



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. E001 OF 2020

IG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Conviction and sentence of Hon. M. Kimani (SRM) delivered on 21st September 2020 in Mandera Criminal Case No. 16 of 2020)

JUDGEMENT

1. The appellant herein was charged, convicted and sentenced to fifty (50) years imprisonment for the offence of defilement of a child contrary to **section 8 (1) (2) of the Sexual Offences Act**. The particulars of the offence were that on 11th March 2020 at about 2100 hrs at Derkale Location in Banisa Sub County within Mandera County, he intentionally and unlawfully caused his penis to penetrate the vagina of **RI** a child aged 1 year.

2. Being aggrieved and dissatisfied by the trial Court's decision the appellant lodged his Petition of appeal on 7th October 2020 raising thirteen grounds of appeal that may be summarized as hereunder;

a. The trial magistrate relied on extraneous matters in the course of his determination.

b. The trial magistrate failed to consider that the appellant was not positively identified and the prosecution case relied only on circumstantial evidence.

c. The trial court failed to consider the appellant's mitigation and proceeded to issue a heavy and excessive sentence.

3. Both parties canvassed the appeal through written submissions. The appellant submitted that the element of penetration was not conclusively proven by the prosecution. That despite him being examined there was no evidence linking him to the offence. He also took issue with the fact that the father of the minor, an essential witness did not testify. He cited various authorities which the court considered.

4. On its part the Respondent submitted that all the ingredients of the offence of defilement had been proved. The age of the minor & penetration was also proved by the clinical officer who presented the age assessment report and the P3 form. As for the identity of the perpetrator it was stated that the same was borne by the fact that no one was with the minor at the material time the alleged offence took place save for the appellant and a three-year-old minor.

Analysis and Determination

5. The role of this Court as the first appellate Court is well settled. It was held in the case of **Okeno vs. Republic (1972) EA 32** and in **Mark Oiruri Mose vs. R (2013) eKLR** that a first appellate Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

6. **PW1 SMI** testified as an intermediary on behalf of the 1-year-old victim, as the mother of the minor and a wife to the appellant. Prior to the material day the 11th of March 2020, she was married to the appellant for about three (3) months. She told the court that on the aforesaid date she was in the kitchen while the appellant was in the main house with the minor subject matter and another three (3) year old child, when she heard the minor cry. She went to check on the minor, but did not find the Appellant yet he had been in the main house with the children. She noticed the minor's vagina had been penetrated and torn. The minor's behind had also been penetrated and she was bleeding severely. The witness who was in shock escorted the child to hospital. She encountered the appellant but she never spoke to him. She sought treatment at Banisa Sub County hospital and was referred to Mandera County referral hospital where the minor was treated for one (1) week. The appellant went to the hospital the following day.

She testified further that the appellant is not the biological father of the minor.

In cross-examination she conceded that she never saw the appellant committing the act. Though she asserted that there was no other person in the house apart from the appellant, herself and the two minors.

7. **PW2 Hussein Mohammed Somo** a registered clinical Officer working at Banisa sub county Hospital. He examined both the minor and the appellant. He testified that during examination the minor's clothing was wet and blood stained. The vaginal area had abnormal external genitalia with active bleeding. There was laceration on the vaginal area and tears on the labia. There was also anal tear and fecal matter flowing from the anus. The hymen was not intact. There was tenderness and swelling within the vaginal area. The approximate age of the injury was 19 hours as at the time of filing the P3 form. He formed the opinion that the victim had been penetrated in both the vagina and the anus.

He also examined the appellant. No tears and laceration were seen in his penis.

8. **PW3 PC Jones Muia** informed the court that that on the 11th of March 2020 PW1 reported that while she was preparing dinner the previous day, she heard a distress call from the child and left to where the child was sleeping. She found the appellant exiting the bedroom where the child was sleeping.

Further he informed the court that he is the one who escorted PW1 and the child to the hospital where the P3 was filled. Thereafter they went for the Appellant. They found him hiding in the neighborhood and arrested him. The victim's age was also assessed. He produced the report marked as EXH. 2.

9. At the close of the prosecution case the court found the appellant had a case to answer and he was placed on his defence. He denied the charge. While giving his evidence in chief, the appellant stated that he did not know the complainant, who in this case was PW1. He stated further that he had been framed as on the material day he had gone to fetch water for his donkey.

10. The trial Court in its determination found that the ingredients of age and identity were proved. On identity of the perpetrator the trial court proceeded to warn itself of the danger of convicting a person on the evidence of a sole witness. It further considered the alibi of the appellant and held as follows;

“... Had the circumstantial evidence pointed exclusively to the identity of the accused at the scene? I would answer in the affirmative, for reasons as stated earlier first, it was undisputed that PW1 and accused were spouses living together. Secondly PW1 did not resent the accused, as the latter stated himself. Thirdly, there exists no evidence to suggest that PW1's home had been intruded by a 3rd party on the material night. There was thus no motive to falsely charge the accused. As such the alibi raised by the accused could not surmount the overwhelming prosecution evidence that it was the accused who defiled the victim.....”

11. 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.

12. The age of the complainant was not contested at the trial or in this appeal. The prosecution produced the complainant's Age Assessment Report as proof of age which indicated that the complainant was 1 years old at the time of the commission of the alleged offence. The age of the victim by as stated by PW1, PW2 &PW3 was not challenged. Neither was the evidence by PW1 PW2 concerning injuries sustained by the victim.

13. **Section 2 of the Sexual Offences Act** defines penetration as:

‘the partial or complete insertion of the genital organs of a person into the genital organ of another person.’

Upon examining the victim, the clinical officer, PW2 reached formed the opinion that the victim had been penetrated both in her vagina and the anus.

14. On the identity of the perpetrator. The prosecution's case was based on circumstantial evidence. In **Abanga alias Onyango v R Cr. App. No 32 of 1990**, the court laid down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.

15. PW1 was clear that there were only 4 persons at the house on the material day. The minor victim, another minor age 3, the Appellant and herself. She was also categorical that she had left the two children in the company of the Appellant in the main house while she was in the kitchen cooking. The two were in a husband- wife relationship. There was no evidence that they had quarreled. Indeed, the Appellant stated that they had no grudge against each other. The questioned of the Appellant being framed by the complainant does not therefore arise.

16. Further this Court resonates with the reasoning of the trial magistrate that the alibi evidence could not surmount the prosecution case. The

court does not find either that the trial magistrate considered extraneous factors.

17. The court further finds PW1 to have been a truthful witness and believes her testimony that she left her two minor children in the hands of the Appellant as she prepared food in the kitchen. She returned on hearing cries and finds their step father missing and her baby defiled. The court also finds that the circumstances surrounding the child's defilement unerringly points towards the Appellant as none other than the defiler of the child. Afterall, he had all along been in the company of the children and interestingly was nowhere when the child was found defiled. The conviction was safe.

18. On the sentence imposed by the trial Court. **Section 8 (1) & (2)** of the **Sexual Offences Act** provides as follows;

8. (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 imprisonment for life.

19. Sentencing is a matter of discretion and an Appellate court ought not to interfere with sentence unless the same is too severe or too low so as to cause an injustice. The law prescribes up to a maximum of life imprisonment. The trial court considered the appellant's mitigation, Victim Impact assessment and the pre-sentencing report by the probation officer before passing out the sentence. This court has also considered the circumstance of this case and finds the sentence imposed by the trial court was not excessive and wishes not to disturb the same

20. The upshot of this court's determination is that the appeal lacks merit and the same is hereby dismissed.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF JANUARY 2022

ALI-ARONI

JUDGE