REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 265 OF 2010

JOSEPH WAIRUGUINI MURIITHI……..…..……..APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

(Being an appeal against conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 167 of 2008 (Hon. D. Ole Keiwua) on 26th October, 2010)

JUDGMENT

The appellant was charged and convicted of two counts of defilement of a child contrary to **section 8(1) (2)** of the **Sexual Offences Act No. 3 of 2006.** In the first count it was alleged that on the 15th day of February, 2008 in Nyeri North District within central province, the appellant intentionally and unlawfully committed an act of penetration to RWW a child aged 8 years. And in the second count, it was alleged that on the same date and place, the appellant intentionally committed an act of penetration to JWK, a child aged 10 years. He was sentenced to life imprisonment on each of those counts with the sentences running concurrently.

For each of the two counts, the appellant was also charged with the alternative count of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act** but since he was convicted of the principal counts, there was no finding on these alternative charges and thus they are of little concern in this appeal.

The appellant has appealed against both conviction and sentence and in his petition he has faulted the learned magistrate's decision on the following grounds:-

1. The sentence imposed upon the appellant was illegal and that he was detained for more than five days contrary to article **49(f)(i)** and **(ii)** of the **Constitution**;

2. The learned magistrate erred in law in failing to consider that the appellant was not medically examined to prove that he was in any way connected with the offences with he was charged and convicted;

3. The learned magistrate erred in failing to consider an identification parade was necessary; and

4. The learned magistrate erred in law in meting out a life sentence against the appellant when case against him had not been proved to the required standard.

The two minors who are said to have been defiled testified that on the material date they were walking home from school when they met the appellant; the appellant lured them into a nearby bush where he

defiled each of them in turns. They gave graphic details of how the appellant assaulted them sexually. The complainants were taken for treatment when they reported this assault to their parents.

It turned out from the complainants' testimony that they did not know the appellant before he allegedly assaulted them. In her testimony, the second complainant's mother, **GWK (PW3)**, told her that their assailant was a person she described as a young man who carried two polythene bags, one white and the other green. In those bags, there was what appeared like cassava and clothes.

With this information, the complaint's parents started looking for this stranger and in the course of their endeavours they met one Muriuki who told them that he had met a young man carrying two paper bags and who was looking for employment as herds boy. The complaint's father bumped into a man who fitted the description given by Muriuki. He therefore asked the witness to come along with the girls and confirm whether he was the person who had defiled them the previous day. It would appear from her testimony that her husband went with the appellant to them; according to her evidence, he was accompanied with the appellant and one Wamarwa. The complainant's identified him as the person who had defiled them. He had a white polythene bag packed with his clothes. Upon interrogation he admitted having met the complainant's the previous day.

According to the police, they escorted the appellant together with complainants to Kiganjo police station where they reported the children's case. The appellant was detained at the station as the witness and the complainant proceeded to Nyeri Provincial General Hospital where the police referred them for treatment. The doctor at the hospital confirmed that indeed the children had been defiled and in this regard the witness produced the treatment cards showing that the complainants had been treated of the injuries they sustained.

The witness identified the polythene bag the appellant is said to have been carrying; she testified that the complainants identified in it the grey trousers the appellant is said to have been wearing on the day he allegedly committed the offence. This particular trouser was also produced in court.

JWG (PW4) is a father to **RW (PW1).** He testified that on the evening of 15th February, 2008, his daughter told her that she had been defiled together with her class mate, **W (PW2)**. The witness made a report to the chief and on 16th February, 2008, he embarked on a search for the culprit based on the description the complainants had given him. He met the appellant whom he said was carrying a paper bag packed with clothes. The witness suspected that the appellant, being a stranger in the village, could possibly be the person who defiled the complainants. He called his wife who was taking the complainants to hospital and informed her to wait for them to confirm whether the appellant was the person who had assaulted them the previous day. Somehow, this witness led the appellant to the bus stage where the complainants and (PW3) were waiting. According to his evidence, the complainants identified him as the person who had sexually assaulted them though he had changed his clothes; they pulled a greyish trouser from his bag which they identified as the one he was wearing at the time of the offence. With this evidence, the witness, his wife and the complainants took the appellant to Kiganjo police station where they handed him over to the police as they proceeded to hospital for examination and treatment of the complainants.

