REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HIGH COURT CRIMINAL APPEAL NO.79 OF 2014

ANTONY MUGA AYATTA..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(An appeal against the conviction and subsequent sentence delivered by Hon. Ochanda R.M. Nakuru on the 2nd day of December, 2013, whereby the Appellant was convicted for the offence of defilement and indecent assault of a child and sentenced to life in prison)

JUDGEMENT

1. The Appellant Antony Muga Ayatta was on the 2nd December, 2013 convicted and sentenced to serve a life imprisonment for the offence of Defilement of an eight(8) year old child Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act Number 3 of 2006. Being dissatisfied with the conviction and sentence, in his Amended Petition of Appeal, he preferred five grounds:

> 1. The learned Magistrate erred in law in failing to establish the language that the appellant understood.
>
> 2. The learned Magistrate erred in Law and Fact in convicting the Appellant on evidence that did not meet the standards required in Law to uphold a conviction for the offence.
>
> 3. The learned Magistrate erred in Law and Fact by meting upon the Appellant an excessive sentence in the circumstances.
>
> 4. The learned Magistrate erred in Law and Fact in considering extraneous matters that were not in issue.
>
> 5. The learned Magistrate erred in Law and Fact in omitting to explain to the Appellant all the ingredients of the offence he was charged with.

2. The prosecution called five witnesses among them, the mother and father of the minor child, who is deaf and dumb. PW1 the father of the child KM testified that on the 2nd July, 2011 around 5.00pm, he was home with the child who was playing outside when it started to rain so he went out to get her in the house. He could not see her. At that time PW2, GM C, the step mother of the child stepped in and both went to look for the child in the maize farm, each different direction. PW2 then beckoned PW1 to where she was at the window of the house of the accused **House No. C24** and asked him to peep through the window to the house. She testified that she peeped through

the window which was open and had no curtain and saw the accused sleeping on the child without his trousers on, and the child had no clothes on on a bed in the single roomed house. At the same time PW2 called neighbours. PW1 testified that he came over to the accused house and upon peeping through the window, saw the accused, without clothes save his shirt on the top of the complainant. Together with neighbours, they tried to open the door that was locked from inside but the accused opened and pushed the child outside. PW1 testified that the accused tried to lock himself inside but they pulled him out without his trousers and under wear, and sat him down.

3. Upon entering the house, they found the accused's trousers and underwear, and the child's pants on the floor. They examined the child and found she had no underwear on. With the help of neighbours, they took the accused to Sewage Centre with his trousers. PW1 and PW2 testified that they took the child to the nearest health centre, where they were referred to Bondeni Police Station and thereafter to the Nakuru Provincial Hospital. PW2 identified the child's Blue pants that she said had worn the child that day and the accused's trousers in court as the ones they found in the accused's house-when she accompanied a police officer PW4 to the house later that evening. PW2 stated in her evidence that the accused was their neighbour and they lived in the same plot. While their house was **No. C 11** the accused lived in house **No C 24** and was well known to them, and had no grudges with him, and he lived alone.

4. PW3 Dr. Justus Nandi testified that he worked at the Nakuru Provincial Hospital, as a Medical Practitioner. He produced a P3 form filled by a fellow Doctor, Dr. Colatu who had examined the child on the 6th July 2011. He informed the court that Dr. Colatu had been transferred and that he was familiar with his signature. He confirmed his signature. He confirmed that the P3 form was signed by Dr. Colatu who after examination found that the child was mentally retarded and that her hymen was broken with vaginal bleeding and foul smell and, concluded that she had been defiled. An age assessment report for the minor was produced and it indicated that the child was eight(8) years old, was deaf and dumb.

5. In his sworn defence, the accused failed to mention anything about the offence or the evidence tendered by the prosecution witnesses about being found in the act sleeping on top of the child naked in his house. All what he told the court was that on the 2nd July, 2011 at about 5.00p.m he met PW1 a neighbour and asked for refund of money he had borrowed from him and that he dismissed him and told him that was the last time he were to disturb him then he went into his house. After fifteen minutes, he stated that some three people on *boda boda* with PW1 came, and held him and frogmatched him, members of the public beat him saying he had defiled a child and took him to Bondeni police station including the mother of the child, and thereafter was charged with the offence.

6. On cross examination, he said he knew PW2 and he had lived with them since 2002 in the same plot and knew the child and he had no grudge with the family. He could not explain the events of the fateful day when he was caught in the act with the child. He denied that the child's pants were found in his house.

7. I have analysed the evidence on record. As stated in the case **Okero -vs- R (1973) EA 32**, the court is under an obligation to re-evaluate the evidence tendered and come up with its own findings and conclusions; bearing in mind that the court neither saw or heard the witnesses as they testified. That I have done. There is overwhelming evidence on record that the complainant was defiled, and that the Appellant was caught in the act.

PW3 (the doctor) confirmed that the child's hymen had been broken, was bleeding and had foul smell. The accused person was caught in the act in his house by the mother and father (PW1 and PW2) and the neighbours who were called and witnessed the act. He was seen and found lying on top of the child without his trousers and underpants on, and the child's under pants too were removed and all found on the floor of the house. Having said that he had no grudge with the parents of the child same for an alleged debt, there would be no reason for them to have framed him. PW4, a police officer who accompanied the accused and the mother of the child to his

house after his arrest and collected his trousers and the child's pants from his house. I find that all the prosecution witnesses corroborated each other in their testimonies.

8. I have considered the trial Magistrate's judgment. I find that from the analysis of the prosecution and the defence evidence, he was satisfied that the accused committed the offence he was charged with and proceeded to convict him and sentenced him in accordance with the law as provided.

The appellant faulted the trial magistrate's judgment both on conviction and sentence.

