REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 132 OF 2011

WILLIAM NJERU NTHIGA alias KIVEMBE.....APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

From original conviction and sentence in Criminal Case No. 3 of 2011 at the Principal Magistrate's Court at Siakago by Hon. S.M. MOKUA on 2/8/2011

J U D G M E N T

WILLIAM NJERU NTHIGA alias KIVEMBE the Appellant had been charged with the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act No.3 of 2006.

The particulars as stated in the charge sheet were as follows;

> **WILLIAM NJERU NTHIGA alias KIVEMBE:** On the 13th day of December 2010 in Mbeere North District within Embu County in the Republic of Kenya caused his penis to penetrate the vagina of RGN a girl aged 13 years.

The Appellant pleaded not guilty and the matter proceeded to full hearing. He was convicted on the principal count of defilement and sentenced to twenty (20) years imprisonment. And being aggrieved by the Judgment has filed this appeal citing the following grounds;

1. ***That the learned trial Magistrate failed to consider the fact that the Appellant's constitutional rights were violated when PW5 the Assistant Chief locked the Appellant in cell on 30th December 2010 and took him to Siakago police station on 31st December 2010 and was taken for plea on 3rd January 2011.***
2. ***That the learned trial Magistrate failed to consider the fact that no medical test was conducted on the Appellant like DNA to confirm whether he had really been in contact with the complainant's body.***
3. ***That the learned trial Magistrate erred in both law and fact when he failed to consider the fact that the Appellant was denied his right to cross-examine PW2 and PW3.***
4. ***The learned trial Magistrate failed to consider the Appellant's defence.***

The facts of the case are that on 13/12/2010 at 1pm PW1 a girl aged 14½ years was at their home with her brother (PW3) when the Appellant came there asking for water. He was given the water. After drinking it he told her he had been sent for youths to go and meet at his mother's place. He further told her they were to pass through the church. She dressed up and they left. After crossing some river the Appellant held her and she screamed. He held her by the neck. He took her to the river bank, undressed her and

removed her pant. He had sex with her. They moved to another point and he again had sex with her a 2nd time. As she cleaned herself she saw PW2. The Appellant pushed him away. He took her to a different direction and had sex with her the 3rd time. When it started raining he left her. She finally went home and slept. When her parents came home she reported to them. She was taken to hospital and the matter was reported to Siakago Police Station. While at the river where this incident took place PW2 and PW4 who were herding cattle heard noises from the cave. They saw the Appellant emerge from there while stark naked. He chased them away. PW5 examined PW1 and found that she had been defiled. The Appellant was then arrested. The accused in his unsworn statement of defence denied the charges. He explained how he was arrested and beaten for defiling a 14 year old girl. He testified that on 12/12/2010 he had guests and on 13/12/2010 he went to Kanyuambora and left at 5pm and got to Kirie at 7pm.

When this appeal came for hearing the Appellant presented the Court with written submissions expounding on his grounds. He submitted that the evidence of the investigating officer (PW8) was very suspect. The State through learned State Counsel Miss Ing'ahizu opposed the appeal. She stated that the complainant's age had been proved (EXB6) same to the act of penetration. And that PW1's evidence had been corroborated by that of PW3 and PW4. She told the Court that the Appellant's constitutional rights had not been violated.

This being a first appeal this court is enjoined to re-evaluate the evidence on record and come to its own conclusion. I do not lose sight of the fact that I did not see or hear the witnesses. The Court Appeal in the case of ***PATRICK & ANOTHER – REPUBLIC [2005]2 KLR 162*** held 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 and to the appellate Court's own decision on the evidence. It is not the function of first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions".***

I have considered the submissions by both the Appellant and the State plus the grounds of appeal. I have equally evaluated the evidence on record. Before I deal with the grounds of appeal I wish to state that in this case there were three main issues which were to be decided on by the Court. These were as follows;

i. Whether PW1 was a minor and if her age fell in the bracket of 12 years – 15 years as provided for under section 8(3).
ii. Whether PW1 was defiled.
iii. If (ii) is in the affirmative whether the Appellant is the person who defiled her.

The charge sheet shows that the Appellant was charged under section 8(1) and (2) of the Sexual Offences Act. The particulars show that she was aged 13 years. PW1 told the Court she was aged 13 years and was in standard 6. Her father PW6 said PW1 was born on 6/3/1996. He produced the clinic card (EXB6), which confirmed the date of birth. This clearly shows that PW1 was aged 14 years 9 months when this incident took place. EXB6 is the document that ideally confirmed the date of birth of PW1. The Prosecution may not have been keen on quoting the correct section for punishment. Section 8(3) of the Sexual Offences Act covers the age of 12 years – 15 years. The minimum sentence provided is 20 years imprisonment. My finding is that failure to indicate the correct sentencing provision did not prejudice the Appellant in any way as the section creating the offence was correctly indicated. The learned trial Magistrate also addressed this issue very well in his judgment.

The next issue is whether the complainant was defiled or not. PW1 confirmed that she was defiled by a man. He had sex with her three times at different intervals. She was even unable to walk. When she reached home she went and slept. The clinical officer who examined PW1 stated this at page 9 lines 7-13;

> ***"Physical examination disclosed she was walking with difficulties. She was seen a day after the incident. There was penile penetration. She was aged 14 years. Her genitalia had blood and sand. She had a tear vaginal area near the anus. The hymen was broken. HIV test was***

negative. Vaginal swap showed no infection. I concluded that there was penetration. I filled the P3 Form on 28/12/2010. P3 form MFI 1. I have the notes for Rispa Gakii together with lab request MFI 2, post rape care form 1. The assailant did not use a condom".

The Appellant had no question for this witness in cross examination. The evidence of PW5 clearly confirms that PW1 genitals were penetrated by a penis (EXB1). My finding therefore is that PW1 was defiled.

Ground 2

The charge sheet shows that the Appellant was arrested on 31/12/2010 which was a Friday. He was arraigned in Court on 3/1/2011 which was a Monday. I do not find/see any violation of his constitutional rights as alleged.

Ground 3

The offence was committed on 13/12/2010. The Appellant was arrested on 31/12/2010. He had obviously bathed and even if any tests were to be done they would have revealed nothing. Ground 3 must fail.

Ground 4

It is true that PW2 and PW3 were minors and they gave unsworn evidence. The Appellant was not given a chance to cross examine them. Had their evidence been the only evidence linking the Appellant to the offence 1 would have made a finding that an injustice had occurred. PW1 who was also a minor gave sworn evidence and she was cross-examined on it. She gave the name of the culprit to her father PW6 and the Assistant Chief (PW7) leading to his arrest. PW1 gave a detailed graphic account of what happened to her on this day 13/12/2010. Her evidence is well corroborated by the medical evidence given by PW5. The learned trial Magistrate well considered the Appellant's defence (page 25 lines 22-25) and found it watered down by the evidence of the Prosecution witnesses. I have no reason to fault the findings of the learned trial Magistrate.

The Appellant was lucky to get away with the minimum sentence. The result is that the appeal lacks merit and is dismissed. The conviction and sentence are confirmed.

Right of appeal explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF NOVEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ingahizu – State

Appellant

Njue- C/c