REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO.47 OF 2014

JOHN MALUSI TUNDU ..... APPELLANT

VRS

REPUBLIC ..... RESPONDENT

(Appeal arising from the conviction and sentence by Hon. M. D. Kiprono

in Hola SRM's Cr. No.30 of 2014)

JUDGMENT

This is an appeal against the conviction and sentence from the judgment of the ***Senior Resident Magistrate, Ag., M.D Kiprono*** delivered on **15th August, 2014.**

The appellant was charged with the offence of defilement contrary to **Section 8 (1)** as read together with subsection **(2)** of the **Sexual Offences Act**. The particulars were that on diverse dates between 1st October, 2013 and 23rd November, 2013 in Tana North District within Tana River County, he intentionally and unlawfully caused his penis to penetrate the vagina of ***L V*** , a child aged 9 years. In the alternative count he was charged with the offence of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act. The particulars being that he touched the vagina of ***L V*** , a child aged 9 years.

He was found guilty of the main charge, convicted and sentenced to life imprisonment.

He filed a petition of appeal raising 9 grounds. They are that:

1. *The Learned Magistrate erred in law and in fact disregarding precedent law which was binding on him;*
2. *The Learned Magistrate failed to properly interpret section 124 of the Evidence Act failing to appreciate that there was no other material evidence implicating the appellant other than the uncorroborated testimony of a child of tender age;*
3. *the Learned trial Magistrate failed to direct himself on relying on uncorroborated evidence of a child of tender age whose reliability was in doubt, and this was prejudicial and fatal to the conviction of the appellant ; and*
4. *The Learned trial Magistrate failed to appreciate that the standard of prove (sic) required in the case was higher and requiring evidence of corroboration by other evidence irresistibly pointing at the guilt of the appellant but instead relied on conjecture, and suppositions to confirm the conviction of the appellant"*
5. *That the Learned Magistrate failed in law and fact in not finding that the prosecution failed to prove its case beyond reasonable doubt.*

6. *The conviction was based on uncorroborated and unsworn evidence of PW1.*
7. *The Learned Magistrate failed to find that the prosecution case was full of inconsistencies .*
8. *The sentence meted upon the appellant was excessive in the circumstances.*
9. *The Learned Magistrate failed to consider the defence case.*

This is a first appeal and the court is obligated to look at the evidence afresh, reconsider and re-evaluate it and reach its own conclusion, keeping in mind that the trial court had an opportunity to see the demeanour of the witnesses as per **Okeno vs R [1972] KLR 19.**

The appellant submitted that there was tampering with the evidence of pw1 who gave two versions and who was promised new clothes by her aunt . That there were inconsistencies in the evidence as to the hospital the child was treated as ***pw1*** stated it was Bura Center, ***pw2*** , Hola District Hospital, ***pw3*** Garissa Hospital and ***pw4***, Bura District Hospital. That pw1 was said to be at home on 23.11.13 and at the same time at church, that ***pw2*** was on 23.11.13 at 8p.m at the shamba and at the same time at mama Ngina. The appellant took issue with the fact that the brother ***M*** of ***pw1*** and her friend ***A M*** were never called as a witness. Further, there was lack of evidence as the money used to entice pw1 was not produced in evidence and neither was the medical report on the appellant who was also examined. In addition, the p3 form was not filled so as to indicate which weapon was used to cause the alleged injuries being the lacerations and as a post rape form record had not been produced, there was no defilement proved. Counsel for the appellant relied on the high court finding in ***Simon Rokoo v Republic [2014]eKLR***, where the court made an observation that where there was no direct evidence it would be desirable to produce the initial medical examination notes. This is not the case presently, as the clinician who examined her was a witness and produced the medical report in form of a p3 form.

Counsel for the appellant also relied on the high court case of ***Peter Kipchumba Too v Republic [2014] eKLR,*** where initial medical reports had not been produced, nor was the appellant examined nor was it indicated the weapon that he used to cause an injury to the alleged victim. The appellate Court noted that the record of the trial court did not lead it to find that the evidence of pw2 was explicit that there was penetration, and found that the offence of defilement had not been proved but that of attempted defilement had been proved.

