REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 48 OF 2015

PETER GAKURU MAINGI……..……APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

*(Being an appeal against conviction and sentence in Mukurweini Senior Principal Magistrates' Court Criminal Case No. 15 of 2012 (Hon. M.W. Murage***)**

JUDGMENT

The appellant was charged with the offence of defilement contrary to **section 8(1)(2) of the Sexual Offences Act, No. 3 of 2006** and an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the same Act. According to the particulars in the main count, it was alleged that on the 7th day of December, 2012 at [particulars withheld] in Mukurweini district within the Nyeri County, the appellant intentionally caused his penis to penetrate the vagina of R W, a child aged 11years. The particulars in the alternative count were similar to that in the main count except that in the alternative count, the appellant is said to have intentionally touched the vagina of R W, a child aged 11 years with his penis.

The court found him guilty of the principal count and thus sentenced him to life imprisonment which is the mandatory sentence provided for the sort of offence that the appellant was convicted of.

He has appealed to this court against both the conviction and sentence and in his amended petition of appeal which he filed in court on 24th February, 2015, he raised the following grounds, as far as I understand them:-

1. The learned magistrate erred in law and in fact in relying on the evidence of the prosecution witnesses without considering the possibility of a conspiracy amongst the complainant's family members;

2. The learned magistrate erred in law and in fact in convicting the appellant based on the evidence of **PW5, PW6** and **PW7** which was not conclusive;

3. The learned magistrate erred in law and in fact in convicting the appellant without due regard to his sworn evidence that was not controverted by the prosecution; and

4. The learned magistrate erred in law and in fact in convicting the appellant without complying with **section 169(1)** of the **Criminal procedure Code, Cap 75**.

The appeal was opposed by the state and its counsel urged this court to dismiss the appeal and uphold both the conviction and sentence.

This being the first appellate court, it is incumbent upon it to evaluate the evidence afresh and come to its own conclusions independent of the factual conclusions of the trial court but always bearing in mind that it is the trial court that had the opportunity, hence the advantage of seeing and hearing the witnesses. **(See Okeno versus Republic (1972) EA 32).**

The prosecution summoned eight witnesses the first of whom was the complainant; according to her testimony, on 7th December, 2012, she went to the appellant's house at around noon after delivering milk at Muchatha. She was later joined by her cousin **N W (PW2)** but the appellant immediately dismissed her. After N's departure the appellant closed the door to his two-roomed house, made the complainant sleep on his bed and proceeded to defile her; she gave a graphic account of how the appellant went about defiling her; he removed her skirt and pant, unzipped his own trouser and inserted his penis into her vagina. The appellant pushed his penis but it could not enter; she could not, however, tell how deep the penis entered.

It was the complainant's testimony that though this was her maiden sexual experience she did not feel any pain. She managed to escape and ran away when the appellant told her to sleep on him. When she reached her home which was approximately 200 meters from the appellant's house she told her sister **L M (PW3)** what the accused had done to her. The two then went to tell **M W (PW4)** who attempted to call the complainant's mother but could not find her since she was out of reach of the phone network. It is then that they decided to call the father **(PW6)** who came and found them at home. He asked the complainant to dress up so that they could go to hospital; they proceeded to Mukurweini police station and then to hospital at Mukurweini in the company of the police. The witness identified her notification of birth showing that she was aged 11 when the offence was committed.

The complainant explained during her cross-examination that the appellant accosted her when she had taken the milk gallon or can back to his house; it was her evidence that the appellant ought to have delivered his employer's milk but had requested the complainant's parents that she delivers the milk at the dairy since he was unwell.

She also testified that while she was outside the appellant's house, he boiled an egg for her and invited her into the house to eat it; when her cousin **N W W (PW2)** came she had apparently eaten the egg.

N (PW2) herself testified that indeed on the material day at around 3.00pm her mother sent her to pick a panga from the appellant's house. She found the appellant with the complainant; the complaint was inside the house seated on the bed in the kitchen while the appellant was outside. After she was given the panga, the appellant asked her to go and get some potatoes for him. She did not go back to him.

The complainant's sister **L M W (PW3)** testified that on the material day at about 1 pm she was coming from school where she had gone for tuition when she met the complainant taking milk to Muchatha. Later, while she was at home washing clothes she saw the complainant taking the milk can back to the appellant's house. At around 3 pm she came back home crying; she found M together with one M W, whom the witness described as her friend and told them that the appellant had defiled her. She proceeded to her aunt's **(M W's (PW4's))** place, to borrow a phone and call the complainant's mother. Since she couldn't get her she called her father who responded and came home immediately and went to Mukurweini with the complainant.

