IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE 87 OF 2011

JAMES MURIITHI GITAU..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From original conviction and sentencing in Criminal Case No. 325 of 2010 of Principal Magistrate's Court at Githunguri, Hon. B. Nzakyo (Ag.P.M.) on 29th March 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. It was alleged in the particulars of the charge that on 24th February 2010 at ***[particulars withheld]*** Village in Githunguri District, within Central Province, he defiled L.N.M a child aged 9 years old.

In the alternative he was charged with the offence of indecent act with a female child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars were that on 24th February 2010 at ***[particulars withheld]*** Village in Githunguri District, within Central Province, he committed an indecent act with a female child namely L.N.M by touching her private parts.

He denied the offences but after the trial he was convicted of defilement and sentenced to life imprisonment. This is an appeal against both the conviction and sentence.

He filed amended supplementary grounds of appeal where he submitted on 4 grounds of appeal. In the first ground, he blamed the trial magistrate for failing to observe that the identification evidence of PW1, PW3 and PW4 was questionable, doubtful and unsatisfactory. Secondly, he argued that there were material contradictions in the testimonies of PW1, PW3 and PW4. Thirdly, he urged that the trial magistrate failed to summon an essential eye witness who would have shed more light on this case, and finally, he submitted that the P3 form was produced unprocedurally and consequently dented the medical evidence submitted by the prosecution.

Before the learned trial magistrate took the evidence of the complainant, he conducted a *voire dire* and being satisfied that the child understood the nature of an oath and duty to speak the truth, he had her sworn. She proceeded to give an account of what transpired on the date of the alleged offence.

The complainant described how the appellant met her in the company of two of her classmates and asked them who had taken his pencil. The complainant sensing danger then decided to run away. The appellant pursued her and on catching up with her forcibly, took her into a nearby maize farm where he removed all the complainant's clothes as well as his and defiled her. She felt pain and bled during the ordeal.

Meanwhile, her school mates had already fled. After the ordeal she put on her school uniform and started walking towards the school. As she went along the way she heard people shouting prompting her to turn around and head back home. While on her way home, she met with PW6 who was their neighbour and told her that she had been defiled. PW6 informed her aunty Purity who then proceeded to Githunguri Police Station where they reported the incident. The complainant was taken to Githunguri Health Centre where she was treated. She identified the appellant in court.

PW2 is the mother to the complainant. She narrated how she received a call requiring her to report to Githunguri Police Station. On 24th February 2010 at around 8.00 am, she went and found her daughter there and was informed that she had been defiled. She observed that her dress and pants were blood stained. Thereafter, she recorded a statement and had a P3 form filled.

PW3 and PW4 in their testimonies corroborated the evidence of PW1 on the events as they unfolded in sequence, when the appellant approached them, save for the question the appellant had asked them, whose content varied from that of PW1. The question was whether they had seen his brother?

They narrated how they went and reported the incident to their teacher PW5 who informed their Headmaster and also mobilized students to go and search for and rescue the complainant. The students went all out in search of the appellant whom they apprehended and brought to their school where he was identified as the culprit by both PW3 and PW4. Some pupils found the complainant at home having been defiled before she was taken to hospital. PW3 and PW4 identified the appellant as the one who had approached them and who ran after the complainant.

PW6 was the complainant’s aunty who took her to hospital and reported the incident to the police when she came back home after the ordeal. She observed that her dress was stained with blood. She identified this dress as an exhibit in court.

PW7 Dr. Caroline Nguru examined the complainant in hospital on 24th February 2010 and found evidence suggestive of defilement. She found that the complainant had normal external genitalia. However, she had blood on the vulva which was reddish and bruised. She signed the P3 form and produced it as medical evidence.

PW 8 arrested the appellant. He testified that he was positively identified at the police station by three girls. PW9 an analyst from the Government Chemist upon examination found that the complainant’s under pant had blood stains of blood group O which was her group. He however did not establish the type of the appellant’s blood group as the sample he was given was poor in quality and did not yield any result. PW10 booked the report and issued the complainant with a P3 form. He also recorded the witness statements and charged the appellant with defilement.

In his defence the appellant denied the offence and argued that he had nothing to do with it. He urged that though he was arrested for defiling PW1 and stealing her phone, when called upon to identify him, PW1 and her friends did not identify him.

As the first appellate court I have examined and evaluated the evidence before me and noted that the complainant gave a clear account of what transpired between her and the appellant.

Regarding the first and second grounds on the veracity of the identification evidence and the material contradictions in the evidence of PW1, PW3 and PW4, I have examined the record and noted that, whereas PW1 identified the appellant as wearing a Red Jacket which was corroborated by PW8 and PW10 who recovered the same from the appellant’s house and produced it in court as exhibit 4, PW3 and PW4 on the other hand testified of a black jacket and a black sweater respectively.

PW3 and PW4 further corroborated each other’s testimony on the jeans trouser worn by the appellant which had an imprint of a gun on it. Of curious note however is the fact that PW4 in his evidence in chief and cross examination by the appellant indicated that they were initially unable to identify the appellant as he had subsequently changed his clothes. They were however able to do so when he removed the cap

he was wearing at the time.

The appellant was not arrested immediately and in my view must have had sufficient time to effect a change of clothing at his house so as to disguise himself and remain anonymous from the prosecution witnesses. This was further evidenced by the fact that the red jacked was recovered at his house by PW8 and presented in court as exhibit 4 by PW10.

While cross examining PW4, I note that the appellant does not disprove the assertion by PW4 that he had changed clothing and effectively leaves that issue in abeyance. This in my view had a bearing on identification and might explain the varying accounts on the color of the jacket. Further the record does not indicate the colour of clothes he wore in court. However, PW3 during cross examination by the appellant clearly states that the appellant was wearing the same clothes during the offence as the ones he wore in court.

On the purported contradictions on record, I note that they relate to the accounts of PW1, PW3 and PW4 regarding the appellant's exact statement to them at the scene of crime. Whereas PW3 testified that the appellant inquired of them who had taken his pencil, PW3 and PW4 on the other hand testified that the appellant had instead asked them if they had seen his brother. While these statements evidently vary, I find this contradiction by the prosecution witnesses immaterial and peripheral. They do not go to the root of the case neither do they affect the totality of the evidence relating to the charge.

Thirdly, the appellant urged that the trial magistrate failed to summon an essential eye witness who would have shed more light on this case. This was a girl who PW4 in her testimony observed was fetching water at the scene, and witnessed the whole episode. She however ran away when the children raised an alarm. There is no legal requirement in any case for the prosecution to call a certain number of witnesses or a particular witness. Section 143 of the Evidence Act fortifies this position. It states:

> **"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."**

Having said that however, the prosecution owes the court a moral duty to ensure that justice is indeed served on every accused person in an effort to safeguard their fundamental right to fair trial.

This notwithstanding I am of the view that nothing turns on the failure by the prosecution to call this girl as a witness.

Finally, the appellant submitted that the P3 form was produced unprocedurally and consequently dented the medical evidence by the prosecution. It is apparent that he is not challenging the substance of the medical findings rather the procedure of producing it.

I have examined the record and it is clear that PW7 who examined the complainant on 24th February 2010 signed and produced the P3 form in court. I see nothing unprocedural in it's production save for the fact that it was not marked as an exhibit which omission is curable under section 382 of the CPC.

In his Judgment, the learned trial magistrate found that there was overwhelming evidence against the accused person as he was positively identified by three witnesses, and further that the medical evidence on record proved that the complainant who was barely 10 years old was indeed defiled by the appellant.

It is an established principle in our Law that the evidence of a child of tender years given on oath after *voire dire* examination requires no corroboration in law, though in practice the court must warn itself of the dangers of basing a conviction on the evidence of a child of tender years without looking for corroborating evidence.

In the instant case, PW1 was aged 10 years at the time of the commission of the offence and therefore a child of tender years. After *voire dire* examination the court was persuaded that both she, PW3 and PW4 understood the nature of an oath and proceeded to administer the usual oath. Having testified on oath, her

evidence, similarly, did not require corroboration. But even if corroboration was required, there is on record the evidence of PW3, and PW4 on the ordeal as it occurred. The effect of their evidence is that they supported PW1's testimony on how she was chased and defiled by the appellant.

I agree entirely with the assessment of evidence by the learned trial magistrate and find that sufficient evidence was adduced to justify the conviction. The sentence is legal and I see no reason to interfere with it.

This appeal is lacking in merit both on conviction and sentence and therefore stands dismissed.

SIGNED DATED and **DELIVERED** in court this **15th** day of July, **2014**.

A.MBOGHOLI MSAGHA

JUDGE