Police constable Phillip Ruto (PW5) who was then currently attached at Kiganjo police station testified that he was manning the report desk when the complainants, their parents and the appellant came to the station; he booked the complainants' complaint and also re-arrested the appellant. He also booked the polythene bag together with the grey trouser the appellant is said to have been carrying. Upon interrogation, the complainants told the police officer that the appellant had been carrying the polythene bag when he defiled them; they also identified the grey trouser he was wearing at the time of the incident.

The investigating officer corporal **Charles Getende (PW6)** testified that the first complainant's father and the second complainant's mother together with the complainants themselves were at the station on 15th February, 2008 to lodge a complaint of defilement against the appellant. After recording the report, the officer referred the complainants to hospital for treatment and he only charged the appellant after he received the complainant's duly filled P3 forms back from the hospital. He also escorted the appellant to

hospital for age assessment.

The appellant and the complainants were examined at Nyeri Provincial Hospital on 15th February, 2008; according to the complainant's medical outpatient cards and the P3 forms that were subsequently completed in their behalf, there were lacerations on the complainant's respective vaginal walls, their hymens were broken and they were found to have bacterial infections. As far as the first complainant was concerned, there was a discharge from her vagina and little dried blood around the labia. The P3 forms and the medical cards were presented in court by **Dr Wanjama Gacathi, (PW7),** a medical officer at Nyeri Provincial General Hospital; this particular witness neither examined the complainants nor treated them but that he testified that he was able to interpret the entries made in both the treatment cards and the P3 forms. The same witness produced the P3 for in respect of the appellant and testified that the appellant's genital was bruised more particularly at the penis head. According to the evidence of this witness, the complainants' ages were estimated to be 8 and 10 years respectively.

In his unsworn statement, the appellant said that on 16th February, 2008, he was looking for work when he was arrested by two men who suspected that he was a thief; they took him to Kiganjo police station. He testified that he was charged five days later and that he knew nothing about the charges against him.

That was the evidence that was presented at the trial and at it is apt at this juncture to analyse it in the context of the provisions of the law under which the appellant was charged.

Section 8 (1) and **(2)** of the **Sexual Offences Act** under which the appellant was charged provides 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 erson who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

In order to establish the offence of defilement, the prosecution must prove that the accused person committed an act which caused penetration of a child. Where penetration is proved, then where it is proved that the victim is 11 or years or less, the accused person is subject to a mandatory sentence of life imprisonment.

As to whether the complainants were defiled as understood in **section 8(1)** of the **Act**, there is the corroborative evidence of the complainants themselves, their parents and most importantly, the doctor that they were in fact defiled. The complainants testified that the appellant sexually assaulted them in turns. They reported this assault to their parents who took up the case with the police; the police, as part of their investigations, referred the complainants to the hospital where they were examined and treated the same day they were assaulted. Treatment cards were produced and admitted in evidence to demonstrate that the complainants were examined and treated of the sexual assault on the 15th February, 2008. A government doctor made findings upon examination of the complainants that the complainants' vaginal walls bore lacerations, their hymens were broken and bacterial infections were detected. Again there was a vaginal discharge and dried blood around one of the complainants' labia.

The prosecution evidence that the complaints were defiled was neither controverted nor challenged; the doctor's evidence on the condition of the complainants' genital organs was consistent with what amounts to penetration as defined in **section 2** of the **Sexual Offences Act** which defines the word "penetration" (as understood in section **8 (1)** of that **Act**) as "*the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

I agree with the learned magistrate's finding that the prosecution established beyond all reasonable doubt that the complainants were defiled.

The next question is whether the appellant is the person who defiled the complainants. The direct evidence on this question came from the complainants themselves; they were consistent in their evidence that the appellant lured them into a thicket and defiled them in turns. They were able to identify him as a short man wearing a grey trouser and who carried two polythene bags; he carried cassava in one of the bags while the other was packed with clothes. When they saw the appellant the following day, they quickly recognised him as the person who had accosted them the previous day. They were also able to tell that he wore a trouser different from the one he had been wearing when he defiled them; incidentally, this particular trouser was found in the paper bag and was admitted in evidence as an exhibit.

The complainants identified the appellant before he was re-arrested by the police; indeed they pointed him out as the person who had defiled before he was taken to the police where he was re-arrested and subsequently booked for the offences with which he was convicted. An identification parade which the appellant claims should have been conducted was not necessary in these circumstances.