M also testified that the appellant had on the previous day come to their home and requested to have R deliver milk to dairy on his behalf since he was unwell; the dairy was said to be about 2km away from

their home. The appellant's house was about 150 metres from the complainant's home.

M W(PW4) testified that on 7th December, 2012 at around 3 pm **L M (PW3)** came and borrowed her phone to make a call to her father; the father came and took the complainant to hospital.

The clinical officer from Mukurweini District Hospital, **Ann Kiragu (PW5)** examined the complainant; she testified that the complainant came to hospital accompanied by her father and two police officers. Upon examination she found a vaginal discharge. The external genitalia was found to be normal. There was neither laceration nor cut wound but the complainant's hymen was broken. She was put on PEV drugs to prevent pregnancy; she was also given antibiotics and counseled. The officer confirmed that there was penetration because the finding of epithelial cells showed that there was injury to the vagina.

The complainant's father **S W M (PW6)** testified that on the evening of 7th December, 2012 he was on his way home from Muchatha shopping centre when he received a call from his daughter, **L M (PW3)** telling him that the complainant had been defiled by the appellant. When he arrived, the complainant told him that she had been defiled by the appellant; he proceeded to Mukurweini police station where he made the report and later took the complainant to hospital. He testified that the complainant was aged 11 and produced a notification of the complainant's birth in proof of this fact.

The investigating officer was **Police Constable Eric Nyangau (PW7)**; he testified that on 7th December, 2012 he was at the station when the complainant arrived accompanied with her father at around 4.15 pm. The complainant reported having been defiled. He accompanied them to hospital for treatment. In his investigations, he established that the complainant was 11 years old; he also issued the complainant with the P3 form which was subsequently filled at Mukurweini District Hospital. Upon gathering sufficient evidence, he charged the appellant with the offence for which he was convicted.

The last prosecution witness was the assistant chief of Igana Sub-location, **Mr Bernard Mwai Waitimu (PW8);** he testified that on 8th December, 2012 at around 7.25 am he received a call from the complainant's father informing him that the appellant had defiled his daughter and he suspected that he could run away. He then proceeded and arrested the appellant and took him to Mukurweini police station. He testified that the appellant was his long-time friend and that he had known him for 50 years and for all this time there was no report of him having been involved in any crime; neither has there been any grudge between the appellant and the complainant's family.

When he was put to his defence, the appellant opted to give a sworn testimony; he testified that on 7th December, 2012 he met the complainant's father while on his way to get the animal feed. He stated that the complainant's father told him that someone was going to deliver the milk once he (the appellant) milked; he also asked him for milk but the appellant told him that he could not give him the milk without the consent of his employer.

After he milked and while he was feeding the cows, he heard children make noise and arguing amongst themselves on who was going to deliver the milk. It was his evidence that the complainant delivered the milk upon the instructions of his father leaving the appellant at the cowshed. She later came back and found the appellant alone.

N(PW2) also came looking for a panga. She found both the appellant and complainant seated outside. He denied that the complainant entered his house or sat on his bed because nobody used to enter his house.

The appellant testified that the complainant's father had wanted to be given milk free of charge and when the appellant declined to give him, he held a grudge against him. He said that he overheard

M(PW3) say that the appellant could not help anybody before she made the call to the complainant's father. He also accused the complainant's father for having seduced his wife on the pretext that he was preaching to her. He warned him not to come back to his house again. The appellant testified that there was bad blood between him and the complainant.

That is as far as the evidence of both the prosecution and the defence went and it is this evidence that the court has to reconsider in exercise of its appellate jurisdiction.

The appellant was convicted of the principal count of defilement contrary to **Section 8(1) (2)** of the **Sexual Offence Act** and it is this particular offence that deserves attention in the analysis of the evidence proffered in the appellant's trial; that provision of the law states in its relevant part as follows:-

> **8. Defilement**
>
> *(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *(2) 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.*

Two critical elements which must be established before one is convicted of the offence of defilement under this provision are first, the act of penetration and second, the age of the victim.

> "Penetration" as a technical term is defined under **Section 2** of the Act to mean *"the partial or complete insertion of the genital organs of a person into the genital organs of another person"*.

The complainant was graphic in her evidence on how the appellant sexually assaulted her; according to her testimony, he removed her skirt and her pant; he unzipped his trouser and inserted his penis into her vagina. She testified that she could not tell how deep the penis entered but for purposes of establishing penetration the depth of insertion does not matter and the insertion of the genital organ of one person into the genital organ of another can either be partial or complete.

