



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. E001 OF 2020

SWALEH MWINYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment & sentence of Hon. E.A. Nyaloti, Chief Magistrate

delivered on 11th day September 2020 in the Chief Magistrate's Court

Sexual Offence Case No. 25 of 2018).

J U D G M E N T

The Appellant Swaleh Mwinyi was charged with the offence of defilement in Mombasa Chief Magistrates Court Sexual Offence Case No. 25 of 2018.

The particulars to 1st Count are that the Appellant on diverse dates between 13th April 2012 and 14th October 2012 at Kaloleni area in Mvita Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of LAM a child aged 7 years.

In the 2nd Count that particulars are that the Appellant Swaleh Mwinyi on diverse dates between 13th April 2012 and 14th October 2012 at Kaloleni area in Mvita Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of (S.M.M) a child aged 9 years.

Based on evidence of six prosecution's witnesses, the Appellant was convicted in the 2 counts of defilement and sentenced to serve life imprisonment.

Aggrieved and dissatisfied with the conviction and sentence, the Appellant lodged the Appeal herein on the following grounds filed on 9th October 2020:-

- a) **That the learned trial Magistrate erred in law and fact by finding him guilty & convicting him without considering that sentence was harsh & excessive.**
- b) **That the trial Magistrate failed to note that the age of the Complainant was not proved beyond all reasonable doubt.**
- c) **That the learned trial Magistrate erred in law & fact by finding him guilty and sentencing him without considering that the prosecution case was governed by massive contradiction and discrepancies.**
- d) **That the learned trial Magistrate erred in law & fact by convicting & sentencing appellant without considering that the case was poorly investigated which led to a miscarriage of justice.**
- e) **That the learned trial Magistrate erred in law & fact by finding him guilty & sentencing him without considering his defence.**

The prosecution's case was that PW 1 noticed that her daughter & her sister's daughter complainants in Counts I & II had dirty under-wears.

PW 1 learnt from the house-girl that the children had been coming from school with money. When interrogated they said it was the accused who had been giving them money on their way to and from school. That he also gave them snacks. The two children aged 9 years and the 2nd one in grade 3 didn't disclose why the Appellant was giving them money. They only said that Appellant removed their panties. The children were taken to Coast General Hospital where they were examined and found to have been defiled.

A report was made at Makupa Police Station and P3 forms were duly issued and filled at the Coast General Hospital EXP 1 & P2. That the children were taken for counselling and appellant herein was later arrested.

PW 1 said that the two children told her that the Appellant used to call them and give them some powder to sniff and then defile them as they used to feel dizzy and she said that the children could be drowsy & threw themselves on the ground. EXP. 4 – Certificate for birth for complainant in Count 1.

In cross examination, PW 1 said that the 1st complainant L.A.M used to attend S.A School and the stage where she was dropped was 3 metres from the house. PW 1 said the children were taken to school by the father but are picked from the stage by house-help and they could walk alone sometimes. She said they were always to and from the house. She said there were many drug takers in the route that is followed by the children.

She said after school the children go for madrassa. She said the children used to leave school at 4.00pm. PW 1 said the children told her Appellant started defiling them using his fingers before using his penis. She said the children refused to be bathed but she did not suspect anything. She noticed the children were afraid even to go near their father. She said she was surprised to see their dirty smelly trousers.

PW 2 AMO testified that on 12th October 2012 at 4.00pm he returned home and were in the sitting room with his wife when the Complainants returned from school late and left without saying anything. PW 2 became suspicious and on 14/10/2012 a good Samaritan came and asked him how he was related to the Appellant and warned him to watch relationship and L & S. That when she called the two children they denied.

That because of the clue from the good Samaritan they took the two children to Coast General Hospital and it is while at hospital that 1st complainant said that Appellant used to take them to the bush and he used to buy for them sweets & mabuyu. He said the children told him the abuse started when they were in grade 1 and that Appellant had threatened to kill them and set PW 2's vehicle on fire.

