



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KERUGOYA**

**(CORAM : R, MWONGO, J.)**

**CRIMINAL APPEAL NO 47 OF 2017**

**NYAGA MIIRU GACHINGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence dated 30-6-2017 of Hon M. Nasimiyu, SRM, in S.O. Case No. 21 of 2015 at Gichugu PMs Court)*

**JUDGMENT**

**Background**

1. The appellant was charged and convicted with the offence of Defilement contrary to Section 8(1) (2) of the Sexual Offences Act No.3 of 2006. The brief facts were that on 28<sup>th</sup> August, 2015 at Nyangeni sub-location, Ngariama location in Kirinyaga County, intentionally and unlawfully caused his penis to penetrate the vagina of ANN a child aged 4 years.
2. Dissatisfied, the appellant has appealed on thirteen grounds set out in his amended grounds of appeal. These grounds subsume some of the original grounds of appeal raised. They were amplified in the appellant's submissions, filed by his counsel, which raise the following issues for determination.

**Issues**

3. The following issues arise for determination on the appeal are:
  - a. Whether the inconsistencies in the evidence caused injustice to the appellant
  - b. Penetration and the identity of the Perpetrator
  - c. Whether there was proof of the offence beyond reasonable doubt sufficient corroboration of the victim's evidence
  - d. Whether the conviction and sentence were lawful
4. The role of this court is to evaluate all the evidence and to come to its own conclusions taking care to note that it did not itself have the opportunity to hear the witnesses and see their demeanour as held in **Kiilu & Another v Republic [2005]1KLR 174**, where the court said:-

***“An Appellant on first appeal is entitled to expect the evidence as a whole submitted to fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.***

***It is not the function of the first appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses”***

See also **Okeno v R 1972 EA 32**.

5. Evidence was adduced at the trial by that the by six prosecution witnesses. The trial court was required to receive proof of the elements of the offence as stated by the Court of Appeal in **CRA 32 OF 2017 G.O.A vs Republic (2018)** where the court stated,

***“The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence.”***

6. PW1, NGC, ANN’s father, testified that he was at home on 28<sup>th</sup> August 2015, a Friday. At about 6.00pm he saw ANN go to the accused’s home 30-40 meters away, for a visit. The accused is his cousin. Later, ANN returned home crying and when he asked the child what was wrong she just cried and said nothing. He did not get to know what was wrong and his wife was not at home. In cross-examination he said he thought ANN had been beaten; that she told his other daughter LM what had happened; that L did not tell him anything; that L told her mother on 29<sup>th</sup> August, 2015; and that he learnt of the defilement when ANN was taken to hospital by his wife. He said he has no differences with the accused prior to the incident.

7. PW2 SK, is ANN’s mother and the accused’s brother in law. She stated that she was in Mwea when her son called her on 29th August, 2015 and told she was required back at home; that he did not tell her why she was required; that it was when she got home on 30th August that her daughter, PW5, told her what had happened to ANN; that on speaking to the child, she told her that the accused put her on a chair, removed her trouser and penis and inserted it into her vagina.

8. SK, PW2, reported to a Nyumba Kumi elder who advised her to report to the police, which she did on the following day 31/8/2015 at Kianyaga. They were referred to Kianyaga hospital; there ANN was interrogated and examined, and the doctor said the child had injuries in her private parts. She was issued with a card to take to the police station, and returned with a P3 form. These were filled in and she was issued with lab results and the filled in P3 form. In cross examination she said that the ANN told her the incident occurred at about 5.00pm on the material day; that she examined ANN and saw she had a vaginal discharge and her vagina was enlarged. She asserted that there was no dispute with the accused’s family

9. The victim, ANN, testified as PW3. She gave unsworn evidence after the court determined through a *voir dire* examination that although she does not understand the meaning of an oath, she was fairly intelligent and understood the importance of telling the truth. She also understood the difference between truth and lies. In this regard, the trial court fully complied with section 19 of the Oaths and Statutory Declarations Act on the taking of evidence of a child of tender years.

10. ANN said that Baba Juliet, who she identified as the accused, removed her trouser and pantie; took her and put her on a chair and removed his penis (chuma”) from his trouser – she pointed to the place between her legs. She said he told her:

***“ ‘chuma ziingiane’ meaning he will have sex with me.***

***He inserted his penis in my vagina. He did not stay for long. I felt bad... It was painful”***

11. ANN said that she then dressed up, and went home. There she found her sister and mother. She told only her sister what had happened; that her mother took her to hospital the same day; that she was examined by a doctor; and was also taken to the police station

12. In cross examination she said the incident took place in the morning hours; that she did not usually visit Baba Juliet; that he inserted his penis in her vagina whilst she lay on her back; that he laid on top of her as she lay on the chair after lowering her trouser.

13. PW 4 Beatrice Kubai, a Clinical Officer testified concerning the medical evidence and submitted the bundle of medical evidence, viz, PExbs 1a, 1b, 2 and 3, being: Treatment card, Laboratory results, P3 Form, and Post Rape Care forms respectively. She said the complainant was attended to by Clinical Officer Mercy Wamuyu and not herself.