I have not found any reason to doubt the complainant's evidence; it is not in dispute, as she testified, that she was at the appellant's residence at the time she is alleged to have been defiled. The appellant himself admitted that she was with him after she returned the milk can to him and that **N (PW2)** found them together although her evidence was that the complainant was in the house while the appellant was outside. According to Naomi, she had been asked to pick a panga from the appellant and again the appellant himself admitted that N came to his house for that particular purpose and that the Panga she came to pick had been left with him by N's mother. N, whom I also find to have been a credible witness and whose evidence was not shaken, testified that the appellant dispatched her away leaving him with the complainant alone.

To corroborate the complainant's evidence, her sister **M (PW3)** saw her go to the appellant's house and later she came back home from the same house crying and complaining that the appellant had defiled her; she immediately took the step of calling her father **(PW6)** using W's **(PW4's)** phone to inform him of what had happened.

Further, the evidence of the clinical officer **(PW5)** left no doubt that the complainant had been defiled; upon examination of the complainant, she established a vaginal discharge from the complainant; she also identified epithelial cells from which she opined that there was a vaginal injury; these coupled with the fact that the complainant's hymen was broken was sufficient proof that there was penetration.

My overall assessment of the entire evidence is that there was not only penetration and thus defilement of the complainant but also that the appellant had the opportunity and time to commit this particular offence of which he was convicted. He may or may not have been unwell when he asked for assistance to have his employer's milk delivered on his behalf as per M's (PW3's) and the complainant's evidence and it may just have been a coincidence that it befell upon the complainant to deliver the milk on his behalf; however, whatever the case may have been, the appellant took this opportunity to commit the offence and even perfected it when he sent N away from his house so that he could be left alone with the complainant. I see no other reason why he encouraged the complainant to remain at his house when she had already delivered the milk can and sent N away as soon as she arrived on the pretext of getting him potatoes.

The appellant testified that there was a grudge between him and the complainant's father because the latter wanted milk from him, free of charge but which he could not give without his employer's permission. He also alleged that the complainant's father seduced his wife at one time and that he had barred him from entering his house. Indeed his defence was that members of the complainant's entire family had conspired against him because they did not want him to work where he was working; in other words the charges against him were ill-motivated.

I agree with the learned magistrate that the appellant's defence was not plausible; as for the allegation of demand for free milk, I do not see why the appellant would have freely allowed the complainant to deliver the milk to the dairy when at the same time he allegedly declined to give her father the milk without his employer's consent. Again this issue of milk together with that of the alleged seduction of his wife were matters that were never put across to the complainant's father or indeed to any of the other prosecution witnesses when they testified.

The other element of the offence against the appellant which I find the prosecution to have established to the required standard is the age of the appellant. A birth notification issued pursuant to **Births and Deaths Act, Cap 149** was admitted in evidence showing that the complainant was born on 13th November, 2001. This implies that at the time the offence was committed on 7th December, 2012 the complainant was within the age bracket of 11 years and below and therefore the appellant was properly charged and, for reasons I have given, convicted under **section 8(1)(2)** of the Sexual Offences Act.

On the whole I have not found any merit in any of the grounds of appeal raised by the appellant; in particular, there is nothing to suggest that there was conspiracy amongst the prosecution witnesses as alleged in the first ground of appeal; the evidence of the clinical officer (PW5) was an expert opinion which was not controverted and, contrary to the appellant's submission, there is no reason why the learned magistrate should not have relied on it; similarly, no reason has been given as to why the learned magistrate should have ignored the evidence of the complainant's **father (PW6)** and that of the **investigations officer (PW7)** as submitted by the appellant in his second ground of appeal.

As far as the defence of the appellant is concerned, the learned magistrate considered it but found it not to have raised any doubt on the prosecution evidence against him. I agree with the learned magistrate that the appellant's defence was not sufficient enough to displace or sway the prosecution case.

As for compliance with **section 169** of the **Criminal Procedure Code**, that section prescribes the contents of a judgment which should include the point or points for determination; the decision thereon and the reasons for determination. The section also says where there is a conviction the judgment must specify the offence and the section under the Penal Code or any other law under which the accused person is convicted and the punishment to which he is sentenced.

My appreciation of the judgment of the trial court is that the learned magistrate generally complied with the provisions of this section in its material particular. The appellant alleged in his submissions that the learned magistrate did not indicate under what law he was convicted and therefore he was prejudiced. Read in its entirety, it is apparent from the judgment that the appellant was convicted of the principal count of defilement contrary to **section 8(1) (2) of the Sexual Offences Act** for which he was sentenced to serve life imprisonment.

I am persuaded that the learned magistrate properly directed herself on the facts and the law and came to the correct conclusion that the prosecution had proved its case beyond all reasonable doubt. I will uphold the conviction and sentence which, in any event, is mandatory. The appeal is dismissed.

Dated, signed and delivered in open court this 3rd June, 2016

Ngaah Jairus

JUDGE