The prosecution at the appeal made submissions in support of the finding of the trial court stating that the evidence of the victim was corroborated by other witnesses and the 'evidence on record was consistent and overwhelming.

The victim was lined up as the first prosecution witness, ***pw1*** . The trial court before commencing with her evidence conducted a *voire dire* examination and reached the conclusion that she was an intelligent child/minor capable of giving testimony but would give unsworn testimony.

She testified that her name was ***L Z S*** or ***N L*** or ***N*** and lived with her grandmother ***Pw2*** ,***M N***, at Bura. She testified that the appellant had picked her from school during break-time and teachers saw this. He did not take her but after break-time, one teacher ***M N*** took her home. She testified that other children lied that he had slept with her and were only framing him as he had done nothing to her. She stated that she could not recall what she had recorded at the police station and that nobody had told her to give a different story. At this juncture the prosecution prayed for and the trial court granted the prosecution an adjournment as they stated that the testimony given by ***pw1*** was a different version and needed time to organise the case.

On a latter date, ***Pw1*** was recalled . She testified that her name was **L Z** and that on 23.11.13 she was at the field with her friends, including her friend **A M,** when the appellant, called her and told her that he would show her how people made love. The record shows that she said it in Swahili "*twende tutombane*". He then directed her to go ahead of him to a certain bush where she spread a sack, he slept over her and inserted his penis in her private parts. She felt pain. Upon leaving the place she informed her elder brother ***M***. She further stated that ***Pw 2*** at the time was in Nairobi and when she arrived back and found her bleeding from her private parts, she reported to the police. ***Pw1*** informed the police what the appellant had done to her. She was treated at the hospital at Bura centre. Her testimony during cross-examination

was that she had told the truth , she did not scream and nobody came to her rescue. Her aunt who was told by one Shiro escorted her to the police station and also promised her clothes and school in Madrasa.

Pw2, M N, confirmed that she resides with ***pw1*** at Bura . She stated that at around 8.00.pm on 23.11.13, she was from the shamba and found ***pw1*** and other children. As she sat outside she overheard ***pw1*** tell the other children she had been defiled. It was her testimony that she did not immediately examine ***pw1 .*** The following day ***pw1*** and ***pw2*** went to church. While there, women brought ***pw1*** to ***pw2*** as she had soiled her dress with blood. They inspected ***pw1*** and ***pw2*** called ***pw1's*** step-mother one ***I O*** (***pw4,)*** and informed her about ***pw1***'**s** sickness. ***Pw1*** was taken to Hola District Hospital and police started investigations.

Pw3, L M N, a minor of 14 years of age gave unsworn testimony and stated that she resided with ***pw2,*** her grandmother and that ***pw1,*** her cousin. She testified that on 23.11.13 at about 1.00 p.m while in church ***pw1's*** dress got blood-stained and women whose names she did not know inquired from ***pw2*** about ***pw1's*** age and whether or not she was experiencing periods. ***Pw2*** called ***pw4*** and ***Pw2*** went with ***pw1*** to the police. ***Pw3*** asked ***pw1*** what had made her bleed and ***pw1*** stated that it was because she had had sex with the appellant in the bushes. ***pw3*** informed ***pw2*** about this***.*** At cross-examination she stated that ***pw1*** was taken to Garisa Hospital.

Pw4, I A D, testified that she was the aunt to ***pw1*** and on 23.3 13 at about 8.00p.m. her mother, ***pw2 ,*** summoned her and informed her that the appellant had defiled ***pw1.*** She then escorted ***pw1*** to the police whereby ***pw1*** recorded her statement before they proceeded to Bura health centre for examination. At cross-examination she stated that she did not see the appellant defile ***pw1*** nor did ***pw1*** state to her that he defiled her.