PW 2 identified Post Rape Case forms EXP 5 & issued duly filled for the two minors. PW 2 said that he used to employ Appellant but after the incident he failed to go to the house. That when he saw accused in the mosque and asked him to go and work for him appellant insisted that he needed food 1st before he could work. That PW 2 bought the food which after he called police and Appellant was arrested and taken to Makupa police station where he was arrested and charged.

PW 2 said the Complainants were transferred to another school due to the offence and threats issued by the accused/Appellant. PW 2 testified that he had known the Appellant since his childhood. He said that he noticed suspicious behavior prior to 12/10/2012 when they discovered the complainants had been defiled. He said appellant was a drug user.

PW 3 – L.A.M.O, the Complainant in Count 1 said she was a standard 3 pupil at S .A Primary School when she gave unsworn statement on 12th September 2013 after voire dire examination had been done. She said that on a Friday in April 2012, she was on her way from school in company of S.M.M. the Complainant in Count II when they met the Appellant who was a cousin to their cousin and he called them and took them to the shop where he bought for them Milo & then took them to an alley and removed his trouser and also lifted her skirt and removed her panty and put his urinating organ into hers after making her lie down on the ground while facing up. She said she screamed but the Appellant had threatened her. She said by then the 2nd Complainant was outside the alley. She said the Appellant threatened to kill them if they told anyone.

PW 3 said the Appellant had an oval object with the colour of chocolate which he made her to sniff and she got a headache. That when he finished defiling her he told her to call S.M.M. That PW 3 called S.M.M. and she went to where the Appellant was as she remained outside of the alley (kichocho). She said S.M.M. was gone for long and when she came from the alley she didn't tell her anything.

That they went home and didn't meet anyone on the way. They did not tell anyone what happened when they got home as the Appellant had threatened to kill them. That later their parents came to know what happened and they were taken to hospital.

PW 3 said that it is at the hospital she said what happened. She was taken to Makupa police station and again she told the police what happened and her statement was recorded. PW 3 said that she took her mother to where the Appellant had been defiling her since she was in standard one (1) in 2nd term.

She said the Appellant defiled her many times in 2nd terms as he could defile her either very early in the morning when she was going to school or when she was returning from school. That when the 2nd Complainant started staying with them the Appellant also defiled her.

PW 3 said that the Appellant used to go to their home to paint but when he started defiling them he stopped going to their house. She said no one else had defiled her. She said she had not been coached. She said she knew the Appellant when she was in KG 3 and he started defiling her in 2011 in 2nd term when she was in standard one. She said Appellant used to buy for her Milo Chocolate and could remove another object for sniffing from his pocket. She said that during the incident no one passed through the alley.

PW 4 also gave unsworn statement and reiterated what PW 3 told the court on how the Appellant bought for them Milo chocolate and sometimes gave them money. PW 4 said that the Appellant could grab them, take them to akichocho and defile them inturns as the other

waited away from kichocho. PW 4 said the Appellant threatened to kill them if they screamed or told anyone.

PW 4 said it is in the hospital that they told the doctor what happened. PW 4 also said the Appellant made her sniff an oval object which had chocolate colour and when she did she would vomit and have headaches and chest pains.

PW 4 said that she knew Swaleh who used to go to their house. She said that Swaleh sometimes defiled them in the morning when they were going to school or in the evening when coming from school. She said that Swaleh defiled them in the alley when it was deserted and nobody ever saw them. PW 4 said the Appellant could defile them in-turns.

PW 5 P.C. Beatrice Achieng of Makupa Police Station Gender Office investigated the defilement of the two minors. She advised A to report and to take the two complainants to hospital where they were treated and P3 forms duly filled as well as PRC forms.

PW 5 said she interrogated the 2nd complainant who narrated to her what happened to them as per their testimonies in court. PW 5 said that she was shown the scene which looked like a dumping site for plastic crates.

That on 17th January 2012 the Complainants father told her he had arrested the suspect with help of traffic police. PW 5 compiled the file and charged the Appellant with offence of defilement. After PW 5 testified the Appellant jumped bail on 6th November 2013 when the doctor was supposed to testify. On 22nd August 2016 the charge was withdrawn under Section 87(a) Criminal Procedure Code pending arrest of the Appellant.

