**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL 144 OF 2013**

**JOSEPH MUTUKU NYAUWI…….APPELLANT**

**VERSUS**

**REPUBLIC……..……RESPONDENT**

**(An Appeal arising out of the judgment and sentence of H.M. Nganga RM in Sexual Offences Case No. 297 of 2012 delivered on 14th March 2012 at the Senior Resident Magistrate's Court at Tawa)**

**JUDGMENT**

The Appellant was first arraigned in the original trial court on 11th October 2012 and charged with the offence of defilement of a child contrary to section 8(1) as read together with subsection 3 of the Sexual Offences Act. The particulars of the offence were that on the 7th day of October 2012, at Waia location, Sakai sub-location in Mbooni East District, within Makueni County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of K M, a child aged 12 years.

In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the 7th day of October 2012, at Waia location, Sakai sub-location in Mbooni East District, within Makueni County, he intentionally and unlawfully did an indecent act to K M, a child aged 12 years, by touching her private parts namely vagina with his penis.

The Appellant pleaded not guilty to the charges. He was tried, convicted of the offence of defilement and sentenced to thirty (30) years imprisonment. The Appellant has preferred this appeal against the said conviction and sentence. He filed a Petition of Appeal and grounds of appeal on 13th May 2013, and his learned counsel, O.N Makau & Mulei Advocates filed written submissions dated 21st October 2015.

The Appellant's main grounds of appeal are that the magistrate erred in law and fact in relying evidence which was not trustworthy; the prosecution did not prove the case beyond reasonable doubt; and that the prosecution did not establish the origins of the foul smelling whitish virginal discharge.

The Appellant's learned counsel in his submissions argued on the first ground of appeal that the evidence by PW1, PW2 and PW5 was unreliable, contradictory and uncorroborated. It was contended that PW2's evidence was that the offence took place at 6.00pm, and that there was no inquiry made as to whether there was sufficient light to enable him see clearly. Further he testified that he stood at the top of the valley where he suspected PW1 and the Appellant were, but did not state that he went down to the valley.

It was further submitted that PW5 testified that he had relied on the information given to him by PW2, and that he saw the Appellant and PW1 talking at 4pm. Therefore that save for the evidence of PW1 as to

what transpired in the valley all the other evidence was hearsay. Reliance was placed on the decision in **Stephen Mwanzia Kiumo vs Republic, (2014) eKLR** in this regard.

On the second ground of appeal it was submitted that the prosecution did not prove penetration as PW1 testified that the Appellant placed his penis on her vagina, and the evidence of PW4 was that the victim's hymen had been broken earlier and not on the current episode. Further, he stated that laboratory tests indicated that the complainant had contracted a sexually transmitted disease which was not linked to the Appellant. He thus stated that the prosecution had not proven their case to the required standards, and reference was made to the decision in **Benard Gatu Muchiri vs Republic, (2010) eKLR.**

In opposing the appeal, the learned Prosecution Counsel, Ms. Maureen Wambogo, filed written submissions in court on 15th December 2015. The learned counsel argued that that the Appellant was a person well known to the complainant as he was employed as a herdsman by the complainant's uncle at the time. It was further submitted that the offence occurred at 6 pm and the complainant was able to see clearly and positively identified the Appellant. In addition, that the charge was proved beyond reasonable doubt through the treatment notes which indicated that penetration had occurred.

The learned counsel also noted that an age assessment report and child welfare clinic card showed that the complainant was 12 years old. Lastly, it was argued that the unsworn statement by the Appellant lacked probative value.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The key evidence given at the trial is as follows. The prosecution called seven witnesses. PW1 was the complainant K M, who after a *voire dire* examination was found to be intelligent enough and to understand the nature of an oath, and who gave sworn testimony. PW1 testified that she was 12 years old and that on 7/10/2012 at around 6.00 p.m., she was collecting firewood from a bush not far from their house when the Appellant, who she said was her uncle, came and told her that he would show her where to get firewood.

PW1 testified that she followed the Appellant, but that instead of showing her firewood he got hold of her and threatened to beat her up. The Appellant then told her to remove her undergarment and defiled her. She said that she did not scream as the Appellant had taken her panga. It was her account that after the ordeal she ran away, and on the way met with her elder brother M (PW5) whom she told what had transpired. She said that she also told her father who took her to Mbumbuni police station to make a report, and she was also taken to Kisau sub-district hospital for treatment. She identified the clothes she had been wearing that had been brought to court as exhibit.

