REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 64 OF 2012

ZACHEUS MWENDA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Zacheus Mwenda was charged with four counts of defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. It was alleged that on diverse dates he defiled a child who was aged 17 years old. In the Alternative, the Appellant faced a charge of committing an Indecent Act with a child contrary to section 11 (1) of the same Act.

The Appellant was tried, found guilty and convicted of the four charges of defilement and sentenced to fifteen years imprisonment on each of the four counts with an order that the sentences do run concurrently.

The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. The Appellant relied on the following grounds:

a. **That the learned trial magistrate erred in law and fact by failing to find that the prosecution failed to summon vital witnesses mentioned during the trial for the just decision to be reached;**

b. **That the learned trial magistrate erred in law and fact in failing to note that there was no any medical examination report tendered in court in respect of the appellant to connect him with the alleged crime;**

c. **That the conviction and sentence is not supported by the weight of evidence tendered;**

d. **That the learned trial magistrate erred in law and fact in taking into consideration extraneous matters which had no basis in evidence tendered before him which matter led him to make a wrongful conviction;**

e. **That the learned trial magistrate erred in law and fact in rejecting the unsworn defence without sufficient reasons.**

At the hearing the appellant further relied on 10 other grounds which I have considered and are a repetition of the above grounds. When the appeal came up for hearing on 14th October 2014, the appellant

intimated to court that he would rely on his written submissions.

The appeal was opposed. Mr. Kariuki Learned State Counsel submitted *inter alia* that the prosecution witnesses had tendered sufficient evidence to find a conviction and that the evidence was overwhelming. He further submitted that the unsworn defence given by the appellant was an afterthought and was not corroborated and urged the court to uphold the conviction and sentence.

This being the first appellate court, the evidence adduced before the trial court must be subjected to a fresh evaluation and analysis so that this court can draw its own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision of **Okeno Vrs. Republic 1972 EA 32** where it is stated as follows:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."

The facts of the prosecution case were that the complainant, PW1 KN, a student at [Particulars withheld] Secondary School was in school on 3rd June 2010, when her mathematics' teacher called her and informed her that she wanted to take her to a bishop in Meru town to help address her problems. They proceeded to Riverside and waited for the bishop (the appellant) for about an hour and when the bishop came, he introduced himself as Bishop Mwenda of Word of Faith Church. PW1 then explained to him the problems that she had whereupon the bishop informed her that she had been bewitched and that there was something in her stomach which was growing and it could kill her if not removed. She testified that the bishop told her, that before he could pray for her she had to be tested for HIV. They then both went to Consolata Hospital where they took a HIV test whose result was negative.

The appellant then took her to a KWS forest and under a big tree, he asked her to pray four times for forgiveness before he started praying for her. He then removed a bottle of oil which he claimed was anointing oil and applied the same on her forehead and then poured some on her hands and asked her to apply it on her private parts. The appellant then removed his trouser and underpants and told her to apply the oil on his private parts. PW1 refused whereupon the appellant asked her between him and God who was intelligent and she answered that it was God. The appellant then told her to do what God had instructed. She then went ahead and applied the oil on his penis and the appellant told her to undress and they had sex. PW1 further testified that prior to this incident she was a virgin and the appellant took her to Meru Town after the incident. On 18th July 2010, the appellant went to PW1's home and found her with her brother and grandmother and produced the oil again after praying and applied the same on her brother's shirt and in every room. The appellant told her that to remove the charms in her stomach he had to have sex with her again.

PW1 further testified how they had sex on three other different occasions and eventually on 29th August 2010, they were accosted by KWS officers and police officers whereupon PW1 disclosed to them what the appellant had been doing to her all along. They were then taken to Meru Police Station where PW 1 recorded her statement and both were taken to Meru General Hospital where they were examined.

PW1's evidence was further corroborated by Mary Karambu (PW2) and Jambo Jason (PW3) who testified how the appellant and PW1 went for a HIV test where upon they duly signed a register to confirm that they had voluntarily agreed to undergo the test. PW2 produced the register as an exhibit in court and further confirmed that the patients she attended to were the appellant and the complainant. PW3 introduced PW1 to the appellant to assist PW1 who was undergoing family problems because the

appellant had prayed for her child who got healed. PW3 told the court that the Appellant asked her to buy for him anointing oil and he gave the appellant 2,500/- for it. PW1 later told PW3 that bishop had carnal knowledge of her in the forest and indentified the said bishop as the appellant.

PW4 Sgt. Julius Gikundi, a Forest Officer based at Meru Forest Eastern Conservancy recalled that on 29.8.2010, when on patrol in the forest found an abandoned vehicle Nissan Sunny observed it for 2 hours, suspected it may have been stolen and called KWS personnel. PW6 Ranger Paul Koech proceeded to the scene and in turn, called PW4 PC Peter Kabogo of Meru Police Station who also went to the scene. As they waited for a towing truck the appellant and complainant emerged from the forest. After interrogation PW1 informed them that the Appellant had defiled her on the pretext that he was praying for her.

PW 8 PC Janet who was the investigations officer testified that PW1 told her that she had been defiled by the appellant previously a total of four times. PW8 further testified to having sworn an affidavit before court to enable her to obtain the registration book of a VCT center where the appellant and the complainant had visited for HIV test prior to the complainant being defiled by the appellant. The register was produced in the trial court as an exhibit by a nurse. She further produced as an exhibit the anointing oil which the appellant had applied on the complainant's body which he had alleged would solve the complainant's problems.

The Appellant denied defiling the complainant but admitted having been introduced to the complainant by a teacher for prayers; that the complainant told him that she had sex with men and was scared of contracting HIV and that she wanted his assistance. It was his case that he took the complainant for a HIV test which tested negative and later to the forest for prayers with her family members; that he had parked his car near KWS offices and after prayers, he went back to his motor vehicle only to find the same surrounded by police officers who demanded a bribe from him to release the motor vehicle. He told them that he had only Ksh.3000 shillings whereupon he was arrested together with the girl but the others were released. It was his case that the case was fabricated against him after he declined to bribe police officers.

From the complainant's evidence on record, she narrated to the court how the appellant lured her into having sex with him under the pretext of praying for her to alleviate the hardships she was facing at home. PW1's evidence was clear and consistent and was further corroborated in material particulars by the evidence of PW 2,3,4,6 and 7.

The learned trial magistrate observed in his judgment that the complainant gave her evidence in a simple straight forward manner narrating the sequence of events from the outset when she was introduced to the appellant who took her to the VCT center for HIV testing, breaking down her resistance by invoking the name of God as having ordained the sexual acts. That she further narrated in detail the sexual rituals she was forced to perform by the appellant before they engaged in sex. The learned trial magistrate found PW1's evidence to be lucid and a clear narration of the events as they took place over a period of approximately one and a half months.

From the circumstances of this case, it is evident that the evidence against the appellant was overwhelming, credible and consistent to found a conviction. In any event, PW1, 2, 4,5,6,7 and 8 were unknown to the appellant prior to this incident and I have no reason to doubt their evidence which the trial court found to be truthful and credible. I find no grounds upon which to fault the learned trial magistrate's findings of fact and law in this case.

With regard to the allegation that there was no medical examination report tendered in court in respect of the appellant to connect him with the alleged crime, it was PW5's evidence that PW1 was examined on 30th August 2010. This was exactly one day after the complainant was defiled. The possibility of crucial evidence having been lost cannot be ruled out. In any event as was rightly observed by the trial court, the sexual encounters between the appellant and the complainant occurred within a period of one and a half months and in all those incidents, the complainant was never examined after the sexual activities. In my view, failure to have the appellant medically examined was not prejudicial to the prosecution's case since there were other independent witnesses who testified and corroborated PW1's evidence. In any event, it

is not mandatory that medical evidence corroborate PW1's evidence.

With regard to the other issue raised by the appellant that the trial magistrate rejected the appellant's unsworn defence without giving reasons, I am of the view that the appellant's defence was an afterthought and was not credible. The appellant's case was that he was framed after he declined to bribe police officers and that he was arrested together with the complainant in the company of the complainant's family members. The defence is an afterthought because the appellant was represented by counsel in the lower court and at no time did he question the witnesses on the presence of PW1s relatives at time of arrest or the fact that police asked for bribe. As noted earlier in this judgment, PW4, 6 and 7 were independent witnesses who were unknown to the appellant prior to this incident. I find no cogent reason as to why they would want to implicate the appellant and in any event, the complainant was categorical in her testimony that she was only with the Appellant at the time they were accosted by police officers.

With regard to the other issues raised by the appellant namely that the learned trial magistrate considered extraneous matters and the fact that vital witnesses were not called; it is imperative to note that appellant did not specify the alleged extraneous matters which the trial court relied upon and neither did he specify the vital witnesses who were not called. The only people who were not called in this case were the complainant's grandmother and brother who were present when the appellant applied oil on the complainant's brother's shirt and in every room at the complainant's home. In my view, these were not vital witnesses as they did not witness any of the sexual acts and failure to call them was not fatal to the prosecution's case. Besides there were other independent witnesses who gave sufficient and overwhelming evidence against the appellant. In the end result, I find that the conviction entered against the Appellant was safe. I accordingly uphold it.

The complainant's age was assessed at between 16 -17 years. Under Section 8(4) of the SOA 3 of 2006, the minimum sentence is 15 years imprisonment. The trial court imposed the minimum sentence and I hereby confirm it. The learned trial magistrate in imposing the same observed as follows:

"…..however the court notes the appellant betrayed the trust bestowed on him as a church minister and preyed on an innocent school girl who had come to him in need of prayers and decided to rob her of her innocence. The law provides for a minimum sentence and accordingly I do hereby sent the appellant to 15 years imprisonment on each of the four counts to run concurrently……"

I find that the Appellants appeal lacks in merit and I accordingly dismiss it.

DATED SIGNED AND DELIVERED THIS 14TH DAY NOVEMBER 2014.

R. P .V. WENDOH

JUDGE

…….For Appellant

…….For State

…….Court Assistant

…….Appellant