of the Prosecution's Case:

PW.1 was the Complainant. She testified that she was aged 12 years and a pupil at [particulars withheld] Academy in Class three. She recalled that on the material date she had gone to visit a lady friend of hers in a nearby plot and while there she decided to go answer a call of nature and entered one of the toilets within that plot and as she emerged from therein the Appellant herein pushed her back into the toilet and tore her underpant and forcibly defiled her. She later reported the matter to her aunt who escorted her to hospital where she was examined.

PW.2 C N M was the Complainant's aunt with whom she lived at Mlolongo. She testified that she had sent the Complainant to the market but that she overstayed only to be informed afterwards that she had been spotted emerging from a toilet in a neighbouring plot with the Appellant in tow. She interrogated her and she explained to her on how the Appellant had defiled her. She further testified that she advised the Complainant not to shower or wash her underpant until she was examined in hosptial. She escorted her to hospital for check up.

PW.3 E M who was mother to the Complainant. She testified that upon learning of the incident, she rushed to Mlolongo and was briefed by the Complainant and she then left her sister to take up the matter with the police.

PW.4 RUTH LENGEDE was a Clinical Officer attached to Nairobi Women's Hospital Kitengela branch. She testified that she had worked with his colleague one Dr. Makau and was familiar with his handwriting and who had examined the Complainant and filled a Post Rape Care Form. She produced the said document which confirmed that the girl had been defiled.

PW.5 MAUREEN MWIKALI was a Clinical Officer at Athi River Health Centre. She examined the Complainant and noted that the hymen was torn. The said doctor also saw a torn underpant. She produced the P.3 form as an exhibit.

PW.6 PC. VERONICA NTABO was the investigating officer attached at Mlolongo police station. She received the Complainant and recorded statements as well as recovered the Complainant's torn underpant. She arrested the Appellant and charged him with the offence.

8. The Appellant's Case:

The Appellant was put on his defence and he tendered a sworn testimony. He stated that he was a cobbler and that he did not commit the alleged offence. On being cross-examined he stated that he had ordered the Complainant to leave dirtying the common bathroom as it was not a toilet only to be accused of having a sinister motive upon the girl.

9. Submissions:

Parties filed submissions. It was submitted for the Appellant that the Prosecution's case had not been proved beyond reasonable doubt as it had several contradictions and further that the trial Court erred in relying on the evidence of the Complainant and the doctor without fully complying with the provisions of the law.

It was submitted for the Prosecution that the case had been proved against the Appellant beyond any reasonable doubt and that the trial Court's conviction and sentence be upheld.

I have considered the Submissions by the Appellant and learned counsel for the Respondent. I have also considered the evidence presented before the trial Court. The issue for determination in this Appeal is whether from the evidence adduced in the trial Court the same was sufficient to convict the Appellant on the offence of defilement.

As the charge is one of the defilement, the essential ingredients needed to be established were the age of the Complainant, proof of penetration and positive identification of the perpetrator.

On the issue of the age, the Complainant's mother **E M (PW.3**) stated that the girl was born in 2002. The girl's age was also assessed at Athi River Health Centre which put her approximate age to be 13 years old. The P.3 form and Post Rape Care Forms indicated her age to be 12 years. The Complainant's age was therefore within the bracket provided for under Section 8(1) and 8(3) of the Sexual offences Act which puts it at between 12–15 years for purposes of sentencing in the event of conviction. Indeed the age of a victim can be determined by medical evidence by a doctor in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense (see **FRANCIS OMURONI =VS= UGANDA CR. APPEAL NO. 2 OF 2000)**. The doctor (PW.5) did an assessment and noted that the Complainant was aged 13 years. Hence the aspect of the victim's age was properly proved by medical evidence.

On the issue of penetration, the Complainant testified that the Appellant undressed her by force and proceeded to have sex with her inside the toilet and that she felt pain. She was later examined by the doctors PW.4 and PW.5 who confirmed that there had been penetration. Penetration is defined in Section 2 of the Sexual offences Act as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The doctors established that the Complainant's hymen was torn.

On the issue of identity of the perpetrator, the Complainant stated that she had known the Appellant before as he used to be a cobbler within the neighbourhood. It was still during the evening and she was able to recognize him. The Appellant was therefore not a stranger to her. The Complainant further stated that it was around 7.00 p.m. and there was sufficient electric lights and she was thus able to recognize the Appellant who was arrested afterwards and escorted to the police station. The Appellant has taken issue with the trial Court's decision to convict him based on the evidence of the Complainant under Section 124 of the Evidence Act. Indeed that particular Section provides that the evidence of a child who is a victim of a sexual offence shall be sufficient without the need for corroboration as long as the trial Court records that it was satisfied that the child is telling the truth. Indeed the record of the lower court shows that the Learned trial Magistrate made a note in the proceedings as relates to the evidence of the Complainant on **page 14 line 20** the record reveals thus:-

> ***"Court:- The child is firm and consistent on the issue of defilement."***

It is therefore clear that the trial court believed that the Complainant was telling the truth.

Again the Appellant faulted the trial court for allowing the evidence of the Complainant alone without requiring the Prosecution to call the neighbours who had spotted her together with the Appellant during the incident. Under Section 143 of the Evidence Act it provides that in the absence of any requirement by provisions of law, no particular number of witnesses shall be required for the proof of any fact. The evidence of the Complainant and the other five witnesses clearly established that indeed the offence had

been committed. The failure to call the neighbours did not at all water down the evidence of the Prosecution against the Appellant.

The Appellant has also faulted the trial court for allowing one of the witnesses **Ruth Lengede (PW.4)** to produce the post rape care form on behalf of Dr. Makau. According to the Appellant the provisions of Section 50 and 72 of the Evidence Act were not satisfied. The said witness clearly stated to court that she had worked with Dr. Makau for one year and she was quite familiar with his handwriting. She further stated that as a Clinical officer she would have reached the same conclusion as Dr. Makau. The witness having worked with the author of the document and having become acquainted with the handwriting, I find the witness satisfied the requirements of Section 50 of the Evidence Act and hence the Appellant's submission that it was not complied with is not merited. Further the issue of Section 72 relates only to attestation of documents by witnesses and since the post rape care form was not a document for attestation requiring the need to call the witness, the Appellant's claim thereon lacks basis. Besides the clinical officer (PW.5) examined the Complainant and filled a P. 3 form which she produced as an exhibit and therefore even in the absence of a post rape care form, I find the P.3 form would have been sufficient to establish the issue of whether or not defilement had taken place.

Turning to the Appellant's evidence, he had stated that he was framed up because of ordering the Complainant to leave the bathroom as she had converted it into a toilet and was dirtying it. The Appellant admitted on cross – examination that he used to see the Complainant in the neighbourhood and that he had no grudge with her. He further admitted that a certain woman confronted him and demanded to know what he was doing with the girl in the bathroom. Indeed the Complainant stated in her evidence in chief that she had no grudge with the Appellant. Again the Complainant's aunt stated that she had not known the Appellant before and had no grudge between them. The Complainant in her evidence stated that the Appellant upon releasing her locked himself inside and refused to open the door even after the said woman had confronted him and ordered him to open the door. Therefore if indeed the Appellant was only trying to order the Complainant to leave the bathroom, there was no reason for him to enter the same bathroom allegedly dirtied by the Complainant lock himself and refuse to open the door even after being ordered to do so by the neighbours. As the Complainant and her aunt had had no grudge with the Appellant in the past, there was absolutely no reason for them to frame him up with allegations of defilement. It is highly unlikely that the Complainant would tear up her underpant and then allow herself to be a victim of defilement and blame the Appellant for it. I find the evidence of the Complainant and the rest of the witnesses credible and consistent. The Appellant's evidence did not shake their evidence and therefore the Prosecution's case was quite overwhelming against the Appellant. The Appellant has sought to seek refuge in the evidence of the Clinical Officer (PW.5) who indicated that the Complainant was someone who had had sex severally. Even if that may have been the case, the Complainant has lodged a complaint against the Appellant for defiling her on the material date and therefore the mention of previous sexual intercourse is not helpful to the Appellant. In any case the Complainant was a minor and had no capacity to consent to sexual intercourse with any other person for that matter. The learned trial Magistrate properly analyzed the evidence and correctly arrived at a guilty verdict against the Appellant.

10. For the aforegoing reasons, I uphold the conviction and sentence of the Appellant for the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The Appeal is hereby ordered dismissed.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **3RD** day of **JULY,** 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Mrs Saoli for Respondent

Edward Mokaya – Appellant

C/A: Kituva