Pw5, Daniel Innocent Mapombe, a clinical officer in charge of Bura District hospital on 28.11.13 examined and prepared the medical report concerning ***Pw1. Pw1*** informed him that an old man known to her had defiled her. He found on examination that there had been penetration, the hymen was no longer intact and there were lacerations and bruises in the vagina. He also found that ***pw1*** was suffering from bilhazia. He filled in the p3 form on 29.11.13. At cross-examination he stated that the laceration was in the vaginal track and he could not tell whether it was an adult or child who had caused the penetration.

Pw6, No.78873, P.C Tom Onyango, the investigating officer attached to Bura Police Station stated that the police received a report on 28.11.13 brought by ***pw2*** with allegation of ***pw1's*** defilement. They took her to hospital where she was examined and a p3 form was filled. Then they recorded the statements of the witnesses. The appellant was then charged with the offence.

It was the appellant's evidence that the court disregarded his defence and in particular that he was old and could not engage in such acts. The appellant in his defence did not qualify what age had to do with the commission of the act of defilement. The appellant may have meant in street parlance that '***he could not rise to the occasion***' or in other words that he was impotent. The definition of defilement covers partial insertion by stating that it is ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*** The trial court did not say much of his defence save to state that it had considered it and that the line of defence pursued by the accused never cast a doubt on the solid prosecution case.

The **Sexual Offences Act,** "the Act" provides in its **Section 8** That

> **(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2)A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

The onus of the prosecution therefore was to prove the ingredients of the offence and of the main charge that there was penetration and the victim was a child.

The issues to grapple with are:

1. Was there penetration?

2. Was the victim a child ? And if so what was the age of the child?

3. Who perpetrated the act ?

4. Was there penetration?

Penetration is defined under **Section 2** of the the Act as: "***the partial or complete insertion of the genital organs of a person into the genital organs of another person" .*** It is the evidence of PW1 that the appellant inserted his penis into her vagina. The evidence of PW5 is that PW1 was penetrated. The medical evidence shows that Pw1 was penetrated. She is a young girls and as a result she kept on bleeding. I do find that penetration was proved.

5. Was the victim a child? And if so what was the age of the child?

A "*child"* is defined under the **Children Act, 2001, Section 2** as "***any human being under the age of eighteen years."***

Pw1 apparently did not know her own age but ***pw3*** who claimed to be 14 years of age stated that she was older than ***pw1*** and ***pw2*** stated that ***pw1*** was 9 years. Pw6 produced the Birth Certificate No. [particulars withheld] as **p.exb. 2** which indicates that **pw1** whose registered name is **L Z S** was born on 11.8.2004. The trial court found that pw1 had been defiled between the dates of 1.10.2013 and 23.11.2013. None of the witnesses indicated the dates of defilement as being between those dates save to state that on 23. 11.2013 ***pw2*** confirmed from ***pw1*** that she had been defiled, though she did not physically examine her and **p.exh.1,** the p3 form filled in on 29.11.13 indicates that there was penetration. It can be stated without doubt that in November, 2013 ***pw1*** was only 9 years of age. Hence was a child for purposes of **Section 8** of the Sexual Offences Act and specifically its **sub-section (1).**

6. Who perpetrated pw1 ?

Pw1, testified that the appellant was the perpetrator though initially she had stated that he was being framed. She testified that she knew the appellant who lived at the Village. ***Pw2*** overheard ***pw1*** tell other children that the appellant used to take her to the *mathenge* bush and defile her. ***Pw2*** called her neighbour one ***A O*** and they questioned ***pw1*** who reported that the appellant used to take her to the bush and defile her. ***Pw2*** knew the appellant as a farmer in the area. It was her testimony that she then went out to seek his relatives, one ***mzee J M*** who told her that the issue was beyond him. She sought the help of headman, ***Ramadhan*** and proceeded to one ***mama Ngina*** who went to call the accused but ***pw2*** did not await his arrival. ***Pw3*** stated that ***pw1*** confided in her that the appellant had slept with her. ***Pw6*** testified that the appellant would buy ***pw1*** sweets and defile her and ***pw1*** led the police to the place the appellant would place the money. ***Pw1*** testified that the appellant had put kshs. 15/- for her to use to buy *maandazi*, sweets and *kaimati.* ***Pw2*** at cross-examination stated that ***pw1*** told her that the appellant only gave her mabuyu and kshs. 15/-

In his defence, the appellant stated that he had not defiled ***pw1*** nor any girl. That he only bought her sweets and *kaimati* as he would do to a grandchild and as he did to other children. He did not entice her with any money. It was his testimony that he was old and had a wife and was no longer interested in engaging in sexual intercourse. He stated that ***pw1*** would show ***pw2*** the money hence the present case. At cross-examination he stated that buying goodies for the children and giving them money was not unusual. That ***pw2*** begrudged him.

