



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CRIMINAL APPEAL NO. 67 OF 2015**

*(Being an appeal from original Conviction and Sentence in the Chief Magistrate's Court at Narok Criminal Case No. 835 of 2014 by A. K. Ithuku - SPM)*

**DAVID MARITA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant was charged with Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. In that on the 14<sup>th</sup> day of May, 2014 at [particulars withheld] village in Narok South District within Narok County in the Republic of Kenya willfully and unlawfully committed an act which caused the penetration of his penis into the vagina of **F. M.** a child aged 7 years.
2. Following a full trial he was found guilty and convicted for the lesser offence of attempted defilement Contrary to Section 9 (1) of the Sexual Offences Act, and sentenced to 15 years imprisonment.
3. He has now appealed to this court against the conviction and sentence. In his amended grounds the Appellant raised 3 grounds. The first ground attacks the sentence as excessive. Ground 2 and 3 principally challenge the quality of the evidence upon which the conviction was based.
4. In submissions supporting the grounds, the appellant argued that, based on the sentence provided for the offence of attempted defilement, the sentence of 15 years was harsh and excessive. The Appellant took issue in the remainder of his grounds, with the alleged erroneous name attributed to him by the Complainant. He stated that the said name - George - was not indicated in the Charge Sheet rendering it defective. He further submitted that the prosecution evidence was insufficient and yet crucial witnesses were not called to testify. He contends that his defence was not accorded due to consideration.
5. In opposing the appeal Ms. Waweru on behalf of the Director of Public Prosecutions stated that all the ingredients of the offence were proved. Regarding identification in particular, she reiterated the Complainant's evidence that the Appellant's name was George which was used by all witnesses. She urged the court to dismiss the appeal.
6. The duty of the first appellate court is to re-evaluate the trial evidence and draw its own conclusion. While so doing, the court bears in mind that the trial court had opportunity to see and hear witnesses at first hand. Hence the court will be slow to upset findings of the trial court based on the credibility of witnesses, unless such findings are plainly wrong and no tribunal properly applying itself and could have arrived at them. (**See Okeno -Vs- Republic [1973] EA 32**).

7. The prosecution case was as follows. The Complainant **F.M.** was a girl aged 7 years in 2014. She lived at a place called [particulars withheld] , Ololulunga with her mother **P.M. (PW2)**, father and brother. The Appellant lived next door to the Complainant's family. He was known in the plot as George. On 14<sup>th</sup> May 2014 the Complainant returned home from school. **PW2** was away at work.

8. As the Complainant was playing in the compound with other children, she ran past the house of the Appellant. The Appellant grabbed her and took her into his house and placed her on a bed. He undressed the Complainant and also undressed. He inserted his penis into the Complainant's genitalia. The child's scream attracted a neighbor **Ann Langat (PW3)** who happened to be home. She pretended, knocking on the Appellant's door, to be asking for fire. As the Appellant attended to the knock the child slipped out, appearing disturbed.

9. When **PW3** questioned her, she said the Appellant had done "*tabia mbaya*" to her. **PW3** waited for **PW2** to come home. The Appellant and the Complainant were escorted to Ololulunga Police Post where **PC Rose Kamau** received them. The Complainant was referred to Ololulunga District Hospital. There she was examined and treated. Subsequently a P3 form was completed. She had injuries and spermatozoa on her genitalia.

10. In his defence, the Appellant gave an unsworn statement. To the effect that his name is **David Mareta**, a trader in bananas obtained from Nyamira and sold in Narok. He said he was arrested on the road by people who claimed they were looking for him. They took his Shs. 2,500/=. When he went to Ololulunga Police Post he found two strangers, a lady and a girl. He said he knew nothing about the case.

11. The incident that gave rise to this case occurred during the day time. The witnesses **PW1, PW2** and **PW3** testified that the Appellant lived next to them. They all referred to him as 'George' and identified him during the trial. The fact that this name was not included in the charge sheet does not render the charge defective. The real question was whether the Appellant is the person who committed the actions complained of.