14. The examination by Mercy Wamuyu found as follows: the child’s external genitalia was normal (labia majora and minora); the hymen was broken but not fresh; No spermatozoa were found after a high vaginal swab; there was gram negative diplococci bacteria meaning that the patient had gonorrhoea; syphilis test was negative. Mercy Wamuyu concluded that there was penetration because of the broken hymen and presence of a sexually transmitted disease.

15. PW4 stated that Mercy Wamuyu was her colleague with whom she had worked for two years; that she was familiar with Mercy’s handwriting; and that Mercy was engaged in other official duties at the hospital.

16. In cross examination she stated, without explanation, that the hymen was broken on 28<sup>th</sup> August 2015 despite the child having no bruises or injuries in the labia; she admitted that a freshly broken hymen usually bleeds; that the hymen can be broken through many other causes; that when a minor is defiled by an adult the vagina will be inflamed and there will be injuries in the labia; that gonorrhoea is transmitted by gram negative diplococci; that the child’s vaginal article was normal save for the broken hymen.

17. In re-examination, PW4 she stated that the hymen was not freshly broken, but that wounds in children take a very short time to heal.

18. PW5 LM, ANN’s sister testified that she was in form two. At about 6.00pm on the material she had just returned from school, and was preparing supper. ANN came crying, and when asked what was wrong she at first declined to speak. Later at supper, ANN disclosed that the accused had undressed her taken out his penis and inserted it into ANN’s vagina. He had also threatened to kill her if she told anyone. She bathed ANN that night, as she usually did, and noticed a whitish discharge from her vagina, and that she felt pain.

19. Since her parents were not present, it was not until 8.00am the following day, 29<sup>th</sup> August, 2015, that her brother came and she

explained what had happened to ANN. According to her, he immediately called their mother and reported the incident. The her mother responded saying she would come to take the child to hospital, and that she arrived at 6.00am the following day, 30<sup>th</sup> August, 2015. In cross examination, PW5 said ANN had gone to the accused's house at 3.00pm – this would be hearsay, as she also testified she was in fact at school and returned at 6.00pm. She further said her mother went to report to the police before noon on 30<sup>th</sup> August. She asserted that the relationship between her family and the accused's family was cordial.

20. PW 6 was the Investigating Officer. Her evidence was that ANN was brought to the station by the mother on 31<sup>st</sup> August, 2015. On attempting to interrogate ANN she declined to talk. The other witness eventually came to record statements on 7<sup>th</sup> and 29<sup>th</sup> September, 2015, long after the incident. She established the facts from the other witnesses. However she did not conduct any investigations in respect of the information she had received.

21. In cross examination, she admitted that: she did not visit the scene; that it was unusual that the mother took such a long time to respond to the incident; and that she did not interrogate the neighbours. She said she charged the accused because the medical evidence corroborated the offence.

### **Inconsistencies in evidence**

22. Upon consideration of all the evidence, I note a number of inconsistencies as pointed out by the appellant in his submissions. These include: that ANN stated in cross examination that the incident occurred in the morning, whilst all the other witnesses stated that it occurred in the evening; that the child stated that she found her mother at home when she got back after the incident whilst the father (PW1), mother (PW2) and sister (PW5) all stated she (the mother) was not at home and came back on 31<sup>st</sup> August. Further, Ann stated that she went to hospital on the same day whilst all the other evidence shows she went to hospital on 31<sup>st</sup> August when she was examined; that she (ANN) did not usually visit Baba Juliet or his children whilst the other evidence was that they usually played together.

23. I am aware of the legal position premised on **Willis Ochieng Odera v Republic (2006)** that whilst there may be contradictions in the prosecution evidence, that alone cannot be a ground for quashing the conviction unless it occasions an evident failure of justice.

24. Here, the contradictory evidence is analysed in greater detail in the following section concerning the evidence of the perpetrator and of penetration, key issues which must be positively proved before a conviction can be entered

### **Evidence of Penetration**

25. The evidence of PW4 that the ANN's hymen was broken on a specific date, viz., 28<sup>th</sup> August, can only be said to be hearsay or unscientific opinion, as it is not supported by the medical evidence or tests done by the examining officer. I have carefully perused the medical exhibits. In the P3 form, I note that the officer indicated in Section B the approximate age of injuries as **"2 days 20hours. Defiled 28/2/2015 approx 4.00pm.....Attended to in hospital 12.00 noon. Delayed because mother was not in"**. In Section C no injury of the labia is indicated, but the hymen is indicated to be broken but not freshly.

26. This approximation of the age of the injury is made despite both the P3 and PRC forms indicating that the hymen was not freshly broken and the detailed PRC sketch d ; that there were no bruises and no obvious injuries on the body and the broken hymen not being a fresh bruise.

27. The conclusion by the clinical officer that there was penetration evidenced by the broken hymen and the presence of a sexually transmitted disease cannot be taken as evidence of penetration by the appellant. The evidence of an old breakage of the hymen throws some doubt on the recency of the attack on the victim.