Section 124 of the **Evidence Act** has a *proviso* which gives the exception to the requirement for corroboration of the evidence by other material facts when it comes to sexual offences. It provides that the court shall receive the evidence of the alleged victim if that is the only evidence and record the

reasons if it is satisfied that the alleged victim is telling the truth.

The trial court stated as follows in relation to pw1: *"In my assessment she was quite intelligible and carried a knowing smile on her face. The accused is a person known to her. She can never have been mistaken about the accused. She could not remember the dates the accused defiled her but this does not erode her credibility "*. The court further held that, *"I am satisfied the alleged victim has told the truth. Her credibility is beyond doubt. With the medical evidence adduced and the testimonies of all the prosecution witnesses in support of her case, there can never be any doubt. The witnesses gave candid and consistent testimony. The line of defence pursued by the accused never cast a doubt on the solid prosecution case"*. The trial court believed pw1.

On the alleged grudge held by ***pw2,*** the Court discounted it based on the actions of ***pw2***. On hearing ***pw1***'s story, she first called a neighbour, they then made a confirmation from ***pw1*** , proceeded to the appellant's relatives and the headman, she did not immediately examine ***pw1*** until the following day. The court found that "*The witnesses have been candid and gave consistent testimony. The line of defense pursued by the accused never cast a doubt on the solid prosecution case.....The presence of bilharzia infection does not rule out defilement. "*

At the beginning before being stood down, ***pw1*** had stated that she was in court because of the appellant and pointed at him. The trial court noted at the juncture that "*the alleged victim is very jovial and full of smiles*" . The trial court found that there were attempts to interfere with ***pw1***'s testimony but the same was overcome. It did not however state from whom the interference emanated from. I have perused the evidence of ***pw1*** after she was recalled, at cross-examination she testified that the appellant, one *Ngala* and *Mwalimu,* a teacher told her not to report the incident. In my mind this was the interference.

I do also find that there was nothing much to be said of the defence of the accused juxtaposed against the evidence of the prosecution. It did not cast a shadow of doubt. I am convinced that the appellant defiled ***pw1.***

This case can be distinguished from the present facts. ***Pw1*** in the instant case was categorical that the appellant wanted to show her how to have sex, laid upon her and inserted his penis into her privates. It cannot get clearer than that. Besides this, the trial court which had the opportunity to observe the witnesses believed her. The sentence meted out was life imprisonment in line with section 8(2) of the Sexual Offences Act .

The appellant contends that Pw1 was coached and promised clothes and that her initial evidence was that the appellant did not defile her. The medical evidence shows that pw1 was defiled. When Pw1 was recalled she categorically testified that it was the appellant who defiled her. During cross-examination pw1 informed the court that she had said the truth and that the appellant kept money under a stone for her. There is nothing to suggest that pw1 was coached so that she could implicate the appellant. The defence evidence did not raise any doubt on the prosecution case. According to the appellant he does not engage in sex as an old man. I saw the appellant and it is true he is an old man but that does not prove that he can not engage in sex.

The prosecution did prove its case beyond reasonable doubt. Pw1 knew the appellant very well: The defence evidence to the effect that the appellant used to buy maandazi for other kids does not dislodge the prosecution evidence. The prosecution did prove that it is the appellant who defiled pw1. It is true that the appellant is a bit aged but the sentence is lawful.

In the end, I do find that the appeal lacks merit and is hereby disallowed.

Dated, signed and delivered at Malindi this 7th day of July, 2015.

SAID J. CHITEMBWE

JUDGE