REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 43 OF 2014

EDWARD KATANA SAFARI …….APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 55 f 2013 of the Chief Magistrate's Court at Malindi – L. Gicheha, SPM)

JUDGEMENT

The appellant was charged with the offence of defilement of a girl contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on 7.12.2013 at [particulars withheld] in Magarini District within the Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of G W a girl aged seven years. There was an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

The trial court convicted the appellant on the main count of defilement and sentenced him to life imprisonment. The grounds of appeal as per the amended grounds are as follows: -

1. That the learned trial magistrate erred in law and fact in considering the evidence of my arresters without seeing that the same were not reliable witnesses.

2. That the learned trial magistrate did not consider that the charge of defilement was defective hence unreliable to justify safe conviction.

3. That the learned trial magistrate erred in law and fact in failing to consider that the victims age was, not proved within the requirement of law.

4. That the learned trial magistrate erred in law and fact in not considering that the same was a made up case hence un-reliable to safe conviction.

5. That the learned trial magistrate did not consider that the prosecution side did not prove its case beyond reasonable doubt.

6. That the learned trial magistrate failed to consider my defence as the same was reliable.

The appellant filed written submissions and entirely relied on them. The submissions raises several issues. It is submitted that although PW3 alleged the appellant and the victim did not have their clothes

on when PW3 went to the scene no clothes were produced. The appellant was allegedly taken to the area chief but there is no evidence to show that he was taken there while naked. Those who purportedly saw him could have confirmed that he had committed the offence if he was to be taken without having put on his clothes. That would have proved that he was caught red-handed. The chief was a vital witness but was not called to testify. The investigating officer did not visit the scene or take photographs thereof. It was alleged that the offence occurred in a forest but there is no proof for that.

It is the appellant's submissions that the prosecution case amounted to mere assertions. He relies on the case of MUIRURI NJOROGE V REPUBLIC App. No. 185 of 1987 where the court held that the court does not act on mere assertions unless they are proved by evidence. The trial court acted on hearsay evidence and this led to a miscarriage of justice.

It is further submitted that the offence on defilement requires proof of penetration and age of the victim. The medical evidence did not prove the age of the victim. PW5, the medical officer simply stated that the child was seven years old. Although the complainant's hymen was broken, it is not established what caused the breaking of the hymen. Hymen can be broken by many causes including sports. The age of the injuries is also not indicated. The appellant relied on the case of **BEN MAINA MWANGI V REPUBLIC Nairobi Criminal App 471 of 2001, [2006] eKLR**. In that case Lesit J stated as follows on the issue of the age of the injuries: -

> "**I was not happy with the Doctor's evidence. He was meticulous to record all his finding on the Complainant and even the Appellant. However, he overlooked the most important aspect of the examination which was to show the age of the injuries he found on the Complainant It is unacceptable that the Doctor saw the hymen missing and presence of laceration on the anus but failed to give the age of these injuries. That appears to have been deliberate and in my view the learned trial magistrate should not have let the Doctor go free. At the end of the day the Doctor's findings were very important, were positive to findings of defilement but fell short of connecting the findings to the Appellant by failing to connect the injuries to the time of the offence. The Doctor's findings did not connect the date of the alleged defilement of the Complainant with the age of the injuries noted. It was worthless evidence for purposes of this case**."

According to the appellant the offence occurred on 7.12.2013 but the P3 form was filled on 13.12.2013. the P3 form does not indicate that the injuries were caused by a male organ or a blunt object. The injuries were assessed as grievous harm and that was not proper. Grievous harm injuries are serious and are permanent. They endanger the life of the victim or his health. The person who treated the complainant for the first time was not called to testify. In view of the fact that the age of the injuries as well as the age of the complainant was not given, the appeal should succeed. Further, the medical evidence did not capture the correct nature of injuries and that was improper. The appellant relied on the case of **KAINGU ELIAS KASOMO V REPUBLIC Malindi Court of Appeal Criminal Appeal No. 504 of 2010** where it was held that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence.

The appellant also contends that the charge sheet was defective. It indicated that the appellant was charged with an offence contrary to section 8 (1) and (3) of the Sexual Offences Act. Section 8 (3) refers to children of the age between twelve and fifteen years. The trial court wrongly sentenced him to life imprisonment yet under that section he was to be sentenced to 20 years.

The state opposed the appeal. Mr. Fedha, prosecuting counsel submitted that PW1 narrated what happened to her. The evidence proved that there was penetration. The victim was a child. The medical officer produced P3 form and treatment notes which showed the age of the child. The hymen was broken. The investigations connected the appellant to the offence.

This is a first appeal and this court is bound to consider and evaluate the evidence afresh and make its own independent opinion. Before the trial court six witnesses testified for the prosecution. PW1 was the complainant. She gave unsworn evidence as the trial court after conducting voir dire found that she

did not understand the meaning of testifying under oath. PW1 testified that she was a pupil at [particulars withheld]. She was in KG1. On the 7.12.2013 she was playing with her friends in the evening but there was light. While looking at the appellant she told the court that the person took her to the forest, removed her clothes and told her to lie down. She had a panty. The person lay on top of her and did bad manners. She started screaming as she was being hurt. She started bleeding from her private parts. People went there and took her to the chief then to hospital where she was given medication. She did not know the appellant. PW2 is the mother of PW1. She runs a hotel and was seated at the hotel when she saw people passing while holding PW1. She was informed that PW1 had been defiled at the forest. The people were also holding the appellant taking him to the assistant chief. She went with them and they were referred to Marereni police station. The police referred them to Malindi hospital where PW1 was treated. It is her evidence that PW1 was seven years old.

PW3 F K K is a watchman. On the 7.12.2012 he was reporting on duty. At about 8.00pm when he found PW1 playing. He told PW1 to go home. Before PW1 left he saw the appellant coming out of a club which was near the school he was guarding. The appellant held PW1 by her hand and removed a biscuit from his pocket and gave PW1. The appellant and the child passed behind the class where there is a forest and entered into the forest. A neighbor, PW4, passed by and he informed him that he had seen someone entering into the forest with a child. He did not know the appellant. They decided to follow them. They entered the forest and heard the child screaming. They reached the scene and found the appellant had removed the child's clothes and had defiled her. They held the man and took him together with the child to the assistant chief. They also found the child's mother who went with them to the assistant chief. The assistant chief called for a motor bike and they were referred to Marereni police station. On the way, the appellant jumped out of the motor bike but they arrested him. It is the evidence of PW3 that the appellant had removed his trouser when they found him with the child. The police referred the child to Malindi hospital. When the appellant was arrested, he had rastas but did not have them when PW3 was testifying. Members of Public wanted to beat the appellant but they were stopped and the appellant was taken to the assistant chief. He was scared to follow the appellant alone in the forest when he saw him heading there with the child.

PW4 S K K lives at Kibaoni and he is a fisherman. On 7.12.2013 he was heading home and as he passed near the school he met PW3 who told him that someone had entered the forest with a child and did not know what was happening. They entered in the forest and found someone defiling the child. They arrested him and took him to the assistant chief. They found the mother's child and informed her what had happened. They took the appellant to the police and they were also referred to Malindi hospital. He did not know the appellant. The appellant had no weapon when they arrested him.

PW5 IBRAHIM ABDULAHI was a senior clinical officer at Malindi hospital. He examined PW1 on 13.12.2013 and filled the P3 form. PW1 had been treated at the hospital. She was seven years old and was put on antibiotics. On genital examination, there was inflammation and bruises on her vaginal walls. The hymen was broken. There was no discharge. No spermatozoa was seen. He concluded that there was penetration. PW6 Sergeant SAMUEL NGARE was attached to Marereni police station. On 7.12.2013 at about 7.00 pm he received a call from the report office. He went there and found PW1 accompanied by her mother and members of the public. The appellant had been arrested and it was alledged that he had been found red-handed defiling PW1 at [particulars withheld]. He referred PW1 to hospital and later charged the appellant. The doctor confirmed that PW1 was defiled. PW1 talked of a Rastafarian. The child said she was defiled by a Rastafarian (original handwritten script).

In his unsworn statement, the appellant stated that he lives in Marereni and works in the salt mine. On 7.12.2013 at about 5.30 pm he left his house and went to his uncle. He reached Kibaoni at 6.00 pm and alighted to pass through his young uncle's place. There was a school on the left side and he passed it. After walking hundred metres ahead he met two men who stopped him. He did not talk and continued walking. The two young men followed him while having rungus. They took his money and shared it. They also took his voters and identity cards. He was carrying a letter to his uncle concerning dowry. He was pulled to the school where he met people who said "there he is". He was assaulted and taken to the chief. He tried to explain but the police had been called. A motor bike was brought and he was taken to Marereni police station. He was later charged before the Malindi court with the offence of defilement.

The appeal raises the following issues: -

(i) Was the age of PW1 proved or was pw1 a child.

(ii) Was the appellant properly identified.

(iii) Did the prosecution prove its case beyond reasonable doubt.

Section 2 of the Sexual Offences Act defines a child as follows; -

"Child has the meaning assigned thereto in the Children Act. Under the Children Act 8 of 2001, section n 2 defines a child as "any human being under the age of 18 years".

The same section defines a child of tender years as **"a child under the age of ten years."** The Court deemed it necessary to conduct a *voire dire* examination whose essence is to determine whether or not a minor of tender years understands the solemnity of oath-taking as per **Section 19(1)** Oaths and Statutory Declaration Act. See **JOHNSON MUIRURI V. REPUBLIC [1983] KLR 447 (C.A).**

The importance of proving age was underscored by the Court of Appeal in **ALFAYO GOMBE OKELLO V REPUBLIC [2010] EKLR** where it was held that: -

"In its wisdom, Parliament chose to categorise the gravity of that offence <u>on the basis of the age of the victim,</u> and <u>consequently, the age of the victim is a necessary</u> ingredient of the offence which ought to be <u>proved beyond reasonable doubt</u>" (own emphasis)

In the present case, it was PW1's mother who escorted her to the police station and for the medical examination where the P3 form was filled in. She also testified that the child was 7 years old. The trial court deemed that the child was 7 years as per PW2's testimony and its own observation. It found that the prosecution had proved the age of the minor though no birth certificate or age assessment was produced. It held that: **"...the court saw the child and her body stature confirms that she cannot be more than 7 years. PW2(her mother) also testified and confirmed that the child was 7 years. This is the same information she gave the doctor who first examined the child and also the doctor who filled the P3 form."**

To give weight to its judicial reasoning the trial court followed the High Court decision of **SKO V REP [2014] eKLR** where it was held that age could be assessed by other evidence such as that of the parent or guardian and not necessarily using formal documents such as birth certificate which might be necessary in borderline cases. The appellant has challenged this point and relied upon the Court of Appeal decision in the **KAINGU CASE** (supra) where the Court of Appeal emphasised that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence. The Court of Appeal in **STEPHEN NGULI MULILI V REPUBLIC [2014] EKLR** held that: -

"In the case of KAINGU ELIAS KASOMO V R, MALINDI CRA. No. 504 OF 2014, the Court of Appeal stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence. However, as the Court clarified in TUMAINI MAASAI MWANYA V R, Mombasa CR.A. No. 364 of 2010, proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age."

The trial court relied on its observation of the child, the mother's testimony and further that the information on her age is the same as was given to the doctor who first examined the child and the one who filled the p3 form. On this point, I wish to point out that a P3 form is not conclusive evidence of age as Mabeya, J held in **STEPHEN MUGAMBI V REPUBLIC [2015] eKLR *where*** he stated that

"A P3 form is not conclusive unless the Medical Officer examining the child states with certainty and clarity that he undertook an age assessment of the victim before estimating the age."

It is however clear from the evidence and it can be concluded without doubt that the complainant was a child of tender years. The trial court had the advantage of seeing and assessing the witnesses at first hand hence its determination that the apparent age of PW1 was that of a child of tender years by observation of the stature of her body cannot be faulted. Section 2 of the Children Act provides that **"age- where actual age is not known means apparent age**". Even if the exact age is doubted, the apparent age is known. Therefore, the ingredient of age to the extent that it refers to whether or not the complainant was a child was proved beyond reasonable doubt.

My view on the issue is that the offence of defilement is committed when there is penetration on a child. Section 8 (1) of the sexual Offences Act is the section which creates the offence of defilement. The issue of the exact age of the child only comes in after the act of penetration has been established. The importance of age basically comes into play to determine what punishment to impose. The younger the child the more severe the punishment. I do not prescribe to the idea that once the age of the victim is not proved, then the offender should be acquitted. The worst case scenario would be to assume that the child was over 18 years and convict the offender with the offence of rape. No one is ageless. It is also prudent at times to order for the age of the child to be assessed before sentencing the offender. It cannot be the intention of the law that if one causes penetration to a child whose age is unknown, then no offence has been committed and the offender should be set free. That line of reasoning defeats the same purpose as to why the Sexual Offences Act was enacted. Section 2 of the Children Act clarifies the issue by stating that where the actual age is unknown then the apparent age should apply. The trial court saw the child. She was in pre-primary school (KG1). It is common knowledge that in Kenya children join class one at the age of seven years. Some may start class one at the age of eight or even ten years. The fact remains that anyone who is in pre-primary school is a child. The only exception comes in when an adult who missed school during childhood decides to go back to school and starts from nursery. There is no way out. Once there is penetration on a child, the fact that the child's age is unknown cannot open the doors wide open for the offender to majestically walk away unpunished. What would be the explanation to the child who has been defiled. Can we sufficiently tell the child that although you were defiled, since your age is unknown, no offence was committed. In this case, the apparent age of the child is clear. A birth certificate or immunization card are not the only documents which prove one's age. Age assessment can be done. Apparent age can also prove one's age. I do find that PW1 was a child. The apparent age of children in pre-unit school is that of tender age. The Black's Law dictionary defines the work apparent as **"visible, manifest, obvious or ostensible, seeming."**

The appellant's defence is that he was accosted by two youth while on his way to his uncle's place. He had alighted at Kibaoni at 6.00 pm. Although PW3 estimated the time to be 8.00 pm, it is clear from the evidence of PW1 and PW6 that the offence occurred before 7.00 pm PW1 was still playing and testified that there was light. This is not electricity light. PW6 was called to the report office at 7.00 pm and he found PW1 and PW2 already at the station. The appellant's evidence is that he reached Kibaoni at 6.00 pm. PW3 was able to see someone coming out of the club and removing a biscuit from his pocket.

PW1 testified that she could not identify her defiler. It is the evidence of PW6 that PW1 told him that the offender had rastas. PW3 also confirmed that the appellant had rastas when they arrested him but had no rastas at the time PW3 was testifying. The evidence of PW3 and PW4 is that they followed the appellant to the forest and heard the child screaming. The child herself testified that she screamed as she was being hurt. According to PW3 and PW4, the child was naked and they helped her to put on her clothes. They found the appellant red-handed defiling the child and arrested him at the scene. The appellant's evidence that he was accosted by the two youths does not displace the prosecution evidence that he was arrested by PW3 and PW4. These two witnesses did not know the appellant. No malice can be imputed on them. They were just good Kenyans who could not understand why someone was entering the forest with a child. Only the appellant and the child were in the forest. There is no mistaken identity. The identification is proper and undoubtful.

The next issue is whether the prosecution proved its case beyond reasonable doubt. The appellant contends that the charge sheet was defective, that the age of the injuries is not given, that the injuries were classified as grievous harm which is improper, that crucial witnesses were not called and that this was a made up case.

On the issue of defectiveness of the charge sheet, it is important to point out that the appellant was charged with an offence contrary to Section 8(1)(3) of the Sexual Offences Act. The appellant states that if the child was 7 years of age as claimed, then the charge sheet ought to have read contrary to Section 8(1) (2) of the Sexual Offences Act. I wish to mention that the better way to draft the charges is to indicate Section 8(1) as read with 8(3) or 8(2) or at the least to add a comma between the subsections for example 8(1), (2). This said, the drafting without the suggested words **"as read with"** or the comma does not prejudice an accused person if it does not misdirect them as to the offence charged or if it is in harmony with the evidence presented. Meoli, J in **JOSEPH KINYUA NYAGA MALINDI HCCRA NO.116 OF 2010 (UR)** stated as follows:

> "**I find it necessary to point out that the framing of the charge is not entirely satisfactory. The statement of the offence cites section 8(1) and (3) of the Sexual Offences Act, but omits the words "as read with" in between the subsections. This is clearly erroneous but does not render the charge sheet defective. There are two reasons for saying so. Firstly, the inclusion of the two subsections creating both offence and penalty thereof readily discloses the nature of the offence, regardless of the poor syntax**."