12. **PW1's** evidence was explicit, though unsworn. She was playing with her friends in the compound when they went past the house of the Appellant who pulled her into his house where he placed her on bed before undressing her. He also undressed and inserted his penis in her genitalia. Her screams drew **PW3** out of her house. She knocked on the house of the Appellant on the pretext that she wanted fire. The Complainant emerged from that room appearing "**disturbed**". Immediately she told **PW3** that the Appellant had done "*tabia mbaya*" - a child's polite term for sexual activity - to her. Medical evidence that there injuries to the Complainant's genitalia and the presence of spermatozoa confirm the evidence of **PW1** and **PW3**.

13. The Appellant complains that certain crucial witnesses were not called. It is not clear who these were. Under Section 143 of the Evidence Act the prosecution is not obligated to call a certain number of witnesses. Besides under the proviso to Section 124 of the Evidence Act the court is entitled to act on the sole testimony of victims of Sexual Offences so long as it believes the witness and gives reasons.

14. In this case, there was firm evidence of penetration and the Appellant was properly identified. His defence was really a mere denial which provided no reason why strangers as he claimed the Complainants were, implicated him in this case. That defence was not canvassed with **PW1, PW2** and **PW3** even as they asserted that he was their next door neighbor in the material period.

15. The Complainant in the case was a 7 years old girl by her evidence. The court noted before conducting a *voire dire* examination that she was "**a little girl**". The Clinical Officer who examined her estimated her age to be 7 years. The trial magistrate was alive to the question of the Complainant's age. In this regard he stated:-

**"In this case the age is give an 7 years. An age assessment report was produced. This was consolidated by the P3 form and the testimony of the minor and that of her mother. Determination of age in sexual offences is important because the sentences are graduated**

**with age.”**

16. Even without the age assessment report which in my view was irregularly produced by the investigating officer, the trial magistrate was entitled to find the age proved, based on the other stated evidence.

17. Regarding proof of age the Court of Appeal stated in **Mwalongo Chichoro Mwajembe -Vs- Republic Msa. Cr. App. No. 24 of 2015 (UR)** that:

**“.....the question of proof of age has finally been settled by a 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 Ucher -Vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of 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 decisions 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. The trial magistrate in this case found that because the hymen was intact, no penetration was proved. There is no requirement that the hymen be breached for penetration to be proved. Section 2 of the Sexual Offences Act defines penetration as:

**“Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.**

19. The Complainant said that the Appellant inserted his penis into her genitalia. She screamed due to pain. Inflammation was confirmed around the labia majora and minora of the victim’s genitalia. The urine microscopy showed pus cells, spermatozoa and yeast cells.

20. The Court of Appeal has in this case of **Erick Onyango Ondeng’ -vs-Republic NAI CA No. 5 of 2013 [2014] eKLR** adopted the decision of the Supreme Court of Uganda in **Twehangane Alfred -Vs- Uganda Criminal Appeal No. 139 of 2001, (2003) UGCA 6** where it stated regarding penetration that:

**“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”**

21. The inflammation of the complainant’s genital organ and presence of spermatozoa thereon, together with her evidence clearly established penetration as defined in Section 2 of the Sexual Offences Act. It was a misdirection for the trial magistrate to conclude that because the hymen was not breached there was no evidence of penetration.

22. I do therefore quash the conviction for the lesser offence of attempted defilement and substitute therefor a conviction for the proved offence of Defilement Contrary to Section 8 (1) as read with Section (8) 2 of the Sexual Offences Act. Similarly, the sentence of 15 years imprisonment is hereby set aside. The minimum penalty imposed by Section 8 (2) of the Sexual Offences Act is life imprisonment. The Appellant is accordingly sentenced to life imprisonment. The appeal therefore stands dismissed.

**Delivered and signed at Naivasha, this 14<sup>th</sup> day of July, 2016.**

**In the presence of:-**

**For the DPP** : **Mr. Koima**

**C/C** : **Barasa**

**Appellant** : **present**

**C. MEOLI**

**JUDGE**