



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CRIMINAL APPEAL NO. 8 OF 2020

NDIKI SENZE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal vide Kitui CM's Court Sexual Offence Case No. 48 of 2017)

J U D G E M E N T

1. **Ndiki Senze alias Kili**, the appellant herein was charged vide *Kitui CM's Court Sexual Offence Case No. 48 of 2017* with the offence of defilement Contrary to *Section 8(1) (2) of the Sexual Offence Act No. 3 of 2006*. The particulars were that on **29th April, 2017** at about **6PM** at [**Particulars withheld**] **Village, Musukini Sub-location, Mutitu Location** within **Kitui County**, he defiled (name withheld) a child aged **9 years**.

2. The appellants denied the charge but after trial he was found guilty and convicted. He was sentenced to serve 40 years in prison.

2. A brief summary of the evidence presented to the trial court going by the proceedings thereat reveals that, the **Complainant (PW1)** testifying on oath told the trial court that she was in class four at [particulars withheld] Primary School. She recalled that on 20th April, 2017 at around 6PM while on her way to water cattle, the appellant waylaid her and defiled her under a tree. She told the trial court that he promised to give her Kshs. 20 and "*he pulled my pants on the side and started doing bad manners to me. He was using his penis.....*".

4. The Complainant added that a neighbour by the name TN found them and the appellant took off using his motorcycle. She knew the appellant well as according to her he lived in the neighborhood.

5. The evidence of the minor was corroborated by **TK (PW2)** who testified that on 29th April 2017 at around 6PM while her way to town, she heard a kid crying in the bushes and got curious and went to check only to stumble upon the appellant defiling the minor. She testified that when the appellant saw her, he jumped on to his bicycle and rode away as she asked him if he had a wife. The witness stated that she then took the victim to her mother.

6. The medical evidence regarding defilement was tendered by one Nzuki Musyoka, who stated that he was a doctor at Mutitu sub-County Hospital. He further testified that he was not the author of the medical documents to wit P3 and treatment notes and that the author was one Benjamin who used to be stationed at Mutitu and who was on transfer. The medical officer however failed to state his qualification or that of the author of the medical documents. He also failed to state whether he had worked with the said Benjamin and for how long. He only stated that he knew his handwriting and signature and that the medical findings were that the minor had been defiled and that her hymen was broken. He tendered the P3 as Exhibit 1 and treatment notes as exhibit 2.

7. The age assessment report was tendered by a clinical officer attached to Zombe Hospital who gave his name as Peter Kamwenge (PW4).

According to him the minor was aged 9 years old when he assessed her on 13.04.2017. He tendered the age assessment dated 30.04.2017 as exhibit 3.

8. The investigating officer **Corporal Evans Mogaka (PW5)** testified that a report was made on 30.04.2017 at 11:30 am at Mutitu Polie Station where he was based that a child had been defiled. He stated that the child was escorted for medical examination which revealed that the child was defiled. He added that he was unable to procure the attendance of both the father and mother because the mother became mentally sick and ran away from her home while the father relocated to Nairobi where he could not trace him. He further added that though the appellant ran away after committing the offence, he was nabbed when he turned up for a food relief exercise.

9. When placed on his defence the appellant stated that he was arrested on 28.06.2017 when he went to take relief food that was being distributed at Mutitu. He denied defiling the minor. According to the appellant the minor was told by her father to lie. He however did not state what motive if at all the victim father had to ask her daughter to lie about an incident such as defilement.

10. The trial court evaluated the evidence and found that the essential ingredients of the offence of defilement had been proved. She further found that the age assessment report was unreliable since the report was stamped on 2nd December 2019 when the doctor had indicated in his evidence that he authored the report on 30.04.2017. The trial court nevertheless found that the victim was aged below 11 years according to her visual impression when she observed the child testifying. The trial court further dismissed the defence as a mere denial and found that the prosecution's case had been proved to the required standard. The appellant on that basis was convicted and sentenced to serve 40 years' imprisonment because the trial court found that though the law provided for life imprisonment, in view of the then Supreme Court's decision in **Francis Karioko Muruatetu**, she exercised her discretion and handed the appellant 40 years' imprisonment.

11. The appellant felt aggrieved and filed this appeal raising the following grounds namely;

- i. That the evidence relied upon by the trial court to convict him was insufficient and uncorroborated.
- ii. That the trial court erred to convict him when the case was not proved beyond reasonable doubt.
- iii. The evidence tendered were contradicting and inconsistent.
- iv. That he was not supplied with sufficient details to prepare for his defence.

12. In his written submissions the appellant contends that the P3 Form tendered in evidence did not support the charge. He submits that the author of the said P3 was not called to testify.

13. The appellant further submits that the age assessment report tendered was inconsistent. He however does not state where the inconsistency lies. He contends that the prosecution's case was not proved to the required standard.

14. The appellant has also made submissions on new grounds which he has raised in his written submissions but without leave of this court. I will therefore not consider them in that respect.

15. The Respondent through the Office of the Director of Public Prosecution for the record did not oppose this appeal and left it to this court to determine it on its merits.

16. This court has considered this appeal and the grounds advanced. The role of this court as a first appellate court is to re-evaluate the evidence tendered before the subordinate court with a view to making own conclusion noting that unlike the trial court this court did not have the benefit of observing the demeanor of witnesses during trial.

