REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 1 OF 2014

JOSPHAT MUOKI MUUNDA ……..……...…… APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An Appeal arising out of the judgment and sentence of T.N. Sinkiyian RM in Sexual Offences Case No. 22 of 2013 delivered on 31st December 2013 at the Principal Magistrate's Court at Kangundo)

JUDGMENT

The Appellant was first arraigned in the original trial court on 13th August 2013 and charged with the offence of defilement of a child contrary to section 8(1) as read together with subsection 2 of the Sexual Offences Act. The particulars of the offence were that on the 12th day of August 2013, at ***[particulars withheld]*** village, in Matungulu District, within Machakos County, the Appellant intentionally caused his penis to penetrate the vagina of A N O, a child aged 9 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 12th day of August 2013, at ***[particulars withheld]*** village, in Matungulu District, within Machakos County, the Appellant intentionally and unlawfully touched the vagina of A N O.

The Appellant pleaded not guilty to the charge. He was tried, convicted of the offence of defilement and sentenced to life imprisonment. The Appellant has preferred this appeal against the said conviction and sentence. He filed a Petition of Appeal and Memorandum of grounds of appeal on 19th May 2014, and his learned counsel, Paul Kisongoa and Company Advocates, filed written submissions dated 23rd November 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 defence statement was not considered in light of section 169 of the Criminal Procedure Code.

The Appellant's learned counsel in his submissions argued that the plea was not unequivocal as the language used was not indicated, and the magistrate did not consider the procedure used in plea taking. He cited the cases of **Adan vs Republic (1970) EA 24** and **Mwendwa vs R (1957) EA 429** in this regard. It was the counsel's contention that the ingredients of the offence were not explained to the Appellant nor were they recorded, and that the Appellant's trial was defective as he did not plead to the charges. Further, that the magistrate misinterpreted section 60 of the Evidence Act in that in criminal proceedings the ingredients of an offence must be understood by an accused person in his own language.

The counsel for the Appellant also argued that the trial magistrate did not direct her mind to the presence of corroboration, and that the doctor's failure to examine the Appellant's sexual organs was a fatal omission, and there was therefore no evidence to connect the white substances found on the complainant to the Appellant.

Lastly, it was submitted for the Appellant that the exact language used by the complainant in giving her evidence should have been indicated, and that the literal meaning of the body organs used to commit the offence should have been used. Therefore, that that the trial magistrate erred when she gave her own interpretation and meaning of the words used by the complainant to find that they referred to the Appellant's sexual organs.

In opposing the appeal the learned Counsel for the State Ms. Rita Rono filed written submissions in court on 14th December 2015. The learned counsel argued that the charges had been read out to the Appellant in a language he understood which was Kiswahili. Further, that the trial Court went on to record the Appellant's response in Kiswahili. The counsel stated that the Appellant had been warned against the charges facing him and had been advised to ask questions.

It was further submitted that the testimony of PW1 on her defilement by the Appellant had been corroborated by PW3 and PW4. In addition, that PW7 had confirmed that the complainant's hymen had been broken and blood on the examining finger confirmed that she had been defiled. It was also urged that the age of the complainant had been proven by the birth certificate. As to the ground that the Appellant was of unsound mind they noted that the matter was not raised during trial and the Appellant had not produced any documentation to prove the same.

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 four witnesses. The prosecution called six witnesses. PW1 was J M O, the mother to the complainant, who testified that on 12/8/2013 at about 8am she came back home from delivering milk, and called out for her daughter who she had left at home. She stated that she had left her daughter with her worker, the Appellant. PW1 stated that when her daughter did not respond, she went to tend to her chicken, and that was when she saw the complainant leaving the Appellant''s house.

Upon inquiring why she did not respond to her calls, the complainant said that the Appellant had asked her to go to his house where he had defiled her. She said that the complainant had cried but he had not stopped. She stated that when he was done he had told her not mention the incident to anyone.

PW1 testified that she then requested PW3 to call the police for her and that the Appellant was taken to Nguluni police post. PW1 later took the complainant to Kangundo District hospital where she was examined and treated. She also stated that a P3 form was filled.

PW2 was A N O the complainant. After a *voire dire* examination, the trial Court found that PW2 did not understand the solemnity of taking an oath but was intelligent enough for her evidence to be received, and directed that the witness gives unsworn testimony. It was PW2's testimony that she was at home alone when the Appellant asked her to go to his house, where he asked her to remove her pantie. She stated that he also removed his trouser and defiled her. She described how the incident happened and noted that it was painful. Afterwards, that the Appellant told her not to tell anyone.

