REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 60 OF 2014

JULIUS KIOKO KIVUVA……..……...……..……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. W. K. Cheruiyot Ag. SRM in Criminal Case No. 3 of 2013 delivered on 3rd April 2014 at the Senior Resident Magistrate's Court at Tawa)

JUDGMENT

The Appellant has appealed against his conviction and sentence of twenty (20) years imprisonment. The Appellant was charged in the trial Court with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the offence were that on the night of 26th day of December 2012 in Mbooni West District within Makueni County, he intentionally and unlawfully caused his penis to penetrate the vagina of A M a child aged 15 years.

The Appellant was also charged with an alternative offence of an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the night of 26th day of December 2012 in Mbooni West District, within Makueni County, he intentionally and unlawfully did an indecent act to A M a child aged 15 years by touching her private parts namely breasts, buttocks and vagina with his penis.

The Appellant was first arraigned in the trial Court on 3rd January 2013 and he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to twenty (20) years in prison.

The Appellant was aggrieved by the judgement of the trial magistrate, and preferred this appeal against the conviction and sentence. The main grounds of appeal are stated in his Grounds of Appeal filed in Court on 15th April 2014 and supplementary grounds of appeal availed to this Court during the hearing of the appeal on 21st October 2015.

The grounds were that the charge was not proven beyond reasonable doubt; the charge sheet was defective in nature due to the variance of the particulars in relation to medical evidence which demonstrated that the incident took place on 23/12/2012 and that as such there was non-compliance with section 214(1) of the Criminal Procedure Code; and that the learned magistrate erred in holding that the victim led the police to the Appellant's house, whereas it the Appellant himself who did so.

Further grounds of appeal were that the trial magistrate erred in failing to observe that the victim was under arrest and ought to have been cautioned prior to leading the police to the Appellant's house, and hence the judges rules were violated; that the trial magistrate failed to consider the absence of the

complainant's sweater in the Appellant's house; and lastly that the trial magistrate erred by failing to consider that the Appellant was a scapegoat in view of the circumstances of the case.

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**).

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called six witnesses. PW1 was the complainant A M M. She testified that she was born in 1997 and she produced a copy of her birth certificate as an exhibit. She further testified that on 26/12/2012 at 3.00p.m she went to church, and she left the church premises at around 6.30p.m. On her way home she met with the Appellant whom she testified that she knew by his nickname of K. They began talking and that she told the Appellant that it was already late and she feared her father. The Appellant then told PW1 that he could take her to his house to sleep.

PW1 then accompanied the Appellant to his house where she stated that during the night they had sex twice. The next day in the morning, she testified that the Appellant requested that she waits for him as he goes to collect his phone and withdraw some money to give to her. However, that the Appellant did not come back, and that she proceeded to Kikima Market where she stated that she tried to trace a relative so she could tell the chief what had transpired.

PW1 testified that while at the market she met with one F and a M. She stated that they went to a lodging and that she had sex with Festus before she went home at 8.00p.m. Further, that she hid herself in a bush near home where she was found by a neighbor known as N, to whom she explained what had happened and who then took her to her grandmother. PW1 stated that her father later came home and took her to Kilyungi administration police post where she recorded her statement. She was later escorted to Mbooni District Hospital for treatment.

PW2 was A.P Raphael Ngumo who was attached to Tulimani Divisional headquarters, and who stated that in December 2012 he was stationed at Kiyungi A.P. post. PW2 testified that on 27/12/2012 at 9.25 a.m, one D N made a report that his daughter who was a primary school student aged 15 years was missing. Further, that on the same day at 9.30 pm, he received a phone call from the said D N that the child had come back home.

PW2 testified that he then asked that the child be brought to the police post for questioning. It was his account that the child informed him that on 26/12/2002 she had slept in the Appellant's house where they had sex, and that on 27/12/2012 she went Kikima Market where she met F M and again had sex with him. He stated that he advised the father to take the child to Mbooni police station to report the matter. He stated that he then arrested both the Appellant and the said F.