The Court of Appeal in **YONGO VS. REPUBLIC [1983] KLR 319,** also referenced as **JASON AKUMU YONGO V REPUBLIC [1983] eKLR,** held that a charge is defective under **Section 214(1)** of the Criminal Procedure Code where the charge does not accord with the evidence adduced at the trial or where it gives a misdirection of the alleged offence in the particulars. It has been established that if the defectiveness of the charge sheet prejudices fair trial, that is, it embarrasses or prejudices the accused person's endeavour to prepare his defence to the charge, then the conviction cannot stand see **DANIEL NYARERU ACHOKI V REPUBLIC [2000] EKLR.** In the present case, the charge of defilement was read out and explained to the appellant, secondly the particulars given were in accord with the evidence presented. The evidence to be put forth was the age of the complainant who was alleged to be a minor PW1, and proof of commission of the offence to which witnesses and evidence were called with a bid to prove the defilement. The appellant was not given an impression of a different offence being charged nor was the evidence contrary to the particulars given. He was therefore not prejudiced in the preparation of his defence.

The appellant contends that the assistant chief ought to have been summoned to testify. The evidence shows that when the appellant was arrested, he was taken to the assistant chief who advised the members of public to take him to Marereni police station. The only role played by the chief was to refer the appellant and those who arrested him including PW3 and PW4 to the police. It is not contended that the circumstances changed in between from the chief's place to the police station. The chief's evidence would simply be to confirm that the appellant was taken to him. The appellant testified that he was assaulted and taken to the chief. Section 143 of the Evidence Act states as follows: -

> **"No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact."**

Therefore, as the law does not require that a particular number of witness or better still a particular witness to be called to prove the identity of the perpetrator and for that matter that he was arrested naked, the question to ask is whether or not his identity was established. The appellant's defence was basically that '**it was not him**'. In other words, that it was a case of mistaken identity and trumped up charges. The trial court considered the defence stating that it did not appear truthful and was an afterthought. It found that the appellant was arrested at the forest and not by the roadside. I do agree with those findings.

The appellant has raised the issue of the nature and age of the injuries. The case of **BEN MAINA MWANGI V REPUBLIC** (supra) has been cited. My view on the evidence provided in a P3 form is that

that evidence cannot be taken as **"stand alone"** proof on its own. The P3 form is part of the evidence. I do not agree with the findings of Lesit J that if the age of the injuries is not given the evidence becomes worthless. I do not think there is a medical instrument which can determine the age of an injury unlike age assessment which is scientifically done. The doctor only assesses the age of the injury using the information provided by the patient. In this case, PW1 was not complaining of having been defiled before 7.12.2013. The incident took place on 7.12.2013. That is the evidence on record. The P3 form is not filled on the same date of the injury. The doctor has to first give time for the injuries to heal before filling the P3 form. That is why at times cases of assault change to murder or manslaughter if the victim dies out of the injuries after nursing them for some time. The P3 form was filled on 13.12.2013. That is proper. Treatment notes from the same Malindi hospital were used to assist PW5 to fill the P3 form. The injures were threatening PW1's life as she was a minor who could have been infected with all sorts of veneral diseases. That is why the injuries were classified as grievous harm. The appellant's contentions on the age of injuries must fail.

From the evidence on record, I do find that the defence evidence did not raise any doubt on the prosecution case. The prosecution did prove its case beyond reasonable doubt. The evidence of PW3 and PW4 is quite clear. The appellant was arrested at the forest while defiling PW1. The appeal lacks merit and is hereby disallowed.

Dated and delivered this 10th day of November, 2016.

S.J. CHITEMBWE

JUDGE