REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 42 OF 2011

TONY KIAMBI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT.

The Appellant, Tony Kiambi was charged with the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act, No. 3 of 2006. The Appellant faced a second charge of committing an Indecent Act with a child contrary to section 11 (1) of the same Act.

The Appellant was convicted on both and sentenced to twenty five years and ten years respectively with an order that the sentences do run concurrently.

The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. In the amended grounds of appeal, the Appellant raised the following issues:

1. **That the appellant was not properly identified;**
2. **That the charged sheet was defective because it did not include the word unlawful;**
3. **That failure to provide the appellant with witness statements was prejudicial to him;**
4. **Age of complainant was not proved;**
5. **That the offence was not proved to the required standard**.

The appellant was not represented. He filed written submissions on 4th February, 2015, and at the hearing of the appeal, he relied on the filed grounds of appeal and written submissions in support of his appeal. I noted that the filed grounds and submissions were poorly drafted. I have nevertheless carefully considered the same.

Mr. Mulochi argued this appeal on behalf of the State. While partly conceding the appeal, he submitted inter alia that the Appellant was charged with defilement contrary to section 8 (1) (3) of the Sexual Offences Act 2006; and also faced a charge of committing an indecent act with a child contrary to section 11 (1) of the same Act. It was his contention that convicting the Appellant on both counts was an error and that he should not have been convicted of the second charge having been convicted of the main charge. He further submitted that there was sufficient evidence to convict the Appellant; that PW 1 who was a minor was well known to the appellant that he defiled her from 9 to 11 pm in his house; that her

evidence was corroborated by that of PW2 – PW5. Consequently, he urged that the Appellant was properly convicted of defilement and that the sentence should not have been less than 20 years in respect of the main count. He therefore urged the court to uphold sentence of 25 years on count 1 but allow the appeal of 10 years on the second charge.

This being the first appellate court I will subject the evidence adduced before the trial court to a fresh evaluation and analysis and draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. The duty of a first appellate court was set out by the Court of Appeal decision of **Okeno Vrs. Republic** 1972 EA 32 where it is stated as follows:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."**

Briefly the case before the trial court was as follows: The complainant B. N. was a minor aged about 15 years. On 20.8.2010 about 9.00 pm the complainant was at the home of the appellant where she had been for 3 days because the appellant's mother had gone away and she was requested to go and stay there with the children of the appellant's sister who included PW4 Joy. That the children borrowed a match box from the appellant and after use, the appellant whom PW1 knew as Tony asked her to take back the match box. When returning the match box PW1 found the appellant at the door, he grabbed her, pushed her into his house and undressed her, fell her on the floor of his house, tore her cloths and defiled her. L came calling the appellant's name about 11 pm and it is then that he released her. L also called PW1's name and she got out of the appellant's house. PW3 Ann PW1's aunt and guardian took her to Meru Police Station and then to the hospital.

PW2 L K told the court that on the said night, about 11.00 pm Joy Kinya (PW4) called her and informed her that, Tony the appellant had locked up the complainant in his house. She called out Tony's name but he did not respond. She called B the complainant, who responded and came out of the house.

PW2 said she had heard B crying from Tony's house. She asked B if anything was done to her but she denied but when her family members came, she admitted. PW3 A K, PW1's aunt said that she was asleep about 1.00 am when K woke her up and told her that Tony had locked up the complainant in his house. She went to the house where the complainant was sleeping with Joy (PW4) and one other child and found the complainant crying. On interrogating her, she admitted to having been defiled and they went to report at the police station. She said that the appellant disappeared from that day till September when she pointed him out at [particulars withheld] Market.

PW4 J K who was aged 12 years is a niece to the appellant. She did not give evidence on oath and generally renounced the statement she had made to the police and told the court that she had been made to sign a statement that she did not know the contents. She however, agreed that she had been asleep in the same house with the complainant on the material night and only woke up to find the complainant missing and it is then she told Mama N L (PW2). That Lwent to call out complainant's name who responded and came out of the house where her three uncles Tony, Patrick and Boniface used to sleep and that the complainant declined to say what she had been doing in that house. At the end of her testimony the prosecution said that she was unfavourable witness.

PW5 Sgt. Catherine Nyaga of the Meru Police Station recalled recording a defilement report from the complainant and her guardian on the night of 20.8.2010 about 11.00 pm. She observed that the

complainant was carrying, was wearing an under sized trouser, was carrying her pant and biker which were torn (PEx2&3). She said that next day she visited the scene, was shown Tony's house by his mother and under the bed of the said house she recovered a jeans trouser which the complainant identified as hers (PEx 1). PW5 said that she recorded PW4's statement and never forced her to sign any statement and produced it in evidence. PW5 also produced certified copy of the complainant's birth certificate (PEx5).

The complainant was examined by Dr. Isaac Macharia on 23.8.2010. He said the hymen was perforated and she had been treated at the Meru General Hospital. He was of the opinion that the complainant took part in sexual intercourse.

When called upon to defend himself, the appellant opted to testify on oath. He said that he was arrested and on enquiring why he was arrested, he was informed of the defilement. He said that it was a fabrication because he had disagreed with the complainants.