PW3 was PC Nelson Kiplagat, the investigating officer in the case. He testified that on 28/12/2012 he was in station at Mbooni police station when an A.P officer from Kilyungi A.P Post accompanied by two suspects including the Appellant, the complainant and her father came to the station. The father reported that his child had been defiled. PW3 stated that the complainant was then taken to hospital by a policewoman on 28/12/2012 and issued with a P3 form on 31/12/2012.

Further, that on 30/12/2012 they went to the Appellant's house to conduct a search after the complainant had said that she had left her sweater in the said house, and that the complainant identified the Appellant's house as the one she had slept in on 26/12/2012. However, that they did not recover the said sweater. PW3 testified that they were able to obtain the complainant's birth certificate which indicated that she was born on 26/01/1997.

PW4 was T N, the mother of the complainant, who testified that the complainant was born on 26/07/1997 and produced her birth certificate as an exhibit. She stated that on 19/05/2013 she was approached by two people looking for the complainant, and who inquired if she was hiding the child. She informed them the complainant was staying with her father. That they then went to Mbooni Police station where she was told

that the complainant had been kidnapped by two men on 26/12/2012 on her way from church. PW4 testified that she did not know the men who had hijacked the complainant, and that she recorded her statement at the police station.

PW5 was D M M, the father of the complainant who testified that on 26/12/2012 at about 2.00 p.m his daughter had left home for church. He stated that when her daughter had not come back home by 6.00 p.m., he started looking for her at the neighbors' in vain. He stated that on 27/12/2012 at 9.30 a.m. he reported the matter Kilyungi Police post. Later on that day, he was told by one B M that his daughter had been seen at Kikima centre. He went to look for her accompanied by a police officer at the lodgings where she had been seen but did not find her.

PW5 further testified that at 10.30 p.m on that day, he was called by a neighbor and informed that the complainant had been found. He took the complainant to Kilyungi A.P Post where she was interrogated. He stated that the complainant was later taken to hospital for examination and treatment. He testified that the complainant told him that she met the Appellant on 26/12/2012 and went to his house and spent the night there.

The last witness for the prosecution was Dr. Mulwa Andrew (PW6), who testified that he examined the complainant on 28/12/2012 and he filled a P3 form in respect of the complainant on 31/12/2012. He stated that the approximate age of injuries had been 5 days. He noted according to the medical notes that there was no tear or lacerations on the genitalia.

Further, that the hymen had been broken and abnormal semen was seen in the external genitalia. There was also foul smell on the genitalia, and that a vaginal swab revealed spermatozoa pus which was a sign of infection. He further testified that the complainant had been put on post exposure medication and emergency contraception. PW6 produced as exhibits the treatment card, the laboratory cards and P3 form, and testified that he did not know who defiled the complainant.

The trial court found that the Appellant had a case to answer and complied with section 211 of the Criminal Procedure Code in that respect. The Appellant gave sworn evidence and did not call any witnesses. He stated that on 28/12/12 he was arrested from his house by police officers after a complaint had been filed by PW5. He was taken to Kilyungu A.P post where he found the complainant and one F M. He claimed not to know or to have ever seen the complainant. He stated that the police conducted a search in his house and did not find clothes belonging to the complainant. Further, that the complainant did not explain how she reached the Appellant's house or how the act of defilement occurred.

The Appellant further stated that the complainant had had sex with the said F M for money and not him. He claimed that the spermatozoa found on the complainant did not belong to him. He also claimed that the investigations were not conducted properly, and that the complainant and witnesses had said they did not know him, and he does not know why he was arrested.

The Appellant filed written submissions wherein he contended that the prosecution had not proved its case beyond reasonable doubt, for the reasons that they failed to establish the origins of the spermatozoa or pus cells seen by the doctor who examined the complainant. Therefore, that apart from the purported identification evidence by the complainant, there was no independent corroborative evidence linking the Appellant to the commission of the offence he was charged with.

Further, that the charge sheet showed that the complainant was defiled on 26/12/2012 yet the medical evidence demonstrates that she was penetrated on 23/12/2014, and that as the charge sheet was not amended to reflect the true position, the provisions of section 214(1) of the Criminal Procedure Code were violated. The Appellant submitted that doubt had thereby been created as regards the prosecution's case, and relied on the decision in **Woolmington vs The DPP (1935) AC 462** in this regard.