PW2 was M M, PW1's brother who gave sworn testimony after a *voire dire* examination. He testified that on 7/10/2012 at about 6.00 pm he was at home preparing food when he heard his older brother M (PW5) calling him. He said that he was instructed by his brother to follow his sister and the Appellant and see what they were upto.

It was PW2's account that he stood at a valley and saw the Appellant, with the aid of sunlight, sleeping on PW1. He also stated that he saw PW1 skirt placed on her side. He then went back and informed M of what he had witnessed. PW2 identified the clothes worn by the complainant in Court. He reiterated that he knew the Appellant whom he said had stayed with his uncle for two years.

PW3 was M M, the father of the complainant. It was his testimony that the complainant was 12 years old and to that effect he produced her clinic card in evidence. He said that on 7/10/2012 at 8.00 pm he heard a conversation between his first born son M (PW5) and PW1 where he was inquiring what PW1 had been doing with the Appellant. He stated that he then called his children namely M (PW5), PW1, PW2 and F, and upon inquiring he was told that the Appellant was seen lying on PW1. He stated that PW1 then told him that the Appellant had deceived her and dragged her and eventually defiled her at the valley, and had

told her not to tell anyone.

PW3 in further testimony stated that PW1 had stated that this was not the first time the Appellant had defiled her, and had given her Kshs. 5/= telling her not to tell anybody. PW3 stated that he then took the complainant to hospital the next day where she was treated, and later to the police station where a P3 form was filled. He identified the clothes that the complainant had been wearing in court.

Geoffrey Matia, a clinical officer at Kisau sub-district hospital was PW4, and he testified that he filled the P3 for the complainant. He further stated that PW1 had been defiled and threatened by someone known to her. PW4 testified that upon examination PW1's private parts, the outward skin were normal; the hymen was broken and not fresh; and that she had whitish discharge that was omitting an awful smell. PW4 stated that the examination showed that there was penetration. He said that PW1 was administered sexual transmitted infection exposure proplaxis. He testified that he signed the P3 form and produced it in court as evidence.

PW4 also testified that he conducted an age assessment of PW1 and used her child welfare card which showed that she was born on 14/01/2000 and was 12 years old. He produced the P3 for age assessment as an exhibit.

PW5 was M M, PW1's elder brother. He recollected that on 7/10/2012 at about 4.00 pm he had done chores for his grandmother and when going back home, he had seen the Appellant and the complainant talking. He stated that when the Appellant spotted him he left with PW1. PW5 said that he had then sent his brother PW2 to follow them and report back to him.

PW5 testified that PW2 told him that he had seen PW1 and the Appellant playing sex. He later confronted the complainant about the same, who confessed that the Appellant had taken her to fetch firewood down the valley and had sex with her, and that it was not the first time. PW5 said that he informed his father and recorded a statement on the same. He also identified the clothes that PW1 had worn during the incidence.

PW6 was A.P Morris Kuria, who testified that on 9/10/2012 at 11.00 a.m., he had received a letter from the OCS Mbumbuni directing him to arrest the Appellant who had defiled a child. He stated that they arrested the Appellant and detained him at Mbumbuni Police station.

The last prosecution witness was PW7, Sgt Dina Muita, who was the investigating officer in the case. PW7 testified that on 8/10/2012 she received a report from the complainant and his father that the complainant had been defiled by the Appellant. She stated that the complainant was taken to hospital, her P3 form duly filled and she subsequently recorded witness statements. PW7 stated that she visited the scene which was a valley in the bush. She further stated that she was able to get the complainants underpants, kitenge skirt and navy blue jumper which she produced as exhibits in the trial Court.

The trial court found that the Appellant had a case to answer and put him on his defence. The Appellant gave unsworn evidence and did not call any witness. He testified that he used to work as a shamba boy for the uncle of pw1 and knew the complainant. He stated that he had nothing to say about the allegations against him.

