REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 138 OF 2010

JAMES KINYOR KIPKOGET.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein is James Kinyor Kipkoget. He was charged before the Chief Magistrate's Court Nyahururu with the offence of defilement contrary to **Section 8(4)** of the **Sexual Offences Act**. The particulars of the charge were that between 12th May 2009 and 20th May 2009 at [*particulars withheld]*, within Rift Valley Province, caused his genital organs to penetrate that of E C K, a girl aged 16 years. In the alternative, he faced a charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No.4 of 2006**. After the trial, the appellant was convicted and sentenced to serve 15 years imprisonment. He is dissatisfied with both the conviction and sentence and preferred this appeal based on the amended grounds of appeal filed in court on 15/7/2014. The grounds can be summarized as follows:-

1. **That the conviction was based on a defective charge;**
2. **That crucial witnesses were not called by the prosecution;**
3. **That the court failed to consider the provisions of Section 77 of the Evidence Act;**
4. **That the appellant's defence was not considered;**
5. **That the case was not proved to the required standard.**

On the defective charge sheet the appellant submitted that he was charged under **Section 8(4)** of the **Sexual Offences Act** which only provides for the sentence but the section defining or describing the offence of defilement i.e. **Section 8(1)** of the **Sexual Offences Act** was not indicated; secondly the appellant contended that the charge does not include the words "unlawfully and intentionally" which rendered the charge defective. Reliance was made on **Sections 137(a)** of the **Criminal Procedure Code** and **S43** of the **Sexual Offences Act**. It is also the appellant's contention that the court failed to conduct a voire dire examination on the complainant before her testimony.

The appellant also complained that the court failed to call three crucial witnesses i.e. the duty teacher, who was mentioned by PW2 as having called for a parade where the accused person did allege that the father was holding a girl in his house; that the said child was not called as a witness or the complainant's uncle who was present when PW1 was found in the appellant's house.

The appellant further faulted the court for failing to comply with **Section 77** of the **Evidence Act** in that the prosecution did not apply to the court to have the P3 form produced by another doctor other than the maker and further that the appellant was not asked whether or not he objected to the production of the P3

form by another doctor who was not the maker.

Lastly, the appellant contends that the age of the complainant was not proved as no evidence was led to prove it and that the Investigation Officer did not testify as to the reasons why he decided to charge the appellant.

The appeal was opposed and the learned counsel for the state, Mr. Chirchir, submitted that the appellant met the complainant on 11th May 2009 after she was sent away from school, convinced her that he married to her aunt, took her to his home where he defiled her till 20th May 2009 after information that the girl was locked up in the appellant's house; that the complainant was examined and found to have been defiled.

This is a first appeal and this court is required to evaluate and analyse the evidence afresh and arrive at its own determination and conclusions. Before I do so, it is necessary to recap the evidence that was adduced before the trial court. The prosecution called a total of 6 witnesses while the appellant gave an unsworn statement in his defence and called his brother as a witness.

PW1., ECK told the court that she was 17 years at the time she testified. She narrated to court that on 11/5/2009, she was sent away from school for school fees. When at Kinamba, the appellant found her seated, introduced himself as a relative, her aunt's husband. They boarded the matatu together to Matuikiu and since it was late in the evening, about 7.00 p.m., the appellant asked her to go to his house. At the appellant's house, her aunt was not there and the appellant informed her that she had left for a trip. At bed time, the appellant showed her where to sleep on one bed while he slept on another and his children in another room. He tried to defile her on that night but did not manage. The appellant locked her up in the said house when he left and did not allow her to leave. He defiled her from 12/5/2009 till 20/5/2009 as he threatened to cut her with a panga if she screamed. On 20/5/2009, her uncle came to the appellant's house and after an argument, the appellant told her to leave. PW1 said that Administration Police Officers were called and arrested the appellant. PW1 was taken to Ndindeka Health Centre where she was examined and a P3 Form filled on 22/5/09.

PW2, P K, is the complainant's mother, who gave her testimony partially and was stood down in order to produce the complainant's birth certificate but was never recalled to complete her testimony. She was therefore not subjected to cross examination by the appellant and the court cannot consider her evidence.

PW3, Cpl Maurice Odinda, of Matuiku Administration Police Camp is the one who arrested the appellant at about 2.00 p.m. He said people went to the camp with the complainant, alleging she had been defiled, he accompanied them to the appellant's house where he was arrested and taken to Kinamba Police Station.

PW4, Dr. Fredrick Kariuki, produced the P3 Form Exh.1. on behalf of Dr. Ndegwa who had been transferred from Nyahururu District Hospital.

When called upon to defend himself, the appellant in his unsworn evidence said that on 11/5/09, he attended a funeral at Dindika, went home and found his child, Joan Chepkorir unwell, took her to Mwenje Dispensary, she was treated and they arrived home late.

DW2, Joseph Kimutai, the appellant's brother said that the appellant was not at home on 11/5/09 because he had taken the sick child to hospital. He was surprised to learn of the allegations against the appellant.

Whether the charge is defective: I do agree that the charge was defective in that the charge did not state the section which defines the offence of defilement i.e. **Section 8(1)** of the **Sexual Offences Act**. **Section 8(4)** of the **Act** only provides for the sentence for defilement of a girl between the age of 16 and 18 years. However, in my view, failure to state **Section 8(1)** of the **Sexual Offences Act** the charge does not render the charge invalid because it was specifically stated that the offence is one of defilement of a girl under the age of 18 years. The particulars of the charge also described the complainant as being a girl aged 16 years which brought the charge under **Section 8(1)** of the **Sexual Offences Act.**

The appellant also faulted the charge due to the fact that the words **"intentionally and unlawfully"** were not used.

Under **Section 137** of the **Criminal Procedure Code**, no charge shall be open to objection in respect of the form or contents of its frame in accordance with the **Code**. The charges severally conformed to the provisions of **Section 137(1)** of the **Criminal Procedure Code** save for the above stated words. Further **Section 43(1)(c)** of the **Sexual Offences Act** defines what intentional and unlawful acts are:-

> **S43(1) "(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence."**

Under the **Sexual Offences Act**, all sexual intercourse with a minor under the age of 18 years is unlawful. As such, the omission of the words 'intentional' or 'unlawful' is not a fatal defect to the charge. Besides, the case went to full hearing and the appellant must have understood what the charge entails. I find that the defect is not fatal lto the charge and that ground must fail.

Whether the charge of defilement was proved: PW1 was the only witness to the offence**.** She recalled how the appellant enticed her, cheating her that he was married to her aunt. She is the one who pointed out the appellant to PW3 before he was arrested. PW1 led the police to the house where she had been held for over 7 days. Unfortunately, the uncle who was said to have been present at the scene was not called. This court has no idea why the said uncle was not called as a witness but he would not have made much difference to the prosecution case because he did not witness the offence. His evidence would only be relevant only as regards the finding of the complainant at appellant's house. In respect of the appellant's child and the teacher on duty who allegedly disclosed where the appellant was holding the complainant, that piece of the evidence was given in the incomplete statement by PW2, whose evidence should not have been taken into account because it was incomplete as she was stepped down before subjected to cross examination by the appellant. It is however noteworthy that the evidence of one witness can prove a fact and it is not always true that more than one person will witness an offence. **Section 149** of the **Evidence Act** states that a fact to be proved by a single witness.

PW1 testified that she was 17 years at the time of her testimony. She testified in court on 16/9/09, whereas the offence was allegedly committed in May. She did not specify which month of the years she was born. The Doctor who examined the complainant estimated the age at 16 years. Under **Section 8** of the **Sexual Offences Act**, the age of the complainant is material in that it determines the sub section under which an accused will be charged and the sentence to be imposed in the event of a conviction. The appellant was charged under **Section 8(4)** of the **Sexual Offences Act** and it was the duty of the prosecution to prove that the complainant was aged between 16 and 18 years at the time of the alleged offence. There was no attempt by the prosecution to prove this very important ingredient of the charge. PW2 who was stood down to avail the said evidence was never recalled. In the end, the prosecution failed to prove the charge of defilement as the age of the complainant was not known.

I do agree with the appellant's submission that the trial court did not comply with **Section 77** of the **Evidence Act**. If the maker of the medical report was unavailable, it behoved the prosecution to make an application to the court to have the P3 form produced by a different doctor and the appellant should have been invited to state whether or not he opposed the production of the P3 form by another doctor other than the maker or he wanted the maker called. The report was irregularly produced in evidence.

Should PW1 have been subjected to a voire dire examination? Voire dire examination is only required for children of tender years who may not be able to understand the meaning of the oath or not intelligent enough to testify. Section 2 of the Childrens Act defines a child of tender years as being below 10 years. PW1 was 16 or over and voire dire examination was not necessary.

The evidence before the court is that of a single witness. She told the court that she was defiled by the appellant from 12th to 20th May 2009 when she was rescued. Identification is not in issue. I have considered the defence of the appellant which only talks of the events of 11th when he claimed to have taken his daughter to hospital and supported by that of DW2. However, no mention was made of the

other days between 12th and 20th. There is no evidence that PW1 knew the appellant before and no reason why she could frame him. She led PW3 to his house where he was arrested. The question of identity does not arise because the complainant had stayed with the appellant for over a week. PW1's testimony was not shaken. The defence in my view, is not an alibi because it was raised as an afterthought and the court rightly dismissed it as a mere denial tailored to get the appellant off the hook.

So, was the charge of defilement proved to the required standard? Since the court believes PW1's testimony that the appellant had sexual intercourse with her, but the age of the complainant was not proved nor was there malice evidence, the charge of defilement was not therefore proved. I will find the conviction on the charge of defilement to have been unsafe and I hereby quash it and set aside the sentence. However, the complainant related to the court that the complainant had sexual intercourse with her from 12th till 20th May 2009 when he was arrested. Even if there was no corroborative medical evidence, the court believes that the appellant caused his genital organs to come into contact with the complainant's genital organs intentionally and unlawfully. There had been no finding made on the alternative charge of indecent act contrary to **Section 11(1)** of the **Sexual Offences Act.** An indecent act is defined in **Section 2** of the **Sexual Offences Act** as an unlawful intentional act which caused:-

> **"(a) any contact between any part of the body of a person with the genital organs, breasts, buttocks of another, but does not include an act that caused penetration;**
>
> **(b) exposure or display of any pornographic material to any person against his or her will."**

In this case the age of the complainant was not ascertained and the court cannot confirm that she was a child. The court has however discretion to invoke **Section 179(2)** of the **Criminal Procedure Code** which provides that a person can be convicted of a minor offence which has been proved by evidence though he was not charged with it. Due to lack of medical evidence and age assessment, I will proceed under **Section 11(A)** of the Sexual **Offences Act** as read with **Section 179(2)** of the **Criminal Procedure Code** and convict the appellant of an offence of indecent act on an adult and hereby sentence him to five years imprisonment. The sentence to run from the date of conviction on 29/4/2010. Orders accordingly.

DATED and DELIVERED this 1st day of October, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant in person

Mr. Chirchir for the State

Kennedy – Court Clerk