REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 63 OF 2014

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 1990 of 2012 of the Chief Magistrate's Court at Naivasha before E. Kimilu – Ag.PM)

PAUL EKITELA EBEI……APPELLANT

-VERSUS-

REPUBLIC…….PROSECUTOR

J U D G M E N T

1. The Appellant herein was tried for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. In that on the 9th day of July 2012, at [particulars withheld], in Gilgil within Nakuru County, intentionally and unlawfully caused penetration of his genital organ (penis) into the genital organ (vagina) of **M.N.** a child aged 12 years.

2. The first trial was not concluded by the first trial magistrate and the succeeding trial court ordered a fresh trial. At the conclusion of the second trial, the Appellant was convicted and sentenced to life imprisonment as provided under Section 8 (2) of the Sexual Offences Act.

3. The Appellant filed an appeal to this court raising five grounds of appeal. To the effect that, there was variance between the evidence adduced at the trial and charge particulars in respect of the age of the complainant; that the complainant's age was not proved; that vital exhibits were not produced and crucial witnesses not called; and finally, that the trial court did not consider his plausible defence.

4. In his written submissions to support the grounds, the Appellant took issue with the evidence in respect of the minor's age and argued that it could not be a proper basis for the conviction recorded under Section 8 (2) of the Sexual Offences Act and subsequent sentence.

5. He pointed out that the minor's alleged soiled underwear was not produced in court to support her evidence and that witnesses including one **Emuria** who led to his identification and arrest were not called to testify. He stated that the medical evidence exonerated him from the offence as he had no infection and supported his strong alibi defence.

6. The DPP through Mr. Mutinda opposed the appeal. He reiterated the prosecution evidence at the trial and submitted that all the elements of the charge had been proved.

7. In **Pandya -Vs- Republic [1957] EA 336** the Court of Appeal for Eastern Africa outlined the duty of the first appellate court in the following terms:-

"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the

appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

8. The prosecution called five witnesses during the *denovo* trial. The total sum of their evidence is that the complainant **M.N.** (**PW2**) and her sister **M. N.** resided at [particulars withheld] with their mother J**.A.** (**PW1**). **PW2** was born in 2001. On 5/7/2012 **PW1** dispatched **PW1** and **M.N.** to her cousin's home at [particulars withheld] to collect a chicken. But they did not return home, because on their way home, they were intercepted by the Appellant who was known to **PW1**. He asked them to accompany him to his house for some chicken feed. He left the house and returned at 6.00pm without chicken feed in the company of one **Emuria**.

9. At 7.00pm the said E took **M.N.** with him while **PW2** remained with the Appellant who defiled her 3 times in the night. **Emuria** and **M.N.** came back to the Appellant's house on the next morning. The two men locked the girls in the house and went away. Meanwhile **PW1** became anxious and commenced a search for the two girls, which led her to the Appellant's house. The girls were escorted to hospital for treatment.

10. The matter was reported to police. The Appellant was arrested at **PW1's** home a few days later when in the company of **E** and elders he visited in a bid to persuade **PW1** to "settle" the matter.

11. Upon being placed on his defence, the Appellant elected to make sworn defence statement. To the effect that he worked as a caretaker [particulars withheld] in Gilgil. He tended horses. He said he did not know the complainant and that on 5/7/2012 he travelled to Nairobi Race Course on official duty.

12. He returned on 11th July 2012 and based on information he got from a lady called Alice, he went to **PW1's** house. **PW1** was unknown to him thus the Appellant and was led there by A. He learned then that two daughters of **PW1** had been found in his house. Although he said he was away from the farm in the material period he was arrested by the farm security personnel. He termed allegations against him as "strange".

13. I have considered the submissions made in respect of the appeal and the trial record. Under Section 143 of the Evidence Act there is ordinarily no requirement for the prosecution to call a certain number or type of witnesses.

14. Further Section 124 of the Evidence Act as amended has removed the mandatory requirement for corroboration in sexual offences. The amended provision states:-

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

15. The Appellant's complaint that the complainant's blood stained underwear was not produced at the hearing adds little to his appeal. The underwear was not necessary as medical evidence regarding the examination and treatment of the complainant was tendered. This evidence was unchallenged. For the foregoing reasons grounds 3 and 4 of the appeal have no substance.

16. The appellant has by grounds 1 and 2 challenged the evidence regarding the complainant's age. The complainant (**PW2**) herself testified that she was 13 years old while her mother (**PW1**) confirmed that **PW2** was born in 2001. **PW2** gave evidence in the second trial in 2014. She was therefore correct in asserting that she was 13 years old having given her year of birth as 2001. The doctor who examined her on 10/7/2012 assessed her age as 12 years.