PW2 then went back to their house and told her mother of what had happened. She stated that she was taken to the police and thereafter to the doctor.

PW3 was E M M, who testified that on 12/8/2013 at around 7.41 am, PW1 called her and asked her to call police officers. She then told her that her daughter had been raped by her worker. PW3 stated that she called police officers from Nguluni and they all went to PW1's house where the Appellant was arrested

and taken to the police station.

PW4 was Alex Nganda , an administration police officer at Nguluni. He stated that on 12/8/2013 at around 7.45 am he received a report of rape from PW3. He stated that they then left for the home PW1 accompanied by another female Officer. They then arrested the Appellant.

PW5 was Dr. Dorcas Nyanchama Obare, who testified that on 12/8/2013 she had treated the complainant for defilement. She noted that the complainant looked scared and had a panty with brownish stains. Upon examination she noted that PW2's genitalia was swollen; her hymen broken; and her vaginal canal inflamed. She also noted that there was blood on the examining finger. PW5 concluded that there had been sexual intercourse with the child, and produced the P3 form and her medical notes in evidence. PW5 also testified that she examined the Appellant who was in fair general condition but had red eyes sustained from mob justice.

The last prosecution witness was Corporal David Sigei who testified as PW6. He stated that on 12/8/2013 at around 2pm he was in the office when the Appellant was brought in accompanied by administration police officers from Nguluni, the complainant and her mother. He stated that he then took both the victim and the Appellant to hospital where they were examined. He went on to present the P3 form that was duly filled. PW6 also stated that the complainant was 9 years and produced her birth certificate as an exhibit which showed that the complainant was born on 29th June 2004.

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 herder for PW1, and that on 12/8/2013 he had been doing his duties when he was arrested. He said he had fetched water up to 7am and fed the chicken. The Appellant further testified that he later took a cup of tea and that is when he was arrested.

Upon consideration of the grounds of appeal, submissions made and evidence in the trial Court, I find that the issues raised in this appeal are firstly, whether the correct procedure was applied in the taking of the Appellant's plea, secondly, whether the Appellant's conviction for the offence of defilement was based on sufficient evidence, and lastly, whether the judgment of the trial court conformed to section 169 of the Criminal Procedure Code.

On the first issue, the procedure to be applied in taking a plea of guilty were well enunciated in the case *of* **Adan vs Republic, [1973] EA 445** where the Court held as follows:-

> ***"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.***
>
> ***(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.***
>
> ***(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.***
>
> ***(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***
>
> ***(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."***

The procedure as laid out in ***Adan vs Republic*** (**supra**) is also provided for under *section 207* of the Criminal Procedure Code.

In the present appeal, the record of the proceedings in the trial court indicates at page 1 thereof that the procedure employed in the taking of the Appellant's plea on 13th August 2013 was as follows:

"Date: 13/8/13

Coram

Before: J. Bii – RM

Prosecutor: CIP Gitonga

Court clerk: Zipporah

Interpretation: English/Kiswahili

The substance of the charge(s) and every element thereof has been stated by the court to the accused person, in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies:-

Charge read to accused in Kiswahili

Accused

Count 1: Nakataa

Alternative Count: Nakataa

Court: Plea of not guilty entered. Hearing on 27/08/2013 Court 2. Accused may be released on bond of Kshs.200,000/= or cash bail of 150,000/=.

JAPHET BII – RM

13/8/2013"

It is evident from the said record that the substance of the charges and elements of the same were read to the Appellant in Kiswahili language, and the learned trial magistrate recorded the reply to both charges by the Appellant in his own words which were also in the Kiswahili language. The Appellant has not alleged that he did not understand Kiswahili, which the trial court record shows was the language used. The procedure by the trial Court therefore cannot be faulted and I find no merit in the Appellant's arguments in this regard.

On the second issue as to whether the Appellant was convicted on the basis of satisfactory and sufficient evidence, this Court is mindful of the ingredients of defilement 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."**

The complainant knew the Appellant who she referred to in her testimony as Muoki, and the alleged defilement took place during the morning hours on the material day, which is the time PW1 testified that she saw the complainant coming out of the Appellant's house. The complainant also told PW1 that the person who committed the defilement was the Appellant. The age of the complainant was indicated in the birth certificate produced in Court as 9 years.