17. In my considered view, this appeal has raised two important issues for determination which are: -

- i. Whether age of the victim was proved.**
- ii. Whether the element of penetration was proved.**

18. (i) Age of the victim

The prosecution's case in respect to the age of the minor hinged on the evidence of **Peter Kamwenge (PW4)** who stated that he was a Clinical Officer. According to his assessment the girl was aged 9 years. He testified that he did his age assessment on 13th April 2017 which presented a problem of inconsistency because the offence took place on 29th April 2017. The witness also did not state what qualifications made him an expert in that field of science to indicate his expertise on matters of age assessment. The prosecution failed to lay basis under **Section 48 of the Evidence Act (Cap 80 Laws of Kenya)** and also failed to lay basis as to whether the assessment was done for other purpose other than the commission of the offence.

19. The trial court on its part found the age assessment report (Ex 3) unreliable due to its integrity because the report was stamped 2nd December 2019 when the actual assessment was said to have been conducted in 2017. The trial court noted that the prosecution had earlier in the trial noted that the age assessment report was missing and the trial court concluded that the report may have been doctored to appear like it was prepared in 2017.

20. The trial court upon finding that the age assessment report was wanting in that respect still went ahead and took judicial notice of the fact that the victim's age was below 11 years given that she was in class 4. The question posed is whether it was safe for the trial court to base her finding purely on the appearance of the girl and the fact that she was in class 4.

21. In my considered view, the same was not safe. This is because most parts of Kitui, and Mutitu for that matter is remote and to base a victim age purely on level of education or class the child/victim is, can at times be erroneous. The appellant has submitted that the victim testified that she lived with her 4 siblings and according to him, the girl was the eldest and therefore, there was no chance that she could be 11 years of age. However, I have perused through the evidence of the minor and found that she did not give any indications as to whether she was the eldest or the youngest in her family. The appellant's contention in that regard is therefore unfounded.

22. However, when one considers the evidence in totality regarding the age of the victim, it is evident that the trial court fell into error because as I observed above, it is not safe to rely on appearance or the class in which the victim was at the material time because of some unique circumstance of a given area such as Kitui County.

23. Secondly, it is true that the age of a victim can be established by other medical evidence tendered like P3 Form, Clinic Card etc. In this instance however, the P3 form tendered though it indicated the age of the victim was equally not properly tendered and inadmissible evidence as I will shortly show here below. It suffices to find that the age of the victim was not well established to the required standard owing to the anomalies I have pointed out above.

24. (ii) Whether penetration was established

The provisions of **Section 8 (i) of Sexual Offence Act** shows that the penetration is a key ingredient in an offence of defilement. The provisions of **Section 2 (1)** gives the definition of what penetration entails. What is important in this appeal is the determination of whether that element was established and proved beyond doubt.

25. There is doubt that the evidence of PW1 and PW2 clearly showed that there was defilement. The medical evidence tendered however was wanting in two aspects.

26. In the first place, the medical evidence as tendered by Nzuki Musyoka was inadmissible in evidence because (PW3) did not meet the legal requirements under **Section 48 of the Evidence Act** which provide as follows: -

“When the court has to form an opinion upon a point of.....science or art....., opinions upon that point are admissible if made by persons specially skilled inscience or art.....”

27. The trial court was required first to establish the expertise of PW3 before proceeding to rely on the medical evidence tendered. The failure by both the prosecution and the trial court to lay basis upon which PW3 could qualify to testify as an expert as stipulated under **Section 48(2) of the Evidence Act**, rendered the medical evidence (**P3 & treatment chit**) hearsay and inadmissible in law. He only stated that he was a doctor without giving his qualifications as required by the law.

28. Secondly, the said witness (PW3) stated that he was not the author of the medical documents and that the author was one Benjamin “*stationed at Mutitu but now on transfer*”. The witness did not go ahead to give the qualifications of the said Benjamin and whether he worked with him in the medical field and for how long. His evidence that he knew his signature and handwriting was insufficient because he did not even say whether the P5 Form and treatment chit tendered as exhibits 1 and 2 respectively was in his handwriting and duly signed by him.

29. The provisions of **Section 33 (b) of the Evidence Act** required the prosecution to lay basis first before the trial court could decide whether to allow the witness to testify on behalf of the doctor who for one reason or another may not have been procured without expenses deemed unnecessary in the circumstances. This practice of just allowing an expert testify on behalf of another expert without laying basis and giving an opportunity to an accused to make his/her representations regarding the same is common but wrong in view of the clear provisions of the law cited above.

30. In the absence of compliance with **Sections 33 and 48 of the Evidence Act**, the evidence of PW3 in totality was rendered hearsay and inadmissible. In effect the medical evidence relied upon by the trial to make the crucial finding that there was penetration was inadmissible in law. The only evidence left was the evidence of the minor (PW1) and the evidence of PW2 who stated that he found the appellant in the act. The trial court could as well have relied on the evidence of the victim alone and render a conviction in view of the provisions of **Section 124 of the Evidence Act**.

However, before a trial court does that, it should state in writing why or the basis upon which it opined that the victim was speaking the truth. That crucial issue is missing from the judgement of the trial court leaving the basis upon which conviction was rendered unsafe.

31. This court finds that the prosecution’s case on the question of penetration left some gaps which I have highlighted above. In such circumstances, it could have been just and fair for a retrial to be ordered but given the fact that the incident took place more than 5 years ago and the fact that victim’s family appears unstable and difficult to locate their whereabouts a retrial would not meet the desired objectives.

The long and short of this is that this court finds merit in this appeal.

The age of the minor was not well established for the aforesaid reasons and the ingredient of penetration too was not proved. The **appeal** herein is **allowed**. The conviction is set aside and the sentence is hereby reversed. The appellant shall be **set free** forthwith **unless lawfully held**.

DATED, SIGNED AND DELIVERED AT KITUI THIS 26TH DAY OF APRIL, 2022

HON. JUSTICE R. K. LIMO

JUDGE