REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 31 OF 2015

BETWEEN

MUTALI NYAMWEA alias MOKAKA ……..…….. APPELLANT

AND

REPUBLIC ……....…… RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 465 of 2014 at the Senior Resident Magistrates Court at Mbita, Hon. S.O. Ongeri, SRM dated 19th August 2015)

JUDGMENT

1. The appellant, **MUTALI NYAMWEA alias MOKAKA**, was charged with the offence of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act, 2006***. The particulars of the charge were that on 27th July 2014 at Mbita District of Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the genital organ namely the vagina of JA, a child aged 9 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts by intentionally and unlawfully touching the vagina of JA with his penis. The appellant was convicted of the alternative offence and sentenced to 10 years imprisonment. He now appeals against conviction and sentence.

2. As this is a first appeal, I am obliged to review and evaluate the evidence afresh and reach an independent conclusion as whether to uphold the conviction. In so doing an allowance should be made for the fact that I neither heard nor saw the witnesses testify (see ***Pandya v Republic*** **[1957] EA 336** and ***Kariuki Karanja v Republic*** **[1986] KLR 190**). In order to fulfil this mandate it would be useful to set out the facts as they emerged from the trial.

3. PW 1, who gave unsworn testimony, testified that she was 9 years old. She narrated what happened to her as follows;

> *I recall 27/7/2014 at 6.00pm I was playing and the accused came and found me playing. He carried me to his house. He covered my mouth and lay me on his bed and removed my clothes and inserted his penis in my vagina. I screamed for help as he fucked me because he had not covered my mouth. Some secondary school student knocked the door but he refused to open. He later opened the door. The student came in and escorted me to my guardian.*

4. On the same day at about 7.30pm, the child's guardian, PW 2, testified that she had gone to fetch water and when she came back she did not find her. After sometime some students from the nearby Secondary School brought PW 1 home and told her that they had found her in the

appellant's home. She went to report the matter to Ogongo Police Post and was referred to Ogongo Hospital where PW 1 was examined. She later reported the matter to Mbita Police Station and was issued with a P3 form which she took to Mbita District Hospital.

5. The three secondary school boys who found the appellant with PW 1 testified. PW 3 recalled that the appellant was his neighbour and when he went to visit his friend, he heard some noise which sounded like a child crying. He called PW 5 and they went to the place where the noise was coming from. Another friend, PW 4, was also present. PW 5 knocked the door and after a while the appellant opened the door. The appellant was half naked and had worn the trouser inside out. PW 5 asked whether there was a child in the house but the appellant declined to respond. Nevertheless PW 5 got into the house and found PW 1 crying. They boys took PW 1 to her guardian and later escorted them to Ogongo Police Post.

6. PW 7, a police officer to Mbita Police Station, recalled that on 28th July 2014, PW 2 came and reported that PW 1 had been defiled. He booked the report and issued a P3 form. He also issued a warrant of arrest for the officer at Ogongo AP Post to apprehend the appellant. PW 6, an administration police officer at Ogongo AP Post, confirmed that he received a warrant of arrest issued by PW 7 to arrest the appellant and he did arrest him on 28th July 2013.

7. PW 8, a clinical officer at Mbita District Hospital, testified that he examined PW 1 on 28th July 2014 after she had been brought by her guardian for examination. He did a high vagina swab which showed the presence of spermatozoa. He noted that the hymen and labia were intact and external genitalia normal. In his testimony he concluded that there was no penetration as there was no evidence of trauma to the vagina.

8. When put on his defence, the appellant elected to give sworn testimony. He stated that he was a watchman and he used to see PW 1 at the market. He denied the charges and stated that on the material day, 28th July 2014, he was at the market until 8.00pm. He went to his place of work and then proceeded to his house at 10.00pm. On the next morning he was arrested by police officers while he was at the market and taken to Mbita Police Station.

9. The learned magistrate was convinced that the prosecution had established the lesser charge of committing an indecent act with a child and convicted him on the ground that he was not satisfied that there was penetration but that there was evidence that the appellant's penis touched the child's vagina. The appellant now appeals against the conviction and sentence based on the petition filed on 4th September 2015. In summary he contends that the prosecution did not prove the offence beyond reasonable doubt and that the learned magistrate did not give the accused's defence adequate consideration since the charge against him was a scheme perpetrated by PW 2, PW 3 and PW 4 who wanted to settle scores with him.

10. The respondent filed a cross-petition contesting the conviction of the appellant on the alternative charge of indecent act with a child. Mr Oluoch, learned Senior Assistant Director of Public Prosecutions, submitted that there was overwhelming evidence in support of the conviction but that the learned magistrate erred in law in misinterpreting the meaning of penetration as defined by the ***Sexual Offences Act***. He contended that the learned magistrate did not take into consideration the evidence of PW 8 that spermatozoa were present in the complainant's vagina. Learned Counsel urged that the prosecution proved the principal offence and the learned magistrate erred in convicting the appellant of the lesser offence.

11. 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."*

12. I have reviewed the evidence and I am satisfied that it is the appellant who was found with PW 1

on the material night by PW 3, PW 4 and PW 5. They rescued the child and took her to her guardian and thence to Ogongo AP Post. There was no suggestion in the questions put to them in cross-examination by the appellant that there was a grudge or that the boys had a conspiracy to fix the appellant with PW 2. I therefore reject that contention as a ground of appeal. The witnesses clearly explained why they did not raise alarm or report the matter immediately. PW 4 and PW 5 stated that they were interested in rescuing the child and taking her to the guardian before going to the police while PW 5 stated in cross-examination that he did not scream because he was with the other boys who assisted in rescuing the child. I find the testimony of PW 3, PW 4 and PW 5 corroborates the testimony of PW 1 as to the events of the evening of 27th July 2014. Furthermore, the appellant in his own defence, testified he knew PW 1 and was in the area that evening hence the issue of mistaken identity could not arise considering the totality of the evidence.

13. The main issue in the appeal and cross-appeal is whether there was penetration and on this aspect of the evidence the prosecution evidence was divergent is some respects. PW 1's testimony was clear and sufficiently detailed as to the fact that she was sexually assaulted by the appellant and that the appellant *"inserted his penis in my vagina"*. Such insertion need not be complete. In view of **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the testimony of PW 1 did not require any corroboration if the learned magistrate believe that she was telling the truth. In the judgment, the learned magistrate assessed the credibility of PW 1 as follows, *"In my mind I find that PW 1 did not lie in her evidence. Her evidence was [not] shaken in cross-examination neither did the accused show that the prosecution evidence was malicious."* It follows then that the PW 1's testimony was complete on the issue of penetration. Any other evidence would only be corroboratory.

14. On the other hand the evidence of PW 8 pointed to the fact that there was no penetration. Mr Omboto, counsel for the accused, submitted that the medical evidence was insufficient to sustain a charge of defilement. He pointed to the P3 Form (Exhibit No. 1) which recorded that the hymen was intact and the genitalia normal and the conclusion that there was no evidence of vaginal penetration. Although PW 8 testified that the high vaginal swab disclosed the presence of spermatozoa, the initial high vaginal swab conducted at Ogongo did not reveal any spermatozoa.

15. Mr Omboto called in aid the case of ***Mwangi v Republic*** **[1984] KLR 595** where the Court of Appeal stated as follows;

> *The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she had sexual intercourse not is the absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape, which the doctor's evidence did not establish.*

16. I agree with the issue established by the Court of Appeal. Although PW 8's testimony was clear that there was no penetration, such testimony as I stated elsewhere in the judgment would merely corroborate the testimony of PW 1. I also note that ***Mwangi v Republic (supra)*** was decided when the law required corroboration of the testimony of a child in sexual offences. In this case, the testimony of PW 1 was sufficient to establish that there was penetration. PW 1 described what occurred and there is no reason to believe she was lying. I therefore find that the learned magistrate erred in finding that penetration was not proved.

17. The age of the child was clearly established by the prosecution. PW 1 testified that she was 9 years old. PW 2 produced a child health card which showed that PW 1 was born on 24th May 2005 and a baptisimal card which confirmed as much. I therefore find and hold that the child was 9 years old.

18. In light of the finding that the offence of defilement was established, I dismiss the appeal and allow the cross-petition. I set aside the conviction on the charge of an indecent act with a child and substitute the same with a conviction for the offence of defilement. Since the age of the child was

9 years, the mandatory sentence under **section 8(2)** of the ***Sexual Offences Act*** for defiling a child under 11 years is life imprisonment. I therefore sentence the appellant to life imprisonment.

DATED and **DELIVERED** at **HOMA BAY** this **5th day of November 2015**.

D.S. MAJANJA

JUDGE

Mr Omboto instructed by Rioba Omboto and Company Advocates for the Appellant.

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