IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MWERA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 329 OF 2011

BETWEEN

ROBERT OLE GWENI ……. APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisumu

(AbidaAroni, J.) dated 23rd September, 2011

in

H.C.CR.A. NO. 72 OF 2010)

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JUDGMENT OF THE COURT

1. This is a second appeal in which Robert Ole Gweni, the appellant, is fighting his conviction and life sentence on a charge of defilement; his first appeal to the High Court having been dismissed.

2. The factual background of the appeal is as follows: The appellant was charged with the offence of defilement of a girl aged 11 years contrary to **Section 8(1)** as read with **sub-section 2** of the Sexual Offences Act. He was in the alternative charged with indecent assault contrary to **Section 11(1)** of the Sexual Offences Act (the Act). The particulars of the main charge alleged that on 4thMay, 2009, at [particulars withheld] Sub- location in Siaya District of former Nyanza Province, the appellant defiled **M.A.O.** (the complainant), a girl aged 11 years. Those of the alternative charge alleged that on the same day and at the same place the appellant unlawfully and indecently assaulted the complainant by touching her private parts.

3. The appellant pleaded not guilty to the two charges but after trial before the Principal Magistrate at Siaya, he was convicted on the main charge and sentenced to life imprisonment. As we have said his appeal to the High Court was dismissed thus provoking this second appeal.

4. In his memorandum of appeal, the appellant raised five main grounds which challenged the

propriety of the charge and the appellant's identification and lastly alleged that there was no sufficient and credible evidence to support his conviction.

5. At the hearing of the appeal, the appellant opted to rely entirely on his written submissions in which he put up a spirited submission surprisingly supported by relevant authorities.

6. On the first ground the appellant submitted that the main charge on which he was convicted was fatally defective. He contended that this is because the particulars thereof did not disclose an offence under **Section 8(1)** as read with **sub-section (2)** of the Act. He argued that for a charge under those provisions to be proper, the particulars should specify which genitalia of both the appellant and the victim were involved. He said, in this case the charge should have stated whether the defilement was in the anus or vagina of the victim and which organ of the appellant, penis or testicles, were used to defile the victim. In his view, as a result of that omission, the charge is fatally defective and incurable under **Section 382** of the Criminal Procedure Code (the CPC).

7. On identification the appellant contended that the offence allegedly having been committed at twilight (6.00pm) the conditions were not favourable for a positive identification. He contended that the two courts below failed to warn themselves of the danger of basing his conviction upon the evidence of visual identification by a single witness without corroboration as required by **Section 124** of the Evidence Act. On this ground the appellant cited the Ugandan case of **Bukenya v. Uganda [1972] EA 540**and further argued that the two courts below should have made an adverse inference on the respondent's failure to call the people the complainant said who heard her screams and the other children who threw stones at the rapists to scare them away.

8. On corroboration, the appellant dismissed the medical evidence as worthless. He said that besides the fact that no blood stains from the alleged injury to the complainant's genitalia were examined, the medical evidence does not in any way implicate him as he was not himself examined. The appellant went as far as alleging, without any substantiation, that that evidence was obtained by fraud.

9. In response to these submissions, Mr. Ogoti, Senior Assistant Director of Public Prosecutions, dismissed this appeal as unmeritorious. He argued that the charge is properly framed and is not defective as the appellant claimed. On the identification of the appellant, he submitted that this was a case of recognition and the appellant's identification is not in doubt. As the trial court believed the evidence of the complainant, it sufficed and there was no need of calling any other witness. He therefore urged us to dismiss this appeal in its entirety.

10. We have carefully read the record of appeal, the grounds of appeal and considered these rival submissions. Besides the alleged defect of the charge which we shall presently deal with, as we have pointed out the main issue in this appeal is the identification of the appellant as the defiler of the complainant. Having carefully read the record of appeal we have no doubt at all on this issue. **Mr. Alfonse Otieno, PW4**, the Head Teacher of Jina Primary School testified that the appellant was employed as a watchman in the school on 1st April 2008. So as at the date of the commission of the offence on 4thMay, 2009, the appellant had been working for the school for slightly more than one year. PW4 further testified that the appellant used to work from 4.00 pm to 8.00 pm every day. That placed the appellant at the scene of crime at the material time (6.00 pm) when the crime was allegedly committed. The complainant herself testified that she knew the appellant as she had been seeing him at the school gate for that period. Even under intensive cross-examination by the appellant, she was categorical that it was the appellant who defiled her and not his confederate. In the circumstances we agree with Mr. Ogoti that this is a case of recognition. Recognition as we have repeatedly stated is more re-assuring than mere identification of a stranger. **Anjononi v. Republic [1976 – 80] 1 KLR 1566.**

11. We reject the appellant's contention that at 6.00 pm when the offence was committed, it was getting dark and that the conditions were not favourable for a positive identification. We all live

in this country and know that it is not dark at 6.00 pm. If that were so the complainant would have required a torch to trace her bag in the classroom where it was. We are therefore satisfied that the complainant properly identified the appellant and we therefore dismiss the ground on identification.