Apart from the evidence of the complainants, the rest of the corroborative evidence on the commission of the offences for which the appellant was convicted was largely circumstantial. The appellant was literally wandering in the complainant's village, and in his own words, looking for a job; he testified that he came from Kiamariga village while the complainants were from Tagwa and therefore the evidence that he was a stranger in the village was not displaced. That the appellant was a stranger in a particular village cannot by itself be taken to be conclusive proof that he committed the offences for which he was charged and convicted; however, this fact goes to corroborate the complainants' evidence that they were defiled by a person they had not seen before. The complainants' parents also testified that the appellant was a stranger in the village.

Another aspect of circumstantial evidence was the appellant's clothing and luggage. The complainants testified that they saw him with two polythene bags one of which contained what appeared to be cassava while the other bag was packed with clothes. The appellant is said to have been arrested with one polythene bag containing the clothes; indeed the grey trouser which the complainants described the appellant to have been wearing at the material time was found in the polythene bag. The trouser was exhibited and the complainants identified it as the trouser he was wearing when he committed the offence. It is also worth noting that on 15th April, 2008 and on 12th June, 2008, the appellant is recorded to have asked the court to assist him get his clothes from Kiganjo police station where he had initially been booked; the court eventually ordered that he should be escorted to the station to collect his clothes. It is therefore true that apart from the grey trouser the appellant was carrying other clothes; this is consistent with the complainants' evidence that the appellant was carrying clothes.

It is also important to note that when he was examined, the appellant was found have a *"healing bruise on the penile head"*. As noted, this evidence was neither challenged nor controverted and therefore there was no doubt raised as to whether this bruise could have been occasioned by anything else other than as a result of the sexual assault on the complainants.

These pieces of evidence pointed more to the guilt of the appellant than to his innocence; this evidence is not only corroborative evidence but I find that it is also incapable of explanation upon any other reasonable hypothesis than that of the appellant's guilt.

In the Court of Appeal decision of **Simon Musoke versus Republic (1958) EA page 715** at page 718 the court said of circumstantial evidence;

> "… ***in a case depending exclusively upon circumstantial evidence he(the trial judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."***

This decision was followed in the case of **Okeno versus Republic (1972) EA 32 at page 35** where the Court of Appeal said;

> ***"In our view the magistrate clearly appreciated that a conviction based on circumstantial evidence can only be had where the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."***

The evidence against the appellant was not exclusively circumstantial; as noted there was direct evidence as well and when one looks at the circumstantial evidence, he can safely conclude that the inculpatory facts are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

The final question is the age of the complainants; this question is pertinent because under **section 8(2)** of the **Act** one can only be sentenced to life imprisonment if the age of the victim is eleven years or less. Apart from the complainants' and their parents' testimony that they were respectively aged 10 and 8, the medical cards indicated the ages of the complainants to have been 10 and 8. The doctor who testified attested to the fact that the complainants were of those ages and this evidence was not challenged at all; indeed, looking at the evidence at the trial and the grounds upon which this appeal is based, nothing turned on the age of the victims. I am bound to agree with the learned magistrate's finding that there was no reasonable doubt that the complainants were less than eleven years of age when they were defiled.

The appellant's complaint that he was held in police custody beyond the constitutionally allowable limit before he was charged would not entitle him to acquittal even if that was proved to be the case. In any event, when the appellant raised this issue the prosecutor explained that the appellant was arrested on 16th February, 2008 which was a Saturday. On 18th February, 2008, he was escorted to hospital for examination but was asked to go back on 20th February, 2008 when the doctor was said to be available. It is only after he had been examined that he was taken to court on 21st February, 2008. I agree with the prosecutor's view that, in circumstances, the appellant was brought to court as soon as practicable and the delay was neither deliberate nor prejudicial to the appellant's case. If the appellant found this explanation to be insufficient, then his relief would lie in a civil claim for damages and not in an acquittal. (See the court of Appeal decision in **Kamau Mbugua versus Republic 2010 eKLR**).

I am inclined to hold that the appellant's appeal is not merited; I uphold his conviction and sentence and, accordingly, dismiss the appeal.

Signed, dated and delivered in open court this 8th day of May, 2015

Ngaah Jairus

JUDGE