17. There are no mandatory methods of proving age as submitted by the Appellant. Age can be proved without necessarily adducing an age assessment report, child immunization or birth certificates. The Court of Appeal (Malindi) clearly settled this question in this case of **Mwalongo Chichoro Mwajembe -Vs- Republic, Msa Cr.App. No. 24 of 2015 (UR)**

> **"……the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa -Vs- Republic, Criminal Appeal No.19 of 2014 and Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015*. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in *Francis Omuroni -Vs- Uganda, Criminal Appeal No. 2 of 2000*. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…"**

18. From the medical evidence and testimony by **PW1** and **PW2**, the complainant was aged between 11 and 12 years of age during material period. In this case, it was safer in my view for the trial court to lean upon the evidence by the doctor who examined **PW2** as to her estimated age. It is not clear to me why the trial court decided to completely ignore, without giving reasons, the doctor's assessment of **PW2's** age.

19. The evidence by **PW2** regarding the events of the material evening was not shaken in cross-examination. The Appellant was known to **PW2**. The admitted fact that the complainant and her sister were found in the Appellant's house on 6/7/2012 hence the Appellants approach to **PW1,** corroborates the evidence of **PW2**. Further, medical evidence in the form of PRC and P3 forms [Exhibit 1 and 2] indicate that the complaint had ben involved in a sexual activity. Not only was her hymen broken but her genitalia also showed injury to the labia minora as well as numerous pus cells.

20. The trial magistrate correctly observed in her judgment that:

> **"Accused person in his defence denied this offence and stated that he was at Nairobi on the alleged date until 11/7/2012. This is an alibi defence which accused person ought to have raised in the earliest opportunity for a determination to be made before the hearing. Accused person never raised this during the entire hearing until he was placed on his own defence. Evidence has been adduced that he was at his place of work during the commission of the offence. A security guard from** [particulars withheld] **came to court as a witness and accused never raised the issue that he was at Nairobi at all relevant material times to this proceedings. He never presented any document to substantiate his evidence that he was at Nairobi. It is my findings that this defence is an afterthought and lacks merit. It has come too late in the day and same has not been substantiated.**
>
> **The evidence adduced by PW2 and 1 was corroborated by the doctor PW3 who produced**

treatment documents. The victim was taken to hospital on 6/7/2012 after her mother and aunt rescued her from Accused house. She had blood stains in her inner wear and her hymen was found to be broken. Her labia minora was bruised meaning there was friction. The perpetrator molested her sexually without any protection. Although laboratory test tested negative and no spermatozoa seen, this does not mean that the victim was not defiled. The Post Rape Care Form and P3 Form and initial treatment notes consistently shows the victim was sexually molested and hence defilement cannot be ruled out. The victim was lured by the perpetrator on 5/11/2012 with her sister during day time. He was known to them prior to this incidence. They trusted him when he promised to go and give them chicken feed. Instead, he locked them up and got another person who also went away with the victim's sister and defiled her."

21. The Appellant's alibi was raised at the last moment during his defence. In the case of **Karanja -Vs- Republic [1983] KLR 501** the Court of Appeal stated regarding an alibi defence:

> **"In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought."**

22. The Appellant did not canvass his alibi during the trial. Indeed when **PW1** testified that he was arrested after he went to her home accompanied by elders with a view to "settling" the matter, he did not suggest to her that he was away from home on the material night. In my view the trial court properly directed its mind in finding the alibi an afterthought and dismissing it. There was no plausible reason for **PW1** and **PW2** to randomly implicate the Appellant in this case.

23. Having reviewed the trial evidence on my part, I find that the trial court's conclusions thereon cannot be faulted; the prosecution evidence against the Appellant was overwhelming. However, in light of evidence that **PW2** was aged between 11 and 12 years at the time of the offence, the trial court ought to have entered a conviction on the basis of the preferred charge.

24. For that reason alone I will quash the conviction under Section 8 (2) of the Sexual Offences Act and substitute therefor a conviction under Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.

25. Consequently, I do set aside the sentence of life imprisonment and substitute therefor a term of twenty years imprisonment with effect from 24th October 2014. To that extent only the appeal has succeeded.

Delivered and signed at Naivasha, this **14th** day of **July, 2017.**

In the presence of:-

Mr. Mutinda for the DPP

N/A for the Appellant

C/C - Barasa

Appellant - Present

C. MEOLI

JUDGE