REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 102 OF 2014

BERNARD KIMNGETICH RONO…….....……. APPELLANT

VERSUS

REPUBLIC …….....……. RESPONDENT

JUDGMENT

The Appellant herein **BERNARD KIMNGETICH RONO** has filed this appeal challenging his conviction and sentence by the Senior Resident Magistrate sitting at Molo Law Courts. The Appellant had been arraigned before the lower court on 2/10/2012 facing 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 30th day of September 2012 at [particulars withheld] in Kuresoi District of Nakuru County within Rift Valley province intentionally and unlawfully caused his penis to penetrate the vagina of M C a child aged seven (7) years"***

In addition the appellant faced an alternative charge of **COMMITING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006**. The appellant entered a plea of **'Not Guilty'** to both charges and his trial commenced on 4/12/2012. The prosecution led by **CHIEF INSPECTOR MUTETI** called a total of five (5) witnesses in support of their cases. The appellant was not represented by counsel during his trial.

The complainant who testified as **PW2** was one **M C** a child who gave her age as 7 years. The child was taken through a ***'voire dire'*** examination and the learned trial magistrate found that the child did not properly comprehend the nature of an oath. She therefore gave unsworn evidence.

PW2 told the court that on 30/9/2012 she woke up at 6.00am and went outside the family house in order to relieve herself. As she left the toilet on her way back to the house the appellant called her to him. He pushed her to the ground moved aside her panty and proceeded to defile her.

The appellant threatened to beat the child if she revealed to anyone what had happened. After the incident **PW2** returned to the house but due to the threats did not tell anyone what had transpired. Later **PW2** realised that there was blood coming out of her private parts.

This alarmed the child and it is only then that she told her mother what had befallen her.

PW1 N G was the mother of the complainant. She told the court that on 30/9/2016 at 6.00 am the

complainant went out to relieve herself she took a longer time than usual in the toilet. Later **PW2** called her mother and informed her that there was blood coming out of her private parts. **PW2** examined the child and saw stains of blood and whitish discharge on her genitals and thighs.

The complainant told **PW1** that appellant had defiled her earlier that morning. **PW1** took the child to Olengruone District Hospital for treatment. The matter was reported at Kaptagich police station. Upon conclusion of police investigations the appellant was taken to court 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. He opted to give an unsworn defence in which he denied having defiled the complainant. On 24/9/2013 the learned trial magistrate delivered her judgment in which she convicted the appellant on the main charge of Defilement and thereafter sentenced him to life imprisonment. Being aggrieved the appellant file this appeal.

The appellant who appeared in person during the hearing of this appeal chose to rely entirely upon his written submissions which had been duly filed in court. **MS RUGUT** learned State Counsel made oral submissions opposing the appeal.

In the case of **AJODE –VS- REPUBLIC (2004) 2 KLR 81**, the Court of Appeal sitting in Kisumu held that

> ***"In law it is the duty of the first appellate court to weigh the same conflicting evidence, and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that***"

In this case the appellant was charged with Defilement. Therefore evidence must be adduced to prove that the child was in fact defiled. **PW2** told the court that the appellant accosted her as she was walking back to the house from the outside toilet. He pushed her to the ground and defiled her. **PW2** graphically describes the incident at page 5 line 14 where she states

> ***"As I left the toilet to go to our house, accused called me and pushed me. I fell down. She (sic) told me that if I scream he would beat me. He then defiled me outside his house. Accused penetrated my private parts. He did not remove my inner wear. He just pushed my pants sideways and put his penis inside my private parts. I felt a lot of pain ....."***

The complainant was a young child aged 7 years. It is unlikely that she would have been able to describe such a sexual act if she had not under gone it. **PW2** the mother of the complainant corroborated the testimony of the complainant in that she stated that when the child informed her of the defilement she examined her private parts. She noted blood and a whitish discharge oozing out of her genitals. This type of discharge is certainly not normal in a child so young.

PW 4 CHARLES KIPYEGON MUTAI a clinical officer attached to Kaptangich District Hospital examined the complainant. He noted that the hymen was perforated and there was a bloody discharge. Further lab tests revealed that the child was suffering from a Urinary Tract Infection. **PW4** concluded that the child had been defiled. He filled and signed her P3 form which is produced in court as an exhibit. **P. Exb 1**. He also produced the post rape care form filled out in respect of the child **P. Exb2**. This was expert medical evidence and was neither challenged nor controverted by the appellant. I am satisfied from the evidence on record that **PW2** was indeed defiled as she has alleged on the material day.

The next crucial question would be that of identification. Has the appellant been positively and reliably identified as the man who defiled the complainant? The incident occurred at 6.00 am. Day had broken and it was light. Visibility was good. The complainant came into close contact with the appellant and she spoke to him. She therefore had ample time and opportunity to see and identify her assailant. The appellant was a person well known to the child as he was a herdsman nearby she even knew him by his name **'Bernard'**. In her evidence at page 5 line 12 **PW2** categorically states

"I know the accused. His name is Bernard. He used to herd cows near our home...."

PW2 remains unshaken under cross-examination by the appellant. She stated at page 5 line 26

"I know you. Your name is Bernard...."