9. In his first ground of appeal as appears in his Amended Petition of Appeal filed on the 25th February 2015, it is stated that the learned Magistrate failed to establish the language that the appellant understood. In his submissions, counsel for the appellant Mr. Ngamate stated to the court that the language used to read the charge sheet was Kiswahili, but the appellant did not understand Kiswahili. He did not elaborate. I have looked at the proceedings of the trial court – the language was clearly indicated as Kiswahili. The appellant upon being requested to answer to the charge after the substance and all elements were explained to him he answered "***si kweli.***" In the alternative charge, he also answered "***si kweli.***" When the appellant was given a chance to cross examine the prosecution witnesses, he proceeded to do so and indeed put questions to the witnesses who answered. He cross examined PW1, PW2, in length; and indeed he cross examined the Doctor – and the doctor showed him the P3 form which he cross examined him. He also cross examined the Police officers, PW4 and 5.

It is not possible that the accused did not understand Kiswahili yet he fully and very effectively cross examined all the prosecution witnesses and proceeded to defend himself in his sworn evidence.

I find that the appellant fully understood Kiwahili and fully participated in the proceedings from the beginning. This ground of appeal fails.

10.The trial court was faulted in grounds **two** and **four** in convicting the appellant on insufficient evidence and considering extraneous matters.

I have carefully analysed the evidence tendered by all the prosecution witnesses. I have not seen seen any inconsistencies of contradictions. The appellant took issue with the colour of the child's pants. He submitted that PW5 said the paints were white while PW4 talked of blue pants. It is not disputed that a small pant was found in the appellant's house on the floor, together with his trousers. PW5 a police officer found the said pantS, and collected from the appellant's house. The appellant in cross examination never raised the issue of the pant being found in his house. The child's mother in his evidence in chief stated that she had worn the child the blue pant found on the floor when the appellant was caught in the act in his house. The police officer referred to the pant as white. The fact remains that a child's pants were identified by the mother as the pants she had worn the child that morning. The appellant did not explain how the said pants, whether white or blue in colour was found in his house. I find no merit at all in this ground and I dismiss it. In his submissions, the appellant did not point out any extraneous matters that the trial court is accused to have taken into consideration. I find none. He relied on the following authorities but did not point out what relevance the said authorities had in relation to the matter at hand. **Busia HCRA NO. 70 of 2013 – Joseph Okumu -vs- Republic, Kakamega HCRA No. 76 of 2013 – Enock Kagali -vs- Republic.** and **Meru HCRA No. 229 of 2009 – Abduba Galana Wako -vs- Republic.**

11. Learned State Counsel Mr. Kibelion urged the court to dismiss the appeal as it lacked merit. It was his submission that the appellant participated fully in the proceedings in Kiswahili and that all prosecution witnesses were truthful and corroborated each others evidence. As to the colour of the pants, he submitted that it was irrelevant and what is important is that the pants were found in his house.

As to sentence, he stated that the appellant having been convicted, the sentence meted was what the

law provides hence cannot be termed as excessive as the Childrens Act provides for minimum sentences.

12.As I stated earlier, I have looked at the proceedings of the trial court on the 5th July 2011 when the appellant was first arraigned in court to take plea. In his hand writing, the trial Magistrate on the printed court file, he wrote "language Kiswahili." When the charge was read and explained to the appellant, in response, he answered ***"Sio ukweli***." to both in Count 1 and Count 2."

However, I note that the Magistrate entered a plea of guilty, and proceeded to allocate a hearing date for the case, and further admitted the accused to a bond of Kshs.300,000/= with one surety of similar amount. Thereafter, the case proceeded on the basis that a plea of not guilty was entered.

In the typed proceedings, the trial Magistrate's entry of language – Kiswahili – is omitted. It is not indicated that the language was Kiswahili. Fortunately, the appellant has no issue with this, save that he claims he did not understand Kiswahili. In the said typed proceedings, the entry of the plea of guilty is shown. This was never an issue to the parties, whether knowingly or not, as the suit proceeded to hearing based on the plea of not guilty by the appellant.

13. This court views the two irregularities by both the trial Magistrate and the typing clerk as unintentional and genuine errors that do to go into the substance of the case as has been shown in the proceedings. Consequently, I shall invoke the provisions of Section 382 of the Criminal Procedure Code Chapter 75 Laws of Kenya to rectify and correct the irregularities in the said proceedings as the same did not and have not caused any failure of Justice or Prejudice to either the prosecution or the appellant.

14. In the **Case Enock Kagali -vs- Republic – Criminal Appeal No. 76 of 2013** reported in (2014) KLR, the appellant was charged with the offence of defilement of a minor girl of eight(8) years, and was convicted and sentenced to serve life imprisonment. Circumstances were very similar to the present case when the appellant was caught in the act, save that the date the offence was alleged to have been committed varied as in the testimonies of the prosecution witnesses, and it took very long before the complainant was taken to hospital. The Learned Judge upheld the appeal due to the contradictory evidence.

15.The Appellant was charged and convicted under **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act No. 3 of 2006.**

The complainant, a dumb and deaf girl was only eight(8) years old. The minimum sentence prescribed under Section 8(2) of the said Act is life imprisonment. The Sexual Offences Act is a Statute of strict interpretation and the court has no discretion on sentencing upon conviction. The court having upheld the conviction, there would be no basis upon which it can interfere with the sentence.

In its totality, the prosecution evidence against the appellant was overwhelming.

For the above reasons, I find no merit in any of the grounds of Appeal as stated. It is dismissed.

Dated, signed and delivered in open court this 15th day of July 2015

JANET MULWA

JUDGE

In the presence of:

Kahunga holding brief for Otieno for the accused

Chirchir for the state

Court clerk – Linah.