The Appellant also stated that he had been treated as a scapegoat in the case, as no independent witness was called to support the complainant's evidence that she was seen leaving the Appellant's house. Further, that the fact that her sweater was not found in the Appellant's house and the explanations in the

Appellant's defence statement were also disregarded.

The state opposed the appeal and the learned State Counsel, Ms. Rono made oral submissions in court during the hearing of the appeal on 21/10/2015. The counsel submitted that on the material day the complainant was on her way home, and that because it was late and she feared the wrath of her father, the Appellant offered her a place to sleep. Further, that during the night the Appellant removed the complainant's underpants and had sexual intercourse with her. The learned State counsel also submitted that PW6 who was the doctor who produced the treatment card proved the complainant's hymen had been broken and there was presence of spermatozoa. Finally, that the court had done what was right in the circumstances in prescribing a sentence of 20 years' imprisonment.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and I find that the issues raised in this appeal are firstly, whether the Appellant was convicted under a defective charge, and secondly, whether the Appellant's conviction for the offence of defilement was based on sufficient and satisfactory evidence.

On the first issue, the Appellant argued that the charge was defective under section 214(1) of the Criminal Procedure Code as the charge sheet indicated that the defilement occurred on 26/12/2012, yet the doctor's report indicated that the victim was defiled on 23/12/2012. Section 214(1) of the Criminal Procedure Code provides as follows:

> **"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**
>
> **Provided that—**
>
> **(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;**
>
> **(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."**

All that section 214(1) of the Criminal Procedure Code does is to give the courts power to amend or alter charges, and prescribes certain procedures to be followed when this is done. I have perused the proceedings of the trial court and note that at no time did the Court find any variance between the charge and the evidence, or make any orders as to the amendment or alteration of the charge. In addition, PW1's evidence was consistent that the alleged defilement took place on the night of 26/12/2012, while PW5 testified that the complainant did not come home on that night. There was therefore no violation of section 214(1) of the Criminal Procedure Code as alleged by the Appellant.

Furthermore, section 214(2) of the Criminal Procedure Code provides as follows:

"(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."

It was therefore not necessary to amend the charge on account of a contestation by the Appellant as to the time when the offence was committed.

On the second issue as to whether the conviction of the Appellant was based on sufficient and satisfactory

evidence, the Appellant denied knowing the complainant and alleged that the medical evidence relied upon by the trial court did not link him to the offence, neither was there any independent evidence of the defilement. This Court in determining this issue is mindful of the ingredients of defilement which were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

> "**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

In the present appeal, the complainant testified that she met the Appellant on the material day being 26/12/2012 at 6.30 pm and that she knew the Appellant by his nickname of K. She was therefore able to see the Appellant well as it was during the day, and there were no difficult circumstances present so as to cloud the complainant's memory. This Court can accordingly rely on her sole evidence of identification. The age of the complainant was proved by the production of her birth certificate as an exhibit by PW4, which shows that the complainant was born on 26/01/1997 and was therefore approximately 15 years old at the time of the alleged defilement.

As regards the requirement of penetration, section 8 (1) of the Sexual Offences Act states that:-

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".**

"Penetration" under section 2 of the Act is defined to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person." The complainant (PW1) testified as follows in this regard:

> **"The accused removed my pant and my skirt. I also had a black biker which he also removed. He did not use a condom. We had sex twice that night. We slept upto 9.00 a.m the following day"**

PW1's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal.

In addition, it is also my finding that the medical evidence by PW6 was not sufficient corroboration as to the defilement of PW1, as PW1 testified that she also had sexual relations with one Festus the next day on 27/12/2012. I agree with the Appellant in this respect that in the circumstances, the medical evidence could not conclusively link the Appellant to the offence.

I therefore find that the prosecution failed to prove the element of penetration beyond reasonable doubt, and it was therefore unsafe for the learned trial Magistrate to convict the Appellant on the evidence on record. I accordingly allow the Appellant's appeal, quash his conviction and set aside the sentence imposed upon him. I direct that the Appellant be set at liberty forthwith, unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 9th DAY OF NOVEMBER 2015.

P. NYAMWEYA

JUDGE