Having reviewed all the evidence that was adduced before the trial court, there is no doubt that the complainant was a minor. A birth certificate was produced (PEx5) which confirms that she was born on 11.12.1995. When the offence was committed on 20.8.2010, she was about 15 years old but not 13 years as stated in her evidence. Contrary to the appellant's submission that the age was not proved, the complainant's age was proved by way of production of birth certificate.

I am also satisfied beyond any doubt that the complainant was defiled. PW1 narrated in detail what happened to her. PW6 found PW1's hymen to have been recently perforated, which was evidence of sexual intercourse. PW2, 3, 4 and 5 also testified as to the state in which they found PW1 crying and distraught with her inner clothes torn.

The only question is who committed the act. From the evidence of PW1, 2, 3 and 4, there is no doubt that PW1 had gone to keep PW4 company and the sibling in the appellant's mother's house. PW1 said that it was not the first time she had gone to keep them company.

PW1's evidence was corroborated by that of PW2 that she was indeed in the appellant's house on that night. Although PW4 tried to say that the house belonged to her other uncles, PW2 who is married to the appellant's brother was clear, that when she called out the complainant's name, she emerged from Tony's (appellant) house and that she was crying. PW2 also told the court that it is PW4 who went to call her to inform her that the complainant had been locked up by the appellant in his house. Soon after the incident, PW1 and PW3 reported to PW5 that it is Tony (the appellant) who had committed the offence. Though the incident took place at night, PW1 was in the appellants mother's house, PW1 said the appellant had called asking for the match box and that is when she took it to him. When PW5 visited the scene and asked for Tony's house, the mother showed her the house where she recovered the complainant's jeans trouser under the mattress. To crown it all, PW2 knew the house to be Tony's house. In my view there is overwhelming evidence that the incident took place in the appellant's house and I am satisfied that it is Tony who committed the offence. He was a person well known to the complainant. The appellant denied that there was bad blood between him and PW1 and there was therefore no reason for the prosecution to fabricate the allegation against him.

In his defence, the appellant alleged that PW1's aunt, PW3, had fabricated the allegations because he had disagreements with her. Pressed in cross examination, he was not specific on the nature of the disagreement between him and PW3, and only termed it a family matter and that further said that PW3 used to claim that he abuses her. The appellant has not alluded to any disagreement. I doubt that PW3 would have allowed PW1 to go to keep PW4 company when the grandmother was away if indeed there was misunderstanding between PW3 and the appellant. The defence was not believable and the trial court rightly dismissed it as such. The trial court came to the conclusion that it is the appellant who defiled the complainant and I find no reason to fault the said finding.

It is the appellant's contention that the charge was defective because the word "unlawful" was not included. It may be true that the said word was not included in the charge but under section 8(1) of the SOA, once the child was defiled the act is unlawful because there is no requirement for consent due to

incapacity by the minor. Failure to include the word unlawful in the charge cannot vitiate the charge and is not prejudicial to the appellant in any way. The other particulars of the charge were very clear, that the appellant committed the act with a minor. That ground must fail.

The appellant also complains that he was prejudiced when witness statements were not given to him. Under Article 50(j) the accused person has a right to know the case he is facing and hence is entitled to witness statements in advance. When the accused appeared before the trial court, he asked for witness statements and an order was made that he be supplied with the same at his cost. On several occasions when the case came up, the statements were not availed to him. However, on 13.10.2010, the prosecutor said that he had made arrangements to supply the appellant with statements. On 19.1.2011, the appellant confirmed that he had statements of the 4 witnesses, complainant, her aunt, doctor and police officer. It seems that the statements of PW2 and 4 were not given to him. There is no record whether or not the other statements were given to the appellant but in any event PW2 and 5's evidence would not make a difference to the prosecution case. PW2 was also cross examined by the appellant and the trial court observed that PW2 and 4 were cautious when testifying so as not to implicate the accused being a brother in law to PW2 and uncle to PW4. PW5 had testified that the two PW2 and 4 had been reluctant to come to court because of threats from Appellant's brother. No wonder, PW4 tended to change her statement while PW2 was very cautious on what she said. In my view, failure to avail statements of the 2 witnesses if at all, does not in any way prejudice the defence. That does not however, excuse the court's failure to ensure that the appellant's rights under article 50 of the Constitution were protected. That ground must fail.

I find no reason to fault the trial court's judgment. Upon conviction, the trial court went ahead and convicted the appellant on both the 1st charge of defilement and the second charge of indecent act thus falling into serious error. The two offences arise from the same transaction. The second charge should have been an alternative of the main charge and once a finding was made on the main charge, no finding should have been made on the alternative charge. For that reason, I quash the conviction on the second charge and set aside the sentence of 10 years imprisonment. A person who defiles a girl aged 12 to 15 years is liable to imprisonment for not less than 20 years imprisonment upon conviction. The appellant was sentenced to 25 years imprisonment. The sentence is not excessive, it is lawful and I confirm it. In the end, the appeal partially succeeds in respect of count II and the appellant will serve 25 years imprisonment on count I. It is so ordered.

DATED AND DELIVERED ON 6th DAY OF MARCH, 2015.

R. P. V. WENDOH

JUDGE.

Mungai for State

Jane Court Assistant

Appellant present.