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."

PW2 testified as follows as regards penetration at page 10 to 11 of the typed record of the trial Court:

> **"I was home alone. Muoki came asked me to go to his house. He removed my panty he also removed his trouser. He put me on his bed. Then he remove his 'thing' from between his legs (penis). Then he put inside kitu yangu, ile ya kukojoa, akaingiza yake kabisa nusu (*translation - my thing, the one of urinating and he inserted his inside until halfway*) (she points at her private). He told me not to tell my mother. Later my mum asked me and I told her. When he removed his thing, I saw things like uzaa from his penis. He took his shirt then wiped me kwa mahali yangu ya kukojoa (*translation -at my place of urinating*). I wore my panty then took out dirty plates from his house. Then my mum saw me when I was leaving his house."**

The Appellant did not controvert the evidence by PW1. He however submitted that the trial magistrate erred by giving her own interpretation of the reference to the sexual organs of the Appellant. The trial magistrate's finding in this regard was as follows as stated in page 25 of the typed record of the trial court:

> **"The meaning I gave to the expression 'his thing' is his penis. I arrived at this conclusion by considering several statements the child said regarding 'his thing'. The child said he removed his 'thing' from between his legs after he had put off his trousers. She further said that when he removed 'his thing' from the inside her 'kitu ile ya kukojoa', she saw something like pus coming out of his 'thing'. These statements were the child's way o referring to genitalia in the best way she knew how. I have, as allowed under section 60 of the Evidence Act taken judicial notice of the fact that in our society we hardly ever refer to sexual organs by name. It is almost taboo in all Kenya communities to just say 'penis', 'vagina', 'buttocks' and so on and so forth. Most adults are embarrassed to mention genitalia by name. The difficulty must be dumbfounding for children and particularly one of tender years as in this case. It is a fact of general notoriety in the Kenya society."**

Under section 60(1) (o) of the Evidence Act, one of the facts that Courts can take judicial notice of are tall matters of general or local notoriety. It is a matter of local notoriety that the term "thing" or "kitu" in Kiswahili language is a term normally used to refer to the genitalia of both males and females. The evidence of the complainant in this regard was that the Appellant inserted his thing into her thing. The complainant in addition expressly described her thing as the place where she urinates from. Her testimony was clear and consistent in her reference to her genitalia and that of the Appellant, and showed that there was penetration. The trial magistrate therefore did not err in her interpretation and findings in this regard.

The doctor, PW5, also testified that the hymen of the complainant was broken and there was discharge and blood stains on her genitalia which was swollen, which corroborated the evidence of PW2. I therefore find that the prosecution proved beyond reasonable doubt that there was penetration of the complainant by the Appellant.

On the third issue raised, it was argued by the Appellant that section 169 of the Criminal Procedure Code was not complied with because his defence was not given due regard. The said section 169 provides as follows:

> **"(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.**
>
> **(2) In the case of a conviction, the judgment shall specify the offence of which, and the**

section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."

I have examined the judgment by the learned trial magistrate, and I find that the Appellant's claim is not supported. The trial magistrate set out the unsworn statement given by the Appellant in the said judgment, which evidence she expressly stated she had considered and did not find believable. I have examined the said evidence, and find that all the Appellant did in his defence was to describe the events on the day of his arrest, which did not shed any doubt on the prosecution's case. I therefore find no reasons to interfere with the trial magistrate's finding in this regard.

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.

Lastly, the Appellant in his Petition of appeal also appealed against the sentence. This Court notes in this regard that the Appellant was charged with, and convicted of the offence of defilement under section 8(2) of the Sexual Offences Act, which provides as follows:

"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

It is to be noted from the said provisions that the offence the Appellant was convicted of attracts a minimum sentence of life imprisonment. While sentencing is in the discretion of the court, where a minimum penalty is provided, the sentencing court cannot deviate from the provisions of the law. See in this regard the decision in **David Kundu Simiyu –Vs- Republic Criminal Appeal No.8 of 2008 at Eldoret.**

I accordingly uphold and affirm the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (2) of the Sexual Offences Act, Act No. 3 of 2006, and the sentence for this conviction is legal and is also affirmed.

It is so ordered.

DATED AT MACHAKOS THIS 8TH DAY OF FEBRUARY 2016.

P. NYAMWEYA

JUDGE