The child proceeds to deny any suggestion that she had been coached when she says

"My mom did not tell me to testify what I have already said"

The learned trial magistrate in her judgment at page 17 line 15 commented on the demeanour of the child in the following terms

> ***"Though PW2 is a seven year old girl who gave unsworn testimony, she was consistent and testified innocently in detail what had been done to her on the material day. She was not hesitant and could tell she was truthful....."*** (my emphasis).

This was the observation of the trial magistrate who had the opportunity to see and hear the child testify. Even from the written record and the answers given by **PW2** it is clear that she was a forth right witness. The veracity of **PW2** is further given strength by the fact that she informed her mother that it was **'Bernard'** who had defiled her. She did not waver in her identification of the appellant. As stated earlier the appellant was a man she knew well. There was evidence of recognition. Such recognition evidence was held by the Court of Appeal in the case of **ANJONON & 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"**

I am mindful of the fact that appellant has been identified by a single witness. Rape/Defilements are offences ordinarily committed in secret. It would be very rare to have any other person present. I am satisfied that the complainant has made a clear, positive and reliable identification of the appellant as the man who defiled her.

The appellant raised other minor grounds in his appeal. He submitted that the charge as framed was defective as it quoted section 8(1) (2) of the Sexual Offences Act (which section the appellant submits does not exist). He submits that like correct charge ought to have read section 8(1) **as read with** section 8(2) of the Sexual Offences Act.

In my view this was not a fatal defect and did not prejudice the appellant in his defence of the charge. Article 159(2) (d) of the Constitution exhorts courts to administer justice without undue regard to technicalities. This misquoting of the relevant section of the Sexual Offences Act is one such technicality which in my view does not invalidate the charge.

The appellant also submitted that the learned trial magistrate failed to consider his evidence. This allegation is not factually accurate.

In her judgment at page 17 line 29 the trial magistrate stated as follows

> ***"I have considered accused defence but it was just a mere defence which did not shift the prosecution case in any way"***

I am in agreement that the appellant's defence was a mere denial and did not in any way displace and/or weaken the prosecution case.

The final matter for consideration in this appeal is the question of proof of age of the complainant. The offence of Defilement is defined as sexual contact/intercourse with a minor. Under Kenya laws a minor is any child aged below 18 years. The complainant was stated in the charge sheet to be seven (7) years old. Aside from this verbal statement of **PW2** on her age and a verbal confirmation by **PW1** her mother that

the child was aged 7 years no documentary evidence has been tendered to prove the age of the child. No age assessment report, no birth certificate, no vaccination or baptism card all of which provide sufficient proof of age has been tendered in court. In the case of **KAINGU ELIAS KASONO –VS- REPUBLIC Criminal Appeal No. 54 of 2010** the Court of Appeal sitting in Malindi held as follows

> ***"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 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 therefore the Court of Appeal found age to be a critical component in a defilement case and as such a material fact requiring proof beyond reasonable doubt.

However four (4) years later in the case of **RICHARD WAHOME CHEGE –VS- REPUBLIC Criminal Appeal No 61 of 2014**, the Court of Appeal now sitting in Nyeri held a totally divergent view. In that case the court was considering the question of proof of age of the victim held as follows

> ***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself"***

Therefore here now the Court of Appeal is of the view that documentary evidence such as an age assessment report, birth certificate, baptism card etc are not the only ways to prove the age of a victim in a defilement case. The court held that the testimony of the child regarding her age supported by the mother who bore her would be sufficient. Both these authorities emanate from the Court of Appeal. Both by virtue of the doctrine of *stare decisis* would bind this court.

I am mindful of the decision in the **Richard Wahome Chege case**. However I chose to be guided by the decision in the earlier **Kaingu Elias Kasono** case. The charge of defilement is a very serious charge. It is a charge which upon conviction carries very stiff mandatory minimum sentences. The courts ought not render convictions in such cases unless all ingredients of the charge are proved beyond reasonable doubt. A mere declaration by the victim and her parent regarding her age does not in my view mount to proof beyond reasonable doubt. It is important that such an assertion about age be accompanied by some documents to prove the actual age of the child. The requirement that actual documentary proof of age be availed is not unduly oppressive to the complainants. Most children (or their parents) will have obtained a birth certificate (given that this is now a requirement for school enrolment) a baptism card or a Ministry of Health vaccination card. Such documents are easily and readily available and failure to procure the same only smacks of laxity on the part of the prosecution. Given the serious consequences to the accused arising from a conviction of a charge of defilement, the very least that the court can expect is to have every aspect of the charge proved with reasonable certainty.

In this case no prove was tendered that the complainant was actually 7 years old as alleged by the complainant and her mother. For this reason I find that a crucial ingredient of the charge remains unproven. The trial court ought not to have convicted the appellant on the main charge of Defilement. I quash that conviction and set aside the sentence of life imprisonment.

Having so said I am satisfied that the evidence on record proves the alternative charge of Indecent Act with a child. The appellant pushed the complainant to the ground lay on top of her and pushed aside her underpants. Clearly this intention was to sexually assault her and indeed he proceeded to do just that. I substitute a conviction on the alternative charge of committing an Indecent Act on a child. Taking into account the fact that the complainant was a very young child. I impose a sentence of fifteen (15) years imprisonment. It is so ordered.

Read in open court

Appellant in person Ms Ngovi for State

M. A. ODERO

JUDGE

6/5/2016