IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 28 OF 2016

BETWEEN

MUGANGA CHILEJO SAHA.....APPELLANT

VRS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa, (Chitembwe, J.) dated 25th September, 2012

in

H.C.CR.A. No. 371 of 2010)

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JUDGMENT OF THE COURT

In dismissing the appellant's first appeal to the High Court Chitembwe, J was convinced that there was sufficient evidence on record from which the trial court properly found that the appellant committed the offence of defilement with PW1, a girl aged 8 years; that PW1 knew the appellant well being a neighbour; and that the incident occurred in broad day light. The learned Judge also concurred with the learned trial magistrate that PW1's age was established. With that he rejected the appellant's *alibi* defence and dismissed the appeal.

The appellant now brings this second appeal on the ground that there was no proof of PW1's age; that **section 19** of the Oaths and Statutory Declarations Act was not complied with; that vital witnesses were not called; that **section 109** of the Evidence Act was violated; and that his defence was not considered.

Because this is a second appeal in which we are only concerned with issues of law, we intend only to outline briefly the evidence on record and to relate it to the above grounds which, no doubt raise points of law.

The prosecution's case against the appellant was that he lured PW1 to his house pretending that he intended to send her to buy cigarettes for him. Once in the house he defiled her and warned that he would kill her if she told anyone what he had done to her. When she got home, her mother noticed her blood stained clothes but thought it was dirt. Because she did not suspect anything she asked PW1 to take them off to be washed. It was not until the second day that a neighbour, PW3 talked to PW1 after noticing her

behaviour that the latter opened up and explained what the appellant had done to her. Thereafter, she was taken to the hospital. Through medical examination it was established that the hymen was broken, had suffered bruised *labia minora*, the presence of vanereal infection, and that PW1 had been sexually violated.

The appellant was arrested and charged as explained earlier in this judgment.

Before us, the appellant, who was not represented by counsel, relied entirely on his written submissions in which he has complained, pursuant to the grounds contained in the memorandum of appeal, that the offence, which must be proved by two elements did not meet the threshold. According to him it was for the prosecution to provide proof of age of PW1 and also evidence that she was penetrated. He cited to us the case of **Elias Kasomo V R.** Cr. Appeal No. 504 of 2010 for the above propositions.

Defilement is proved where it is demonstrated by evidence beyond any reasonable doubt that a person has done an act which causes penetration with a child as defined under the Children Act. The penalty for the offence of defilement will depend on the age of the victim. As a vital factor in the proof of the offence, age too must be proved beyond doubt. For example in the appeal before us, PW1 was said to be 8 years at the time of the alleged offence. If this was proved, the appellant would be liable to imprisonment for life in terms of **section 8 (2)** of the Sexual Offences Act.

As we consider the first question, whether there was evidence of penetration, we observe that although the appellant raised an *alibi* defence, there was sufficient evidence that he was not a stranger to PW1. He himself in that *alibi* defence confirmed that PW1knew him **"very well".** Considering the totality of the evidence we are satisfied that the trial magistrate properly directed himself on the question of identification, by, first appreciating that this was a case of identification by a single eye witness whose evidence he had to approach with great circumspection. He also relied on the proviso to **section 124** of the Evidence Act, to the effect that he could only base his conviction on PW1's evidence if he was satisfied that she was a witness of truth. He came to the conclusion that, from the testimony of PW1 and the *voir dire* examination, she was indeed a witness of truth. The learned Judge, though agreeing generally with that conclusion went on a tangent to propound his own hypothesis on the question of identification, saying that;

> **"The trial court evaluated the evidence and concluded that, PW1 was truthful. Although there was no other eye witness to the act, it is quite obvious that no one would want to defile a child in the open. In very rare occasions, the defiler would be caught red handed".**

We have no basis for interfering with the concurrent findings that, in the circumstances of the case the appellant was positively identified.

Penetration is defined under **section 2** of the Sexual Offences Act as the partial or complete insertion of the genital organs of a person into the genital organs of another person. PW1 explained in a clear sequence how, once in the appellant's house, he immediately grabbed her, covered her mouth and "**did bad things….. (*tabia mbaya*)"** to her without undressing her. That he used;

> **"…. his penis. He inserted it inside me. He inserted it at the place I pass urine through. I could not scream as he was holding my mouth and nose. I was injured at my vagina. I bled. ….The accused released me after hurting me……He said he would slaughter me if I told anyone….".**

Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "***alinifanyia tabia mbaya",*** (**IE V R**, Kapenguria H.C Cr. Case No. 11 of 2016), ***"he pricked me with a thorn from the front part of this body."***, (**Samuel Mwangi Kinyati v R**, Nanyuki HC.CR.A. NO. 48 of 2015), **"he used his thing for peeing"**, (**David Otieno Alex v R,** Homa Bay H.C Cr Ap. No. 44 of 2015), "***he inserted his "dudu" into my "mapaja",*** (**Joses**

Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "***he used his munyunyu",*** **(Thomas Alugha Ndegwa,** Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like **"he defiled me"**, which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See **A M M v R** Voi H.C Cr. App. No. 35 of 2014, **EMM V R** Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her.

In this appeal, apart from PW1's testimony which the trial court found credible, there was other independent evidence in support thereof from her mother, PW2, a neighbour, PW3, and the medical officer, PW 6. The latter specifically concluded that there was proof of defilement from the bruised genitalia at the *labia minora.* We agree with the analysis and conclusion reached by both courts below on this issue.

We are equally satisfied that PW1's age was proved beyond doubt by herself and the mother, PW2. Both the trial and first appellate courts were unanimous that PW1 was 8 years at the time of the offence.

We, accordingly find no basis of interfering with the appellant's conviction and sentence. The appeal has no merit and we hereby dismiss it in its entirety.

Dated and delivered at Mombasa this 23rd day of June, 2017.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR