



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A.)**

**CRIMINAL APPEAL NO. 96 OF 2013**

**BETWEEN**

**SOLOMON NJAGI NYAMAU ..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(An appeal from the judgement of the High Court of Kenya at Embu***

***(Ong’udi, J.)dated 11<sup>th</sup> October, 2013***

***in***

***H.C.C.R.A No. 45 of 2011)***

**\*\*\*\*\***

**JUDGEMENT OF THE COURT**

1. **Solomon Njagi Nyamau**, the appellant was charged with the offence of defilement contrary to **Section 8 (1) & (2) of the Sexual Offences Act**. The particulars of the offence were that on 23<sup>rd</sup> March, 2007 in Mbeere District within the then Eastern Province, the appellant defiled LW, a child aged five and a half years.
2. The appellant initially pleaded guilty to the charge and was subsequently convicted, only for him to change his plea to that of not guilty. Consequently, a trial began with the prosecution calling four witnesses. It was the prosecution’s case that on 23<sup>rd</sup> March, 2007 at about 12p.m. PW 1, LW (L) was making her way home from [Particulars Withheld] Nursery School accompanied by a school mate by the name N. L made a stopover at her schoolmate’s home to take water. While there she was invited for lunch but declined the invitation and proceeded home. Along the way L met the appellant who held her hand and led her to a nearby bush, removed her pant and defiled her. According to L she felt pain in her thighs during the ordeal and her pant got torn as the appellant removed it. It was also her testimony that the appellant covered her mouth as he defiled her. Upon completing his mission, the appellant escorted L to her uncle’s shamba and abandoned her there. The complainant finally arrived home whereupon she informed her father about what had transpired. L’s father reported the incident to the police at Karaba before taking his daughter to hospital at Embu. L also testified that the appellant (Njagi) was known to her and so was his home. She managed to identify the accused in court.

3. PW 2, PMI( P) who was L's Father corroborated his daughter's account with notable parts of his testimony being:- L's late arrival from school(8p.m.), her report to the effect that she had been defiled by the appellant (Njagi), his examination of L and subsequent confirmation that her genitals were swollen; and that her pant was torn. P also testified that he reported the said events and findings to the police before taking his daughter to hospital for treatment. PW 3, Dr Mwea Macharia (Dr Macharia), a medical doctor testified that he examined L on 24<sup>th</sup> March 2007 and prepared a P3 Form on the same date. His findings were that the general condition of the patient was normal; her hymen was perforated while her labia, cervix and vaginal (sic) were normal. Dr Macharia also made findings to the effect that L's head, neck, abdomen upper, chest and lower limbs were all normal. The age of the injuries was 24 hours while the probable weapon was a penis; with the degree of harm assessed as grievous. It was the prosecution's case that on the material date L was five and a half years.
4. PW 4, PC Penina Mugo (PC Mugo) confirmed receiving a report on the events of the material date, referring the minor for treatment at the hospital and the preparation of a P3 Form. PC Mugo also confirmed the arrest of the appellant by members of the public who handed him over to the police. The officer positively identified the appellant as the person who was handed over to the police by the public.
5. In his defence the appellant gave an unsworn statement. He testified that on the material day he was arrested by members of the public who found him working at his shamba. Moments later he was escorted to the police station where he was detained and subsequently arraigned in court for an offence he knew nothing about. The appellant denied committing the offence he had been charged with; and attributed his tribulations to P who had framed him on account of a grudge.
6. The trial court convicted the appellant and sentenced him to life imprisonment. Aggrieved by the decision of the trial court, the appellant lodged an appeal at the High Court which was dismissed vide its judgement dated 11<sup>th</sup> October, 2013. It is that decision which has provoked the present appeal. At the hearing of this appeal, the appellant appeared in person while the State was represented by Mr. Kaigai, Assistant Deputy Public Prosecutor. The appellant urged us to look at the matter afresh and submitted that he was never examined by the doctor; and that he was framed. Mr. Kaigai in opposing the appeal submitted that the case had been proved to the required standard; and that L's evidence was clear and consistent.
7. The State also submitted that L was able to recognize the appellant as the person who defiled her and that the possibility of mistaken identity was remote as the case in question was one of recognition. The Assistant Deputy Public Prosecutor also submitted that Dr Macharia had corroborated the fact that L had been defiled. In conclusion, Mr. Kaigai submitted that there were concurrent findings by two courts below and urged us to dismiss the appeal. In a brief response, the appellant urged us to reduce the sentence meted out on him.
8. We have considered the record, submissions by counsel, the appellant and the law. By dint of **Section 361 of the Criminal Procedure Code** only matters of law fall for our determination. See ***Chemagong –vs- Republic, (1984) KLR at page 219*** where this court held that:-

***“A second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja –vs- Republic 17 EACA 146)”.***

9. **Section 8 (1) of the Sexual Offences Act** states that:-

***“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement”.***

From the outset the key ingredient whose existence the prosecution had to establish was that of penetration. This they did successfully. The trial court and the first appellate court arrived at concurrent findings to the effect that L was defiled by the appellant. We are not inclined to disturb those findings. See ***Kaingo V R, (1982) KLR 213.***

10. Having come to the conclusion that the appellant defiled L, the subject of the sentence prescribed by law comes into focus.

**Section 8(2) of the Sexual Offences Act** states that:-

***“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”.***

We note that the appellant made a plea albeit late in the day for his sentence to be reduced. Our attention is drawn to the phrase ***“with a child aged eleven years or less”*** and the phrase ***“shall upon conviction be sentenced to imprisonment for life”*** which form part of **Section 8 (2)** (supra) as we consider the appellant’s plea. We note from the record that the trial court conducted a *voire dire* examination upon satisfying itself that L was a minor. This was in consonance with the decision of this court in ***Michael Muriithi Kinyua-Vs- Republic [2002] 1 KLR 256- Nyeri Criminal Appeal No 38 of 2002***. Confirmation of L age came from the evidence of Dr Macharia, who indicated the same as five and a half years in the P3 report dated 24<sup>th</sup> March, 2007.

11. In ***David Kundu Simiyu Vs Republic, [2009] eKLR – Criminal Appeal No. 8 of 2008***, this court expressed itself as follows with regard to the sentences prescribed by **Section 8** of the **Sexual Offences Act 2006**:

***“Those are minimum sentences and parliament appears to give no discretion to the courts to impose sentences below those specified as minimum. The provisions accord with the prime objectives of the act which is “prevention and protection of all persons from harm from unlawful sexual acts”.***

Accordingly, find and hold that the trial court meted out the minimum sentence as provided in law which we hereby uphold.

12. We find the subject of the detention of the appellant in police custody beyond 24 hours to be moot with all due respect. The law is now settled that the detention of an accused person in police custody in excess of 24 hours does not automatically entitle the accused person to an acquittal. See ***Julius Kamau Mbugua Vs Republic, [2010] eKLR - Criminal Appeal No. 50 of 2008***. We find the appellant’s assertion that his right to fair trial was infringed when PC Mugo testified in English without the aid of an interpreter to be an afterthought. We note from the record that Dr. Macharia testified in English and the appellant proceeded to cross-examine him. This would not have been possible if the appellant did not understand English. The appeal stands dismissed.

***Dated and delivered at Nyeri this 13<sup>th</sup> day of April, 2015.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**