JOSEPH KAMAU KIRUBI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in Criminal Case Number 1711 of 2008 in the Senior Resident Magistrate's Court at Limuru – A.O Ominga (RM) on 20th May 2009)

JUDGMENT

1. The Appellant herein John **Kamau Kirubi** was charged with the offence of defilement of a girl contrary to **Section 8(1)** as read together with **Section 8(2)** of the **Sexual Offences Act**. In the alternative, the appellant was charged with indecent assault on a female contrary to **Section 11(a)** of the **Sexual Offences Act**. At the close of the trial, the appellant was convicted on the main charge and sentenced to serve 20 years' imprisonment.

2. The appellant lodged an appeal to challenge both the conviction and sentence. He advanced six grounds of appeal which can be summarised as follows:

1) The prosecution did not prove its case since investigations were not comprehensively done and scientific evidence was not produced.

2) The trial process was unprocedural in view of the court's failure to put on record the interrogation of the complainant by the court, which led the opinion that she was not competent to testify.

3) The sentence imposed was excessive

4) The defence testimony was disregarded

3. The learned state counsel Mr. Mulati opposed the appeal on behalf of the state. He submitted that DNA test is not a statutory requirement, and that furthermore, **PW3** was an eye witness to the incident. He further submitted that the court had rightfully ruled that the complainant was too young to express herself effectively, and according to **Section 2(b)** of the **Sexual Offences Act**, the evidence of an intermediary can be taken where the complainant cannot testify. He urged that the evidence of the child's mother taken together with that of **PW3** was sufficient to sustain a conviction, and that therefore the appeal should be dismissed.

4. As a first appellate court, this court is duty-bound to examine the evidence on record wholly and exhaustively and arrive at an independent conclusion based on the evidence, as stated in (**Nzivo vs. Republic Cr. App No. 81 of 2003 [2005] 1 KLR, Kiilu and Anor v Republic [2005] 1 KLR)**

5. The brief particulars of the charge are that on 13th February 2010, in Kiambu West District within Central Province, the appellant intentionally and unlawfully defiled EW by penetrating his male organ, namely, penis, into her vagina, a girl under the age of 11 years.

6. The offence of defilement is provided for under **Section 8(1)** of the **Sexual Offences Act** as an act which causes penetration with a child. The age of the child was not in contention. All the prosecution witnesses indicated that the child was 5 years old. The issue for consideration is therefore whether the prosecution proved the element of penetration.

7. On this issue I considered the evidence of **PW3** who witnessed the incident. **PW3** is the aunt to the minor, and her testimony clearly points to the appellant as the one who defiled the child. With this evidence, I agree with the respondent that DNA testing was not necessary since the evidence presented satisfies the ingredients of the offence and connects the offence to the accused person.

8. The testimony of **PW4**, the medical doctor supported the charge. He stated that upon examination of the complainant he found that her hymen was torn and there was discharge from the child's genitalia. The appellant's contention that there was need for DNA testing since doctors can be unreliable does not hold. The appellant did not challenge the doctor's testimony during the hearing, by way of cross-examination. It would be dangerous for this court to accept such a sweeping statement on the unreliability of medical witnesses without evidence on record to support it.

9. I am therefore satisfied that penetration as an element of the offence was sufficiently proved by the medical evidence.

10. I have considered the submission of the appellant on the ground that, the trial court did not adequately consider the defence statement which in the appellant's view cast doubt upon the prosecution case. The appellant submitted that the trial court should have given due credence to the defence case that there existed a grudge between the appellant and PW3. The record shows that the learned trial magistrate did consider and reject the defence. The learned trial magistrate rendered himself thus:

"The allegation of a grudge is based on rather weak premise. The accused faces a very serious offence for which I do not find it prudent (sic) for his own Aunt to falsely implicate him merely because he (accused) had refused to carry out a simple errand, I reject the defence as untrue and of no effect".

11. In his second ground, the appellant stated that the trial court did not put on record the interrogation that was the basis of forming an opinion that the child was not fit to testify. He submitted that this omission rendered the trial a nullity. The record shows that an application was made by the prosecutor, to the effect that the minor should be excused from testifying on account of her tender age. The trial court made the following observation with regard to the minor:

"I have physically sighted and briefly interrogated the child. The mother says she is 5 years old. The child is unable to effectively express herself. Her evidence is accordingly within her testimony".

12. In making a finding on the child's ability to testify, the trial court therefore had the advantage of assessing the character of the witness which corroborated the prosecutor's assertion that the child could not testify. The fact that the trial court did not make a record of responses of the minor to the interrogation in assessing the competence of the child, did not in any way prejudice the appellant's right to a fair trial. Furthermore, the prosecution could, and did indeed prove its case on the strength of other witnesses without the evidence of the child.

13. The trial court exercised its statutory discretion properly to make a finding on the competence of the witness who was a minor. **Section 125 (1)** of the **Evidence Act**, provides that:

"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause."

14. However, it cannot be taken that the minor's mother was acting as an intermediary when she testified. An intermediary is defined under **Section 2** of the **Sexual Offences Act** as:

"a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker."

Therefore, the reference by Mr. Mulati the learned state counsel, that courts are allowed to use intermediaries is not applicable in this case, since the process of declaring the child vulnerable and in need of an intermediary was not undertaken. **PW2** did not testify on behalf of the child and her evidence cannot be taken as the evidence of an intermediary; rather, it was evidence of an independent witness.

15. Having carefully re-evaluated the evidence and submissions of both sides, I am satisfied that the appellant was properly convicted and I dismiss the appeal against conviction.

16. The appellant also invited this court to assess the appropriateness of the sentence imposed urging that it was manifestly harsh and excessive considering all the circumstances of the case.

17. The complainant in this case was 5 years old at the time of commission of the offence. Thus, the lawful sentence according to **Section 8(2)** of the **Sexual Offences Act** is life imprisonment. The trial court therefore erred in sentencing the appellant to 20 years imprisonment which goes against the mandatory life sentence imposed by the Act.

18. The other issue for determination with regard to the sentencing is the age of the accused person. While this fact was not directly alluded to in the grounds of appeal, I nevertheless address it in the interests of justice. The appellant's assertion in mitigation that he was 16 years old prompted the trial court to order for an age assessment. The age assessment report concluded that the appellant ***"can be approximately 17 years old, not yet 18 years,"*** and cautioned that it was an approximation. The appellant's primary school leaving certificate indicated that he was born on 3rd May 1992, on the basis of which the appellant would be 17 years and 9 months old at the time of the commission of the offence. The Probation Report showed that he was 18 years old.

19. From the above, I find that the evidence on the age of the appellant at the time, although inconclusive, points to a high probability that the appellant was below 18 years of age at the time of the commission of the offence.

20. Following this finding, the trial court ought to have sentenced the appellant as a minor guided by the **Children Act Section 190(1)** of the **Children Act** prohibits the imprisonment or placement of a child, in a detention camp, while **Section 191** provides for ways through which a child offender should be dealt with including:

a. discharging the offender under section 35 (1) of the Penal Code;

b. discharging the offender on his entering into a recognisance, with or without sureties;

c. making a probation order against the offender;

d. committing the offender to the care of a fit person, or a charitable children's institution

e. ordering the offender to be sent to a rehabilitation school suitable to his needs and attainments if aged between 10 and 15 years;

f. ordering the offender to pay a fine, compensation or costs;

g. committing the child who has attained the age of sixteen years to a borstal institution;

h. placing the offender under the care of a qualified counsellor;

i. ordering the child to be placed in an educational institution or a vocational training program;

j. ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;

k. making a community service order.

21. In light of the above, the sentence of imprisonment was therefore contrary to the law and is hereby set aside. The appellant having since obtained the age of majority, the options provided for under **Section 191** are no longer applicable. I take notice of the fact that the appellant has been incarcerated since 2010, but even as an adult he cannot continue to serve sentence in an adult penitentiary for an offence he committed as a minor. For the foregoing reasons, although the case was proved, the hands of the court are tied when it comes to the sentences applicable.

I therefore order that the case be mentioned on 17th October 2012, for a probation report to be produced in court with regard to the appellant.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **3rd day** of **October 2012.**

L. A. ACHODE
JUDGE