REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 123 OF 2014

BETWEEN

SAMSON ABUTO ……...…….……...……...…... APPELLANT

AND

REPUBLIC …..…….……... RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 830 of 2012 at Chief Magistrates Court at Homa Bay, Hon. N. W. Kariuki, RM dated 29th November 2013)

JUDGMENT

1. The appellant, **SAMSON ABUTO**, was charged with two counts of defilement contrary to **section 8(1) (3)** and **(4)** of the ***Sexual Offences Act, 2006*** in the subordinate court. The particulars of the first count were that on 19th July 2012 at Gwassi East Location in Suba District he intentionally caused his penis to penetrate into the vagina of MA, a child aged 16 years old. On the second count at the same place and date, he intentionally caused his penis to penetrate the vagina of IA, a child aged 13 years. He also faced an alternative count of committing an indecent act with IA contrary to **section 11(1)** of the ***Sexual Offences Act, 2006*** based on the same facts.

2. The appellant appeals against conviction and sentence based on the grounds set out in the petition of appeal filed on 10th October 2014. The substance of his appeal is that there was no direct evidence linking him to the alleged offence since the complaints were not found in his house. He stated that there is no way the court could find that he could defiled two girls jointly and that the complainants were compelled by their teacher to lie against him. The appellant reiterated the grounds of appeal in his written submissions. He further urged the court find that he did not defile the 2nd complainant as there was no DNA to connect him to her and the DNA in respect of the 1st complainant was doctored.

3. Mr Oluoch, counsel for the respondent, submitted that the prosecution proved all the elements of the offence. He contended that both complainant, PW 1 and PW 2, gave clear evidence how they were each defiled and their testimony corroborated each other. Furthermore, the DNA evidence pointed to the appellant as the perpetrator.

4. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see ***Okeno v Republic*** **[1973] EA 32**).

5. The prosecution case is that on 19th July 2012, the two complainants, PW 1 and PW 2 were supposed to be having night prep at KP School. At about 7.30 pm, their teacher, PW 5, found them missing. He

called their parents and who confirmed that they were not at home. PW 2's mother, who had died by the time of the trial, told him that she had left for preps. PW 6, PW 1's father, confirmed that he was called by the PW 5 and informed him that PW 1 was not at home. He made efforts to looks for her and it only the next morning that he saw both PW 1 and PW 2 walking to school together. When PW 6 asked them where they had been, they told him that they slept under a tree. He took them to the school and in the office PW 5, where both girls confirmed that they had slept at the home of the appellant who was their friend. PW 5 informed the school Board Chairman who caused the appellant to be arrested.

6. PW 1 testified that she was 16 years old and she was in the same class with PW 2. She recalled that on 19th July 2012 she went to the home of the appellant. She described what happened to her in the following terms;

> *I slept with him on the bed. We slept three people. We slept I, Samson and me. I removed my clothes. I had worn a skirt and a blouse. Underneath, I had a biker and a panty, brown and red respectively. I removed them and remained with the skirt. I removed the skirt. Samson had clothes. He removed the clothes. We played sex with him. He slept on top of me. I slept facing up. He opened my legs. He had sex on my vagina. He put sperms on my vagina. The sperm came from his penis. He did not wear a condom. I saw the sperm in my vagina. He had sex with me once. It was not the first time for us to sleep together. Ialso had sex with Samson. Samson is not I's boyfriend. I agreed to have sex with Samson. We were in Samson's simba, his house. It was 5 am. We went to school. I didn't shower…….*

7. PW 2 recalled that on the night of 19th July 2012, they were at the appellant's place, she stated as follows;

> *His house is a one roomed house with one bed. We all slept on the bed. I slept on the edge of the bed near the wall, Samson in the middle and N on the edge. We slept with clothes on. I had a biker and a panty, I removed the school shirt and skirt. We had sex. We had sex with Samson. Both me and N slept with Samson. He slept with N first, then me. I removed the biker and panty and slept on the bed facing up. He did not have clothes on. He slept on me. He touched me on the shoulders. He opened my legs. He inserted the penis into my vagina. He didn't wear a condom. We slept together once …. We left the house at 6 am. We dressed and went to school …..*

8. After both PW 1 and PW 2 arrived at the school, they both testified that PW 5 beat them whereupon they told them what had happened. They were taken to Magunga Police Station and issued with P3 forms. PW 4, a clinical officer at Magunga Health Centre, saw the complainants on 20th July 2012. As regards PW 1, he noted that her vagina had a whitish discharge which he determined was semen after a laboratory test. He took her underpants and sealed them and handed them over to PW 8, the investigating officer. He concluded that the presence of semen confirmed that there was penetration. PW 4 also examined PW 2 and noted that there was seminal fluid in her vagina which was indicative of penetration. He also secured her underpants and drew a blood sample and gave the same to PW 8. He also examined the appellant and took a blood sample and his underpants which he gave to PW 8.

9. PW 8, the officer who investigated the matter, testified that on 20th July 2012, he was at the Police Station when he received the complainants, their parents, officials of a local NGO and teachers from KP School. PW 7, a member of a local NGO who accompanied the complainants to the police station. They made a complaint against the appellant regarding defiled of PW 1 and PW 2. He took statements from the witnesses and took PW 1 and PW 2 to Magunga Health Centre where they were examined by PW 4. He secured the exhibits, prepared an exhibit memo and forwarded them to the Government Chemist in Nairobi for analysis.

10. PW 3, a Government Analyst from the Government Chemist, Nairobi testified that he received the following exhibits from PW 8; A1 - a brown biker indicated as belonging to PW 1, A2 – a red pant indicated as belonging to PW 1, B1 – a red pant indicated as belonging to PW 2, B2 – a white biker belonging to PW 2, C –black short with white stripes on the side belonging to the appellant and D – a

blood sample belonging to the appellant. He was instructed to ascertain the presence and source of blood, semen and spermatozoa. His findings were that items A1 and A2 were stained with semen and blood. B1 and B2 were not stained with any semen or blood while Item C was not stained with semen. He carried out DNA analysis on the stained items and found that the DNA on items A1 and A2 matched that of the appellant's blood sample.

11. When the appellant was called upon make his defence, he elected to make an unsworn statement. The tenor of his defence was that one of the teachers of KP School, who was one of the persons who arrested him, had a grudge against him. He stated that the teacher saw him with PW 1 and that PW 1 admitted their relationship. The teacher was harassing him and threatened to do something bad to him and that is why he suspected that he had been framed by the teacher.

12. In order to prove its case under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must show that the appellant did an act that amounted to penetration of a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

13. In this case, PW 1 and PW 2 gave clear testimony of how the appellant had sexual intercourse with them. Their testimony was credible and consistent and was not shaken by cross-examination. Moreover they both corroborated each other. PW 1 knew the appellant and she led PW 2 to his house where the sexual act took place hence the issue of mistaken identity could not arise. Although, it was not necessary for their testimony to be corroborated by reason of the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, there was ample corroborative evidence. First, the fact that the complainant's were missing from school was confirmed by PW 5 and PW 6. Second, the medical evidence of PW 4 who examined PW 1 and PW 2 on the same day after the sexual act, confirmed that there was evidence of penetration. Third, the DNA evidence produced by PW 3, corroborated the fact that the appellant had sexual contact with PW 1. All this evidence taken together is proof beyond reasonable doubt that the appellant had sexual intercourse with PW 1 and PW 2.

14. In light of this evidence, his defence that he was being framed is at best, a sham. The appellant did not attempt to explain how his DNA was found on PW 1's undergarments. The appellant also suggested that the complainants could have been forced to lie as a result of being beaten. While, it is regrettable that the complainant's were subject to corporal punishment, I do not think this negated the fact that the appellant had intercourse with them. PW 1 and PW 2 gave testimony in court and were cross-examined by the appellant and nothing emerged to suggest that they were being coerced to lie to the court in order to frame the appellant.

15. In ***Moses Nato Raphael v Republic*** **NRB CA CRA No. 169 of 2014 [2015] eKLR** the Court of Appeal stated as follows about proof of age for purposes of the ***Sexual Offences Act***;

> *On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in* ***Tumaini Maasai Mwanya v. R****,* ***Mombasa CR.A. No. 364 of 2010****, where we held that proof of age for purposes 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 purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.*

16. In this case, it is not in doubt that PW 1 and PW 2 were below the age of 18 years old which means the offence of defilement was proved. According to the charge sheet, PW 1 was 16 years old. She also testified that she was 16 years old and but her birth certificate produced by PW 8 shows that she was born on 18th October 1999. In this respect I agree with the learned magistrate that the certificate as a legal document proved the age of PW 1 to be 14 years old at the time the offence was committed. Although the proved age was at variance with the age stated in the charge sheet, such variation was not prejudicial to

the appellant.

17. No birth certificate was produced for PW 2 but she testified that she was 13 years old. Her father testified that he had lost her birth certificate but confirmed that she was 13 years old. This evidence was not contested and I therefore find that PW 1 was 13 years old.

18. Under **section 8(3)** of the ***Sexual Offences Act*** the sentence provided upon conviction for person who defiled a child aged between 12 and 15 years is the same and the minimum mandatory sentence is 20 years imprisonment. The sentence was therefore legal.

19. Before I pen off the judgment, I would like to comment on the application by the appellant to start the case de novo when he was put on his defence. He stated that the ground of the application was that, *"I didn't have a good foundation when I started the case."* The learned magistrate declined the application on the grounds that the appellant understood the proceedings all along, he did not raise any objection to the proceedings and that he cross-examined the witnesses and that the matter concerned children. I do not find any error in the decision of the magistrate to decline the application to start the matter afresh.

20. For the foregoing reasons, the conviction and sentence are affirmed.

21. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 9th day of June 2015

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.