When Appellant was arrested Sexual Offence case no. 25 of 2018 was registered as the initial one had been withdrawn and it appears the Appellant had applied for revision and the High Court ordered that the matter proceeds for hearing on that account directions were taken that matter proceeds from where it has reached.

The trial Magistrate on 4th April 2019 again gave directions that matter would proceed from where it has reached, as it is the Appellant who contributed to the delay when he absconded.

On 19th February 2020 Dr. Francis Otieno testified and produced P3 form and PRC forms for the 2nd Complainant in which it was established they had been defiled EXP 5 & 6. He said redness of vaginal wall cannot be seen when injury is too old.

Appellant in his defence gave sworn statement and said that he knew the Complainant and their parents as the parents used to give him painting work. He said he didn't commit offence for which he had been charged. He said he was in the mosque when the complainant's greeted him. That the Complainants mother told him to go to slaughter for her a goat. That he crossed the road and the Complainant brought a soda. That he entered Complainant's car. That the police stopped the car and started questioning him. That the Complainant's father told the police that he had defiled the two children.

He said he knew the place where it is claimed he defiled the two children. He said the village elder didn't testify. He said that if he committed the offence members of public would have seen as there is a mosque and there are houses where people live.

In cross-examination, the Appellant said he knew the Complainants as their parents used to give him work.

This appeal was canvassed by way of written submissions.

The Appellants submissions were that the trial Magistrate was not bound to sentence the Appellant to life imprisonment. It was also submitted that trial court did not carry out a proper pre-sentence trial before passing sentence. It was also argued that the Appellant had no past criminal record and the sentence meted to him as 1st offender was harsh.

It was also submitted that the Complainant's ages were not proved by a dentist report or a certificate of birth. It was argued that the certificates of birth were marked but were not produced. It was submitted that conviction of the Appellant without proof of age was erroneous.

On grounds 3, 4 and 5, it was submitted that the court did not properly consider evidence given by the prosecution witnesses and that of the defence and thus arrived at glaring conclusion that the prosecution had proved its case beyond reasonable doubt. It was submitted that there were material contradictions in the evidence of PW 1 & PW 2 as to who discovered that PW 3 & PW 4 had been defiled.

It was also submitted that the court did not consider the fact that the shopkeeper or good Samaritan who informed the girl's parents of his suspicion was not called as a witness to corroborate evidence of PW 1, PW 2, PW 3 & PW 4.

The Appellant questioned how the girls could have been defiled when they were being taken to or picked from the stage by their father or by PW 1 or house-girl. It was submitted that since the area was full of drug takers, it could not be ruled out that any other person committed the offence.

It was submitted that PW 3 & PW 4 gave the name of Swaleh as the assailant but there was no evidence they gave the doctor and the police the description of the Swaleh they referred to and PW 3 & PW 4 were not present on arrest of the Appellant. It was submitted that the charge sheet was defective but the issue of defective charge-sheet was not one of the grounds of appeal.

The Appellant submitted that stating the offence was on diverse dates between 13th April 2012 to 14th October 2012 did not give the

Appellant opportunity to properly defend himself.

The Appellants counsel further submitted that the children could not have been defiled in an alley which was open and used by members of the public and there are houses along the alley that occupied and so one could not defile the girls from when they were in Class 1 without any one seeing.

It was further submitted that the madrassa teacher where the children went after school was also not called to testify whether the girls exhibited unusual behavior. That the children were also not examined to establish existence of drugs in their blood. It was submitted that the Appellant was also not examined to confirm he was using drugs to connect him with issue of drugs which it is alleged he gave the girls to sniff.

The Appellant questioned in submissions why one of the girls could not go and report that the Appellant was defiling the other so that the perpetrator could be arrested in the act. It was argued that the prosecution had failed to discharge its burden as to why the children did not report to anyone that the Appellant had been defiling them.

It was also argued that threat to kill was not proved and the appellant was not charged for it. The Appellant argued that if the girls were defiled on their way to school they could not have managed to run to school.

It was also submitted that identification of Appellant in the dock was not proper. It was also submitted that failure to call the arresting officer was fatal to prosecution case. The Respondent's submissions were that the prosecution proved the victim was a child, that there was penetration and the assailant was properly identified.