12. In sexual offences, the proviso of **Section 124** of the Evidence Act authorizes the court to convict even on the basis of the evidence of the victim of crime alone if it believes that victim's evidence. In this case the trial court believed the evidence of the complainant and the High Court found no reason of impugning that finding. We have no reason either. At any rate besides the evidence of the complainant, the medical evidence by **Sadiki Mwiti, PW2** the clinical officer who examined the complainant and found that she had been defiled provided corroboration even though it was not required in this case. We therefore find no merit in the appellant's complainant that there was no sufficient or credible evidence to support his conviction.

13. Lastly, we now turn to the appellant's complaint that the main charge on which he was convicted was defective. For ease of reference, we would like to quote verbatim the charge and its particulars. It reads:

> **"Defilement of a girl of 11 years contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 2006 (sic)."**

The particulars of that charge alleged that:

> **"Robert Ole Gweni: On 4th day of May 2009, at [particulars withheld] Sub-location in Siaya District within Nyanza Province defiled … [M.A.O.] a girl of age of 11 years (sic)."**

14. **Section 8(1)** and **(2)** of the Sexual Offences Act states that:

> **"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to life imprisonment."**

15. Although, ideally the phraseology of the particulars of the charge in this case should have been pleaded to include the word penetration, we do not think that that omission made the charge fatally defective. Sight should not be lost of the fact that **Section 8(1)** of the Sexual Offences Act quoted above simply defines what defilement is. For a sexual assault of a minor to amount to defilement, there must be penetration. In our view the word penetration does not necessarily have to be ncluded in the particulars of the charge. It is enough if the evidence in support of the charge demonstrates that there was penetration.

16. In this case, the minor complainant, after recounting how the appellant and his confederate grabbed and felled her to the ground, how the appellant raised her skirt and removed her panties, she stated that the appellant:

> **"Removed his penis and put it in my vagina. I felt pain and screamed and people heard. Then a child threw stones at the roof and they ran. One of them was putting on his pant. He ran with it."**

Later, still in examination in chief she stated that:

> **"One of the people who attacked me is in court. They were watchmen. The one in court took his penis and inserted it in my vagina. The other one was holding me."**

17. From the foregoing we are left in no doubt that there was penetration and the charge of defilement was proved. In the circumstances we find that the charge was not defective as the appellant claimed.

18. We have already quoted **sub-section (2)** of **Section 8** of the Sexual Offences Act which provides for a sentence of life imprisonment in the case of defilement of a child aged 11 years or below. There was no contention about the age of the appellant in this case. She said she was 11 years and her mother R O , PW2 confirmed that. She testified that the complainant was born on 28th March 1998 and produced a baptismal certificate to verify that. So as at 4th May, 2009 when the offence was committed the complainant was 11 years and slightly over one month old. That put her beyond the ambit of **Section 8(2)** of the Sexual Offences Act because she was above 11 years old. It follows that the life imprisonment imposed upon the appellant is illegal. **Section 8(3)** of the Act, however, provides for the sentence for convicts who defile children between the age of 12 and 15 years. There is, however, no provision for sentence in cases of defiled minors who are between the age of 11 and 12. Despite the mathematical precision that went into the drafting of the Sexual Offences Act especially with regard to sentence, there is obviously a lacuna in the two sub-sections. That however does not follow that the appellant in this case should not be given any sentence at all. In the circumstances we have to give the appellant the *"benefit of doubt"* and move to **Section 8(3)** of the Act which provides for a minimum sentence of 20 years where the victim of the sexual assault is between the age of 12 and 15 years.

19. For these reasons, we dismiss the appeal on conviction but allow the one on sentence, set aside the sentence of life imprisonment imposed upon the appellant and substitute therefor a sentence of 20 years imprisonment from the date of conviction.

Dated and Delivered at Kisumu this 25th day of March, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR