REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

HIGH COURT CRIMINAL APPEAL NO.191 OF 2013

PHINEAS IRUNGU NJUGIRI……………………………..APPELANT

VERSUS

REPUBLIC…………………………………….……………RESPONDENT

(Being an appeal against conviction and sentence in the Kangema Senior Resident Magistrates Court Criminal Case No. 107 of 2011 (Hon. D.Orimba) on 2nd June, 2011)

JUDGMENT

The appellant was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act No. 3 of 2006.** According to the particulars of the offence, on the 23rd day of March 2011 at *[particulars withheld]* village, Mioro location in Murang'a County of central province, the appellant intentionally caused his penis to penetrate the vagina of S.M, a child aged four. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** In this alternative charge the appellant is alleged to have intentionally touched the vagina of S.M, a child aged 4 with his penis on the 23rd day of March 2011 at *[particulars withheld]* village, Mioro sub location in Murang'a County of central province

The complainant's mother, M.W.M testified as the first prosecution witness. She told the court that her daughter who is aged four attended a nursery school at *[particulars withheld]*. On 23rd March, 2011, at about 5 pm when she came back home from a tea buying centre, she found her daughter sitting next to a road. Her daughter complained of having a stomachache. She took the child home and later went to the hospital. The witness told the court that while at home she noticed a discharge of a foul smell from the complainant's private parts. When she inquired from her what may have happened, the complainant told her that the appellant who normally collected nappier grass from their farm had defiled her. The witness testified that it is the same appellant who had earlier carried her and the complainant on his motor cycle to hospital. She took the child for treatment of this sexual assault on 24th March, 2011. The police whom she reported the incident to issued her with a P3 form which she returned to them on 25th March, 2011. According to the witness, the appellant had told her not to tell anybody about what had happened. She also said later in examination in chief that she found the complainant in the company of other children at which time the appellant was cutting the nappier grass in the shamba. The witness confirmed that the appellant was a person she knew and even knew his home and that the two had exchanged text messages before.

The clinical officer who examined the complainant was one **Julius Mwangi (PW2).** In his evidence the witness testified that the complainant had a history of having been defiled by a person known to her. According to his findings, the complainant was in a fair condition at the time of examination; however,

there was tenderness on her abdomen that appeared to have been caused by an object he described as "blunt". Upon examination of her genitals, it was found that the labia majora was swollen and that the hymen was broken; there was a whitish discharge; a vaginal swab was taken though the results thereof are not clear from the record. The complainant was tested of HIV Aids and was found to be negative. The witness concluded that the complainant had been defiled. The P3 form which comprised his findings was signed on 24th March, 2011 and was duly admitted in evidence.

The investigating officer, **police constable Robert Naibei**, testified that he was attached to Nyakianga Police station at the material time and that in his investigations, he summoned the complainant and her mother after it had been reported that the complainant had been defiled. The officer testified that he interrogated the complainant who told her that she had been defiled by the appellant. He summoned the appellant through the chief of Mioro location and that when he appeared the officer bonded him to appear in court where he was charged with the offence for which he was charged and convicted.

In his defence the appellant gave a sworn statement and called four witnesses; he told the court that he was a pastor at Mioro Faith Workers church at Gatiko branch. On 23rd March 2011 he left for Kiriaini; at 1 pm, while at the Family Bank, he received a call from one Tom who apparently wanted some forms from the complainant. The appellant left on a motorcycle and arrived at Mioro centre at 3 pm; he met Tom and the other people who were also said to be waiting for the same forms which Tom wanted. The appellant left the centre at 5 pm together with the elders of his church to see their treasurer apparently to make burial arrangements of one of their deceased church members.

The appellant further testified that at one point, he decided to go and collect nappier grass for his cattle; on his way, he carried a teacher whom he left at her home before he proceeded to collect the nappier grass. Soon thereafter his passenger's husband invited him for tea and together they took tea apparently at his host's place. When he resumed his task of collecting the nappier grass, he saw a lady who apparently worked on the same farm where usually collected the nappier grass from. The lady, who happened to be the complainant's mother, was carrying the complainant. The complainant was sick and her mother sought the appellant's assistance to take her to hospital. The appellant took the complainant and her mother to a chemist where she bought drugs before the appellant took them back home. It is then that the appellant gathered his nappier grass and left for his home.

On 24th March, 2011, so the appellant testified, the appellant was attending a burial ceremony when the area chief summoned him at his office; it is at this office that the appellant was informed of the complaint against him. He proceeded to the police at Nyakianga police station the following day where he was charged with the offence of defilement.

