EPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 9 OF 2013

NELSON MUTHI MIANO…….APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Appeal from the Conviction and Sentence by Hon. E. Tanui, Resident Magistrate at Nakuru in C.M.A/CR.C.NO.157 of 2011 dated 17th January, 2010)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act, 2006**. The particulars of this offence were that on 23rd August 2011, at Maili Tisa Trading Centre Bahati in Nakuru North District, the Appellant unlawfully and intentionally inserted his male genital organ, penis, into the female genital organ, vagina, of A L a girl aged 4 years old. In the alternative, he was charged with committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**. The particulars were that on the said date, he unlawfully and intentionally committed an indecent act with A L a child aged 4 years by touching her vagina.
2. He was on the evidence convicted on the main charge of defilement and sentenced to life imprisonment. He has appealed to this court against his conviction and sentence. He raised eight (8) grounds in his appeal:

a. **That the trial magistrate erred in fact and in law in convicting him when the evidence before court was flimsy.**
b. **That the learned trial magistrate erred both in law and in fact in convicting him uncorroborated evidence.**
c. **That the learned trial magistrate erred both in law and in fact in ignoring the obvious contradictions of the prosecution evidence.**
d. **That the learned trial magistrate erred both in law and in fact in believing the prosecution evidence without a pinch of salt and without any iota of doubt.**
e. **That the learned trial magistrate erred both in law and in fact by shifting the burden of proof from the prosecution to the Appellant.**
f. **That the learned trial magistrate erred in law and in fact by failing to give sufficient cognizance and recognition for the appellant's reasonable defence.**
g. **That the learned trial magistrate erred in law and in fact in convicting him when the charge, the elements and facts thereof against him were not challenged and proved to the required standards.**
h. **That the life sentence handed down by the learned trial magistrate was manifestly harsh,**

excessive and draconian and has resulted in a serious miscarriage of justice.

3. The facts giving rise to this appeal are as follows. The complainant was aged 4 years. She knew the Appellant well as her neighbor and referred to him as 'Muthee'. She testified that on the material day the Appellant took her to his house, removed her panty and biker and then urinated in her vagina using his 'chuchu'.
4. Her mother, PW2 told the court that on that day, she returned home to find that the complainant had left. She was informed by her daughter T that the Appellant had gone with the complainant and other children from the neighborhood to look for fruits. The Appellant brought the complainant back home evening at around 7.00 pm. The complainant refused to eat and complained of pain in her stomach, legs and hips.
5. The following day, PW2 noticed that the complainant was walking with difficulty and looked sickly. On interrogating her, the complainant told her that the Appellant had hurt her. PW2 took her to Maili Saba Hospital and thereafter to Provincial General Hospital where she was informed by the doctor that the complainant had been defiled. She then reported the matter at Bahati Police Station. She later identified the Appellant to PW3, No. 213562 Corporal Peter Chege, who arrested the Appellant on 3rd September 2011.
6. The complainant was examined on 30th September 2011 by Dr. Getuta of Provincial General Hospital Nakuru. She was in fair condition at the time. When he examined her he found that she had a hyperemia in the vaginal canal, her labia majora was swollen and her hymen was freshly broken. She also had a thick whitish discharge. From this examination, he concluded that she was defiled. The P3 Form was produced by PW4 also a doctor from that hospital as exhibit 2. He also produced the PRC forms as exhibit 3.
7. The case was investigated by PW5 No. 79845 from Nakuru Central Police Station. She received the report of the offence on 24th August 2011. She produced the complainant's clinic card which showed her date of birth as 4th June 2007.
8. When put on his defence, the Appellant chose to make a sworn statement. He testified that he is a resident of Maili Tisa and works in the quarry. He denied the charges and alleged that he had been framed. In cross-examination he said that PW2 did not see him as alleged because, he was not home that day.

ISSUES FOR DETERMINATION:

9. The three issues raised in this appeal are; whether the charge sheet was defective; whether the P3 Form was produced procedurally; and whether the prosecution evidence was sufficient to support a conviction. While making these determinations, this court is alive to its duty as the first appellate court to analyse and re-evaluate the evidence afresh to arrive at its own independent findings and in doing so, bearing in mind that it did not have the opportunity to observe the demeanor of the witnesses. Refer to **Okeno** V. **Republic,** (1972) EA 32.

ANALYSIS:

WHETHER THE CHARGE SHEET WAS DEFECTIVE

10. The appellant alleged that the charge sheet was defective as it charged him with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act**.** He argued that there is no such section under the Act and the offence and the charges against him are not known in law.
11. The charge against the Appellant was framed in the charge sheet as ***"****Defilement of a girl contrary to Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006."* **Section 8(1)** of the **Sexual Offences Act** provides for the definition of the term defilement, while **Section 8(2)** thereof creates the offence of defilement of a child aged 11 years or less and prescribes the punishment on conviction.
12. The charge sheet was in drawn in accordance with Section 134 of the Criminal Procedure Code which provides for the ingredients of a charge sheet as follows:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement

of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

13. The prosecution, in the particulars of the offence, clearly disclosed to the Appellant that he was being accused of intentionally and unlawfully inserting his genital organ (penis) into the female genital organ (vagina) of A L a child of 4 years.
14. The proceedings before the lower court demonstrate that the Appellant understood the charges before him and was able to cross-examine the witnesses and put up a defence.
15. It is clear that the failure to specify that the said **Section 8(1)** was being read together with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006** did not occasion the Appellant any injustice. Therefore, this defect in the charge is one which was curable under **Section 382** of the **Criminal Procedure Code.**

WHETHER THE P3 FORM WAS PROPERLY PRODUCED

16. The second ground of appeal was that the P3 Form was produced by an incompetent witness. The complainant was examined by Dr. Getuta who also prepared the P3 Form. However, this P3 Form was produced by **PW4** also a doctor from PGH Nakuru. **PW4** told the court that he was conversant with Dr. Getuta's handwriting and signature with whom he had worked for eight 8 months.
17. **Section 77(1)** of the **Evidence Act, Cap 80**, provides that a document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence. Subsection (2) thereof allows the court to presume the signature on such document to be genuine.
18. That notwithstanding, the P3 Form must be produced by its maker. This was the holding of the Court of Appeal in **Sibo Makovo V. Republic, Criminal Appeal [1997] eKLR**. It held:-

"**The P3 form was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the Evidence Act (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is to taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called."**

19. I am guided by the above finding that the prosecution must lay a basis for failing to call the maker of a document. The trial court, then has an obligation to inform the accused person of his right to insist on the maker to be called and to object to the production. In the instant case, the prosecution did not lay any foundation for not calling the maker of the P3 Form. The appellant was also not informed of his right. He was denied the chance to test the veracity of this document. The P3 Form was therefore produced irregularly.

WHETHER THE CHARGES AGAINST THE ACCUSED WERE PROVED BEYOND REASONABLE DOUBT

20. Having already found that the P3 Form was irregularly produced the question that follows is whether it was proved that the appellant defiled the complainant.
21. The proviso under **Section 124** of the **Evidence Act** allows the court to convict on the sole evidence of the complainant if, for reasons to be recorded, it believes that she is being truthful. In **Kassim Ali** V. **Republic,** the Court of Appeal held the absence of medical evidence to support the fact of rape is not decisive as this fact may be proved by the oral evidence of a victim of rape or by

circumstantial evidence.

22. Similarly, in **Geoffrey Kioji** V. **Republic,** Crim. App. No. 270 of 2010 (Nyeri**) [U/R]** the court reiterated this position and held that:

"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

23. The fact that the P3 Form was irregularly produced was not fatal to the prosecution case. The court could still safely convict if it was satisfied that the other prosecution evidence proved, beyond reasonable doubt, that the appellant committed an act which caused penetration with **PW1.**

24. On my appraisal of the evidence, I find it as a fact that the complainant was defiled on 23rd August 2011. PW1 testified that the Appellant took her to his house where he removed his panty and biker and urinated in her using his chuchu.

25. PW2 corroborated the evidence of PW1. She testified that when the complainant was returned that evening, she refused to eat. The following day, PW2 noticed that the complainant had difficulty walking and looked sickly. The complainant informed her that she had been defiled by the Appellant.

26. There was no possibility of mistaken identity because both PW1 and PW2 knew the Appellant well prior to the incident. The complainant's stand that it was the Appellant who hurt her in his house was unshaken during cross examination. Further he was seen by PW2 when he returned the complainant home that evening.

27. Contrary to the submissions of the Appellant, their evidence was consistent and corroborative. There was no evidence to suggest that he was framed. The complainant stated that she was only asked to tell the court what had happened. During cross examination PW2 denied that the Appellant owed her any money. The Appellant did not lead any evidence to show any ill will on the part of the complainant or PW2 that would lead them to testify against him falsely. Therefore, his allegation that he was framed was displaced by their evidence that he was the culprit or that on that day he was not at home as alleged in his defence.

28. Therefore I find that the conviction of the lower court was based on the evidence adduced before it. Section 8(2) provides that a person who is convicted of defiling a child who is below 11 years shall be liable to life imprisonment. According to exhibit 1 the complainant was four years old at the time she was defiled. Therefore, the sentence meted out by the lower court was lawful.

FINDINGS

29. For the reason stated above, this court makes the following findings:

i) The charge sheet is found to properly outline the essential ingredients of the offence. That defect is curable under **Procedure Code** and is hereby cured to read **Section 8(1)** as read with **Section** 8(2).

ii) The irregularity in production of the P3 Form is not fatal to the prosecution's case and by dint of Section 124 of the Evidence Act, this court finds that there is sufficient evidence to support a conviction.

(iii) The prosecution is found to have proved its case beyond reasonable doubt

DETERMINATION:

Appeals lacks merit and is hereby dismissed.

Conviction and sentence upheld.

Dated, Signed and Delivered at Nakuru this 10th day of July, 2015.

A. MSHILA

JUDGE