Upon consideration of the grounds of appeal, submissions made and evidence in the trial Court, I find that the main issue raised in this appeal is whether the Appellant's conviction for the offence of defilement was based on sufficient, consistent and satisfactory evidence. This Court is in this regard mindful of the ingredients of defilement which need to be proved which were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

> "**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

In the present appeal PW4 undertook an age assessment of the complainant and also produced her child

welfare card which showed that she was 12 years old at the time of the alleged defilement. The complainant knew the Appellant who she referred to in her testimony by name as Mutuku, and stated that he works at her father's house and takes care of her uncle's livestock, and is brother to her father. The alleged defilement took place during the day at 6pm, therefore there was no possibility of any mistake in the identification of the Appellant. PW2 and PW5 also testified as to seeing the Appellant with the complainant, and PW2 stated that he saw the Appellant with the complainant at 6pm.

I do not find any contradiction in the evidence of PW1, PW2 and PW5 as to the time of defilement, as PW5 testified that he had left his grandmother's house at 4pm on the said day. Therefore the reference to 4pm was not with regard to the time he saw the Appellant with the complainant. PW2 and PW5 both testified that they saw the Appellant with the complainant on the material day, with PW2 stating that he did see the Appellant lying on top of the complainant. To this extent there was positive identification of the Appellant.

As regards the requirement of penetration, section 8 (1) of the Sexual Offences Act states that:-

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

"Penetration" under section 2 of the Act is defined 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 in this regard was as follows:

> **"*Question by the prosecutor:* What happened?**
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> ***Answer:* alinishika akaniangusha chini. Akaniambia nikipiga nduru atachichapa (*Translation- he held me and pinned me down. He told me if I scream he will beat me).* (Continues and states in Kiswahili)**
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> **'Akanifanyia tabia Mbaya'(*Translation- he did to me bad manners)*. He told me to remove the clothes and told me he want to do sex. He told me to remove my biker. I removed the underpant. He then did to me 'tabia mbaya' *(bad manners)* in English sex.**
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> ***Q:* What did the accused do to you exactly?**
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> ***Answer by PW 1:* He removed his penis. He opened here. (point at her skirt) and entered his penis in my vagina (Points at her skirt). After that I told him I want to go. He was lying on me when he entered me. When he was entering me I did not scream. I did not scream because he had taken my panga. He told me if I scream he will beat me.**
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> **I was the one who removed my underpant after he told me. He lied on me for about 30 minutes entering and penetrating me. After he left, I ran away. I met M. When I reached I told M what Mutuku did to me. M is my elder brother."**

PW1 testimony was clear, consistent and remained unshaken on cross-examination, and this Court finds that she was a credible and reliable witness, and her evidence proved that there was penetration.

The medical officer, PW4, also testified that the hymen of the complainant was broken and there was discharge from her private parts. This was merely corroboration of the penetration. The fact that the hymen was broken on a previous occasion was explained by the complainant who stated that the Appellant had previously defiled her. In addition, while proof that a discharge or disease in a complainant is linked to the Appellant may strengthen the prosecution case, it is not necessary in proving penetration. Lastly, under section 124 of the Evidence Act no corroboration is required in cases involving sexual offences, where the court as it does herein, believes that the complainant it telling the truth. In this instance therefore the complainant's evidence on its own was sufficient to prove penetration.

The prosecution therefore proved all the elements of the offence of defilement and I find that the Appellant's conviction was safe and on the basis of sufficient evidence. The sentence imposed by the trial Court for the offence is also found to be legal as the Appellant was charged with, and convicted of the offence of defilement under section 8(3) of the Sexual Offences Act, which provides as follows:

> **"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 to be noted from the said provisions that the offence the Appellant was convicted of attracts a minimum sentence of twenty (20) years' imprisonment, and this Court notes that the trial Court considered the need for a deterrent sentence in light of the offence committed by the Appellant.

I however am of the view that the minimum sentence of twenty years' imprisonment is deterrent enough, and I have also taken into account the fact that the Appellant was remorseful in his mitigation. I accordingly allow his appeal only to the extent of reducing his sentence to twenty (20) years imprisonment.

I accordingly uphold and affirm the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (3) of the Sexual Offences Act, but reduce the sentence for this conviction from thirty (30) years' imprisonment to twenty (20) years' imprisonment with effect from the date of conviction in the original trial Court.

It is so ordered.

**DATED AT MACHAKOS THIS 8TH DAY OF FEBRUARY 2016.**

**P. NYAMWEYA**

**JUDGE**