Having considered the evidence on record for the lower court, the trial Magistrates judgment and the grounds of appeal as well as submissions by the Appellant and Respondents the issues for this court to determine are:-

i. Whether the ingredients of the offence of defilement namely – age of the complainant - penetration

- Identity of the perpetrator was proved

ii. Whether the sentence was harsh and excessive.

iii. Whether prosecution's case had massive contradictions.

iv. Whether the case was poorly investigated.

v. Whether the Appellants defence was considered.

To start with the 5th issue, it is true that the trial Magistrate did not indicate having considered the evidence of the Appellant as against the prosecution evidence. However the Appellant admitted knowing the Complainants and their parents and that he used to work for them.

Although the accused denied having committed the offence and said that if he did the people around would have seen him. PW 3 & PW 4 said that he committed the offence when the alley (kichochoro) was deserted.

Appellant alleged he was fabricated but there is no indication during prosecution witnesses evidence in Chief & in cross examination that the accused and the Complainants or even their parents had a grudge or any reason why they would fabricate him.

On the age of the Complainants the trial Magistrate found they were 8 and 9 years respectively as per the certificates of birth and she relied in the holding in **Francis Omueroni vs Uganda CR. A. No. A2 of 2000** where it was held that a point from medical evidence age may be proved by birth certificate, the victim's parents or guardians and by observation. Because the children were of tender years the court conducted voire dire examination and found they had sufficient intelligence but didn't understand the meaning of an oath and had them give unsworn testimonies but they were cross examined.

There was no doubt raised as to the age of the two complainants in cross examination of the prosecution witnesses by the Appellants counsel and the trial Magistrate having made a finding as to age of complainants which this court finds that the ground cannot be sustained.

On whether the Complainants – PW 3 & PW 4 were defiled, PW 1 testified that she noticed a suspicious behavior in the children but she didn't understand why. She also noticed that their underwear's were dirty and the house-help noticed they could come home from school with money and snacks. That they revealed the Appellant gave them the money and snacks but didn't say why he gave them the money & snacks.

The children were taken to hospital and on examination established to have been defiled. On interrogation at the hospital and by police they pointed a finger at the Appellant as the one who had been defiling them over a period of time on their way to or from school. PW 5 – Dr. Francis Otieno produced P3 forms in which it was established the childrens vaginal walls were reddened.

The Appellant was known to the Complainants and their parents and it is PW 2 who identified him when he learnt from the children that he had defiled them and he was arrested by traffic police officers. There was therefore no need for an identification parade because the perpetrator was known to the children and their parents when the children gave his name PW 2 led to his arrest.

Whether there were contradictions in prosecution case. The contradictions pointed out do not go to the root of the case. The issue in question is that it was established that the children of tender years were defiled by a person known to them and that they did identify the person as the Appellant and when the children were examined. It was found that indeed they were defiled. Both children said the appellant lured them using milo chocolate and could also give them something to sniff which made them dizzy & PW 4 said she could also vomit and experience headaches.

The Appellant drugged the children before defiling them repeatedly and threatened to kill them and burn their father's car if they reported to anyone. The failure to report what the Appellant was doing to the children was therefore explained as the Appellant 37 years old adult prevailed upon the vulnerable children not to report that he was sexually abusing them.

This court does not find any reason in the Appellants submissions to prove the charge of defilement was not properly proved.

The sentence on the offence of the defilement under Section 8(1) as read with Section 8(2) of the Sexual Offence Act is life imprisonment and this court finds nothing unlawful about the sentence passed by the trial Magistrate against the Appellant. However, considering that the current trend requires sentence to be defined, I do revise the sentence to 23 years imprisonment in each count to run concurrently. The other grounds of Appeal raised by the Appellant have no merit and they are dismissed.

The Appellant may appeal within 14 days.

DATED, SIGNED AND DELIVERED ONLINE THROUGH MS TEAMS, THIS 12TH DAY OF APRIL 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel – Court Asst

Ms. Kambaga for the State

Appellant presence in person

Mr. Bunde Advocate for the Appellant – no appearance

HON. LADY JUSTICE A. ONG'INJO

JUDGE