28. Further, in my view, once the evidence showed that there was an old hymenal breakage and, in addition, a sexually transmitted infection (STI), it was incumbent on the prosecution to establish the true identity of the assailant. The reason is that, as with many diseases, each has an incubation period from the date of exposure. This could easily have been detected and identified in this case, but no such tests were done, and no explanation was given by the clinical officer before connecting the "not freshly broken hymen" and the STI with the appellant.

29. Without discounting the veracity of the evidence of the victim as to whether she was defiled, I think it was incumbent upon the prosecution, once evidence emerged of a hymen not freshly broken and in light of the STI, to be cautious of connecting the accused to the offence without evidence of a test having been conducted on him. The trial court appears to have accepted the clinical officer's evidence that there was penetration by the appellant due to the fact that the hymen was broken, notwithstanding that the breakage was not fresh.

30. Further, the appellant gave evidence that he had come home at 4.00pm on the material day, and was with his wife and children that evening ; and that ANN did not come to his house. He admitted his house was just about 30 meters from the complainant's house. DW2 also testified that she was at home with her husband on the material evening, as he had come home at 4.00pm. The trial court noted and analysed the defence evidence, but dismissed it because she believed the victim's evidence over that of the accused and his witness; and the fact that the accused's allegations that there were differences between the two families were not that plausible.

31. In my view, in light of the inconsistencies in the evidence and circumstances regarding when the offence occurred, the defence evidence ought to have been taken with more seriousness. In particular any gaps in the defence evidence regarding the accused's whereabouts at the material time. The evidence of the eyewitnesses who saw ANN after the alleged incident must therefore be subjected to careful scrutiny.

32. PW 1 said the incident occurred at about 6pm as he saw ANN go to the accused's house 30 metres away; that she came back crying and he dismissed the tears without asking her what transpired as he thought his daughter had just been beaten by the accused. He came to learn of the defilement when his daughter, ANN, was taken to hospital, a date he couldn't even remember. It is not clear if or when he left the house.

This is strange behaviour of a parent confronted by the sight of a crying child coming from a neighbour's house. PW5 said she was at home at about 6pm making dinner when ANN returned home crying. Yet she also testified that her father was not present

33. PW5's evidence was that she was at home around 6.00pm after school on 28<sup>th</sup> August when her sister came back crying. She stated that her parents were not at home; yet her father, PW1, said he was at home at the time and that whilst ANN did not respond to him, she talked to his daughter Muthoni PW5 and that Muthoni did not tell him anything. She said that she had to wait until her brother came home. He came the following day at 8.00am, and immediately took action by calling the mother. In cross-examination she reiterated that;

***“I was at home alone on 28/8/2015 with the complainant. Just the two of us. Nobody else was present”***

And later she said she could not take any action on her own. In my view, it is quite telling that she said absolutely nothing concerning her father's presence.

34. On her part the mother, PW2, said in cross-examination that when she got home on 30<sup>th</sup> August, she found her daughter skipping. She was therefore not in pain. On examining her daughter, she saw an enlarged vagina and there was a discharge. In re-examination she said the discharge was whitish with blood stains. When she took her to the clinic the following day, the medical evidence did not support this finding by the mother.

35. Unlike the trial magistrate, I thus find the evidence of PW1 and PW5, father and daughter, rather contradictory, and unreliable to that extent. Were they both present at home or not? Was the time 6.00pm when ANN came went to visit the accused or the time she returned home after the alleged incident?

### **Disposition**

36. This is a case of defilement. Proof of penetration is mandatory. In such a case where the medical evidence relied on by the lower court indicates that the hymen was not freshly broken or the breakage is not clearly connected to the time of the incident; and that there was a sexually transmitted infection not connected to the accused and whose incubation period is not identified; such evidence raises critical doubts that demand extreme caution before a conviction is rendered.

37. Here, the trial court relied on the fact that there was a sexually transmitted disease and the child's evidence to find that there was penetration. I am not satisfied, in the absence of a medical test on the accused as to whether he had a sexually transmitted disease, to conclude that he was the perpetrator of the offence. This, together with the fact that though there is evidence of a broken hymen, generally, it is not the responsibility of an accused person to adduce any evidence of his defence or explanation (**Muiruri v R [1983]KLR**). This satisfies me that there was reasonable doubt that the appellant penetrated the child.

38. For all the foregoing reasons, I think the conviction was unsafe and cannot stand. It is hereby quashed. Accordingly the appeal succeeds and the appellant is hereby set at liberty unless otherwise lawfully held.

39. Orders accordingly

**DATED AT KERUGOYA THIS 31ST DAY OF JANUARY, 2022**

**RICHARD MWONGO**

**JUDGE**

**DELIVERED IN THE PRESENCE OF:**

**1. NYAGA MIIRU GACHINGA THE APPELLANT**

**2. MAMBA FOR THE STATE**

**3. WINNIE WANJIRU COURT ASSISTANT**