In his cross-examination, the appellant testified that the complainant's mother had sent him text messages of love before this incident. The message was said to have been sent on 22nd May, 2011 at 9 pm. In his evidence the appellant said that he responded the following day by calling the complainant's mother warning her to stop sending those messages to him. Incidentally, it is the same day that the appellant said that he took the complainant and her mother to hospital and it is also on the same date that alleged offence took place. According to the appellant's evidence, the appellant and the complainant's mother were previously known to each other and in fact he had engaged her services to cut grass for him at a fee of Kshs 250/= per day.

Tom Gioche Gachanja (DW2) testified on behalf of the appellant. He confirmed that the he knew the appellant and that the appellant pastored his church. In his testimony, the appellant called him on the 23rd March, 2011, asking for some forms which he, the witness, had. This witness decided to go to Mioro center to meet the appellant; indeed he met him at the centre at 3 pm. This witness testified that he gave the appellant the forms he was looking for. At 4 pm, the witness and the appellant were joined by other elders from their church for a discussion over burial arrangements for their departed colleague. The witness left the appellant with the elders at 4 pm.

The person who apparently told the appellant of the burial of one of their church members was **Wilson**

Macharia Mwage (DW3) who also testified on the appellant's behalf. Wilson Macharia testified that he personally knew the appellant who also happened to be his pastor. According to this witness, he was at his place of work on 23rd March, 2011 at Mioro centre, more particularly at around 3 pm when he saw the appellant on his motorcycle. The witness called him to inform him of the burial plans of one of the deceased church members. The appellant could not see him immediately because, the appellant told him that he was going to see **Tom (DW2).** Later, the appellant joined the witness together with one pastor John Kaura. The three people discussed the burial arrangements and proceeded to the home of **mama Wangu (DW5)** who was their treasurer. They parted ways at 6 pm. When cross-examined the witness said that he neither knew the complainant nor her mother and that he was not aware whether the appellant had at any time visited their home; he could not confirm whether the allegation against the appellant was true.

One other person that is said to have been with the appellant on 23rd march, 2011 was **John Waithaka Kaura (DW4)**; he testified that on the material day at 4 pm, he met **Wilson Macharia Mwage (DW3)** and the appellant at Mioro centre. He confirmed that they parted ways at 5 pm.

The church treasurer, **Esther Njeri Muoga (DW5)** testified on the appellant's behalf and said that on a date she could not recall the appellant called her at around 5.30 pm to inform her that one of their members had died and that he was on his way together with other church elders to see her. They eventually met and later dispersed at 6pm.

After considering the foregoing evidence, the learned magistrate concluded that the prosecution had proved its case against the appellant beyond reasonable doubt; the appellant was therefore convicted presumably on the principal count of defilement and sentenced to serve life in prison.

The appellant was dissatisfied with the learned magistrate's decision and being so dissatisfied he appealed against both the sentence and the conviction. In the supplementary petition of appeal filed in court on 30th July, 2012, the appellant listed six grounds of appeal; amongst these grounds, the appellant faulted the learned magistrate for convicting the appellant on the basis of inconclusive and insufficient evidence which, in the appellant's view, was made up of assumptions, extraneous considerations, conjectures and uncorroborated hearsay evidence. The appellant also contended that the learned magistrate erred in law and in fact in admitting and relying on irregular and unreliable medical evidence. The learned magistrate was also faulted for failing to appreciate that the complainant neither attended court nor testified. The appellant also argued that the learned magistrate erred in law and in fact for failing to consider the appellant's defence of alibi which displaced the prosecution defence. Finally, it was the appellant's case that the learned magistrate convicted the appellant against the weight of evidence.

When the appeal came up for hearing the appellant's counsel, Mr Ng'ang'a opted to concretise the 1st, 2nd and 4th grounds into one ground while the 3rd, 5th and 6th grounds were argued together as the second ground.

Counsel argued that the prosecution did not discharge the burden of proof. The appellant argued that if the offence was committed on 23rd March, 2011, no explanation was given as to why the complainant was taken to the hospital on 24th March, 2011 and not on the day the offence was committed. The appellant's counsel also took issue with the prosecution's failure to call the complainant and the rest of the children with whom she was alleged to have been playing at the material time to testify; according to counsel, if the appellant was arrested and subsequently charged on the basis of the complainant's complaint to the police, there is no reason why she should not have testified.

Counsel for the appellant argued that the evidence of the second prosecution witness, the clinical officer, ought not to have been considered; according to his argument, the witness testified that the alleged offence took place on 25th April, 2011. Again if the alleged offence took place on 23rd March, 2011, then the age of the injury ought to have been two days and not one day as claimed by this witness. Counsel took issue with this witness' testimony that the hymen was broken yet no bruises were visible and that there were only lacerations.

The appellant's counsel argued further that it was erroneous for the learned magistrate to ignore the evidence of the four defence witnesses which the appellant called in his defence; instead the learned magistrate is said to have taken into consideration extraneous matters and thereby misdirected herself. Counsel relied on the decision of **Okethi Okale & Others versus Republic (1965) E.A 555** and that of the court of appeal in **Mohammed Galgalo versus Republic** being **Criminal Appeal No. 16 of 2002** in support of his arguments that failure to consider the accused person's defence is contrary to natural justice and this omission inevitably unsettles the judgment.

Mr Njeru for the state opposed the appeal and countered that the state proved its case against the appellant beyond all reasonable doubt. On the issue of the child having been taken to hospital on 24th March, 2011 rather than the 23rd March, 2011, counsel argued that there was evidence on record that defilement of the complainant was only discovered later after she had initially complained of stomachache; in any event, the complainant had been warned not to divulge any information concerning her predicament. Counsel asked the court to consider the date of 25th April, 2011 given by the clinical officer as the date when the complainant was examined as a typographical error which could not have prejudiced the appellant's defence.

On why the complainant was not called to testify, the state counsel argued that the complainant being a child of only four years could only testify and indeed she testified through intermediaries as provided for under the Sexual Offences Act. Counsel argued that there was consistent evidence that the complainant was defiled and the fact that lacerations and not bruises were visible could not alter this fact. The appellant's alibi, in the state counsel's view, did not add up as it did not offer any explanation of the appellant's whereabouts when the offence was committed.

That is as far as the arguments by counsel went.

Section 8(1) as read with **section 8(2)** of the **Sexual Offences Act** under which the appellant is charged with reads as follows:

> ***8. (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.***

It is apparent that **section 8(1)** defines the offence of defilement while **Section 8(2)** of the Act defines the sentence upon conviction on the offence of defilement of a child of a specific age.

An important component of the offence of defilement is the act of penetration; as a technical term, "penetration" is defined in **section 2** of the Sexual Offences Act as "***the partial or complete insertion of the genital organs of a person into the genital organs of another person."*** Upon examination of the complainant, the clinical officer established that the complainant's labia majora was swollen on both sides of the vagina; there was laceration on the right side of the labia minora; there was tenderness on palpation and that the hymen was broken. The officer established a non-foul smelling discharge on the external genitalia. These findings would appear to be consistent with what amounts to penetration as defined under this provision of the law. There was therefore proof beyond doubt that the complainant had been defiled.

The question that follows is whether from the evidence on record, it was equally proved beyond doubt that the appellant was the perpetrator of this crime of defilement for which he was convicted.

It is clear from the evidence that there was no eye witness' account of how this crime was committed and who it is that committed this crime. The complainant's mother's evidence which appears to have heavily influenced the decision of the learned magistrate was based partly on what the complainant is alleged to have told her and partly on her own observation of the complainant when she returned home from work on 23rd March, 2011. On that day, the complainant is said to have complained to her mother that she had

a stomachache. She was then taken to hospital for treatment; however, after this treatment and after they had both come back home, the complainant's mother observed some discharge from the complainant's private parts. At this stage, the complainant is said to have opened up and told her that the appellant had led her into the bush and defiled her and that he had warned her not to tell anybody of what had happened. Apparently, the appellant himself was still cutting nappier grass at the time the complainant's mother arrived back from work; she even sought his assistance to take the child to take the child to hospital. She was emphatic that she knew the appellant and that they had previously exchanged text messages before.

On his part, the investigations officer said that in the course of investigations of the complaint against the appellant, he summoned the complainant's mother who came to the police station along with the complainant. In response to his interrogation, the complainant told him that she was on her way from school when the appellant accosted her and led her into the bush where he defiled her. The investigations officer formed the opinion that based on the information he obtained from the complainant, her mother and the clinical officer, the appellant was the responsible for the defilement of the complainant; he charged him accordingly.

One of the issues that emerge in seeking to unravel the question whether the appellant was the person behind the defilement of the complainant is whether the complainant ought to have testified. The appellant's counsel argued that if the investigations officer concluded that the appellant ought to be charged on the basis of a complaint by the complainant then it was necessary for her to testify. The state counsel argued on the other hand that indeed the complainant had testified but through intermediaries in line with the provisions of the **Sexual Offences Act**. Although the counsel did not point out any specific provision in the Act, it is clear from **section 31 (4) (b)** of that Act that indeed a child may give evidence through an intermediary if the court finds and declares such a child to be a vulnerable witness under **section 31 (1)** of the Act. The pertinent parts of **section 31** provide as follows:-

> ***31. (1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such a witness is-***
>
> ***(a) the alleged victim in the proceedings pending before the court;***
>
> ***(b) a child; or***
>
> ***(c) a person with mental disabilities***
>
> ***(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be a vulnerable witness on account of-***
>
> ***(a) age;***

The Act proceeds to list other considerations that may be taken into account including intellectual, psychological or physical impairment; trauma; cultural differences; the possibility of intimidation; race; religion; language; the relationship of the witness to any party to the proceedings; the nature of the subject matter of the evidence; or any other factor the court considers relevant. For our purposes only part (a) is relevant. The other pertinent part is subsection (4) which provides:

> ***(4) Upon declaration of a witness as a vulnerable in terms of this section, the court shall, subject to the provisions subsection (5), direct that such witness be protected by one or more of the following measures-***
>
> ***(a)…***

(b) directing that the witness shall give evidence through an intermediary;

(c)…

(d)…

(e)…

It is apparent from these provisions of the law that while a child may testify through an intermediary, there are elaborate steps which the court must take before her evidence is admitted.

Under **section 31(1)** the court must declare such a child whose evidence is to be taken to be a vulnerable witness; **section 31(2)** also allows the court to make such a declaration either on its own motion or on a request by the prosecution or by any other witness other than the vulnerable witness. It is only after the court has declared a witness vulnerable that the witness can give evidence through an intermediary as one of the means of protecting the witness.

There is nothing on record to suggest that these elaborate steps were taken to justify the state's argument that the complainant testified through intermediaries. Neither is there any explanation as to why these steps were not taken and admit the evidence of the minor. While it is appreciated that the child was only four years old, the investigations officer is recorded to have interrogated the complainant and going by his evidence, there is no doubt that he considered the complainant's statement in concluding that the appellant ought to be charged. If the complainant could positively respond to the investigating officer's inquiries, she could possibly have competently testified through an intermediary. I believe the Act had such witnesses in mind when it made elaborate provisions of how their evidence is to be taken. Failure to take the evidence of the complainant as per the requirements of the Act or the omission on part of the learned magistrate to record why the evidence was not taken yet he relied on what she told her mother and the investigating officer in convicting the appellant rendered the conviction unsafe.

One of the reasons given by the learned magistrate in convicting the appellant is that he was found near the complaint's home; indeed it is apparent from the record the appellant was found cutting nappier grass near the complainant's mother's residence. It is also clear from the evidence that this was not the first time the appellant was collecting nappier grass from that place; he had been there on previous occasions for the same purpose and therefore, in my humble view, it cannot be concluded with any certainty that the fact the appellant was found at what may be presumed to be the locus in quo was in itself sufficient proof that he had defiled the complainant. It is appreciated that one may be convicted on the basis of circumstantial evidence but where the court has to rely exclusively on such evidence there must be corroboration, which in my view was lacking in this case. In the case of **Mwita versus Republic (2004)2KLR** at page 66 where the court of appeal said:-

> "***It is trite that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt."***

Considering the circumstances under which the appellant was found in the nappier grass, it cannot be said conclusively that his presence at that place at the material time was incompatible with his innocence and incapable of explanation upon any other hypothesis that his guilt. A conviction in these circumstances would, in my view, be unsafe.

One other thing that I noted from the learned magistrates judgment is that he did not specify the offence for which the appellant was convicted; this omission is contrary to **section 169(2)** of the **Criminal Procedure Code** which enjoins the court to specify the offence for which the accused person is convicted in its judgment. The section provides as follows:-

169. (2) in the case of a conviction, the judgment shall specify the offence of which, and the section of the

Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

This was not done in the judgment by the learned magistrate; all that the learned magistrate said was, ***"after having considered all the evidence I do find that the case against the accused has been proved as required. I will find out that the accused is guilty and proceed to convict him accordingly under section 215 c.p.c."*** It was left to conjecture as to whether the appellant was convicted of the principle count or the alternative count.

For the reasons I have given, I find that the appellant's appeal is merited and I am persuaded to allow it. The conviction is quashed and the sentence set aside. The appellant is therefore set at liberty forthwith unless he is lawfully held under a separate warrant.

Signed, dated and delivered in open court this 5th May, 2014

Ngaah Jairus

JUDGE