REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 58 OF 2018

MOSES MUNENE NGURA-INI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Nyeri Chief Magistrates Court

Criminal Case No. 34 of 2012 Hon. R. Kefa (PM), delivered on 24 August 2018)

JUDGMENT

The appellant was charged with the offence of defilement contrary to section 8(1) as read with Section 8 (2) of the Sexual Offences Act, No. 3 of 2006. According to the particulars of the charge, on 15 August 2012 in Nyeri County within the Republic of Kenya, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of EWM a girl aged 8.

He faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act the particulars being that on 15 August 2012 in Nyeri County within the Republic of Kenya the appellant intentionally and unlawfully caused his penis to touch the vagina of EWM a girl aged 8.

He entered a plea of not guilty but at the conclusion of his trial he was convicted on the principle count and sentenced to life imprisonment.

The present appeal arises out of a retrial after the appellant successfully appealed against his conviction in an initial trial in which he had also been convicted. This honourable court quashed the conviction and set aside the sentence on19 September 2017; it ordered a retrial out of which the present appeal now arises. In his petition of appeal filed on 7 December 2018, the appellant raised the following grounds:

1. The trial magistrate erred in both law and fact while convicting the appellant on insufficient, contradictory and uncorroborated evidence and thereby occasioning a miscarriage of justice to the appellant.

2. The trial magistrate erred in both law and fact in admitting the evidence of pw2 a child of tender age without properly enquiring whether she was possessed of sufficient intelligence of what an oath was and or understood the duty of speaking the truth.

3. The learned trial magistrate erred in law and in fact in failing to find that the issue of penetration was not proved and was quite in doubt and thus, the sentence passed is hash and excessive.

4. The trial magistrate erred in law and fact in dismissing the appellant's defence without giving solid and cogent reasons for doing so.

In prosecution of its case, the state called four witnesses the first of whom was the complainant's mother, **LWW (PW1). I**n her sworn testimony, she recalled that on 17 August 2012 at about 6.30 pm, she noticed what she described as 'big pimples' on the complaint's vagina; besides the pimples there was also pus and whitish or greenish discharge from the same vagina. Upon enquiry from the complainant, the latter told her that the appellant had been defiling from time to time; to be precise, she told her that the appellant had been inserting his penis into her vagina. She feared informing her mother because the appellant had allegedly threatened to kill her if she did so.

With this information L confronted the appellant whom she had employed as a farmhand and who lived with her in the same home. He denied having assaulted the complainant as alleged or at all. Despite the appellant's denial, L reported the matter to Mweiga Police Station; thereafter she later took the complainant to hospital for examination and treatment. She identified for production a P3 form with which she was issued at the police station and also produced a birth certificate showing that the complainant was born on 12 January 2004 and therefore

was eight at the time of the alleged offence.

On cross examination, Lydia admitted owing the appellant Kshs. 400/- in salary. She had lived with the appellant for about a year.

At the time she testified the complainant was aged 14; nonetheless, the learned magistrate subjected her to *voire dire* examination and came to the conclusion that the she could give sworn testimony. It was her evidence that at the time of the offence, she was in class 2. She would usually arrive home from school earlier than her mother. As she waited for her mother to return, she would sleep on a seat in the kitchen. It is during this times that the appellant would accost her and sexually assault her. It was her evidence that the appellant would threaten her with death if she ever disclosed what he was doing to her.

On two of these occasions, her mother (PW1) found her crying; to divert her attention from what he had done, the appellant told her that the complainant was crying because she was hungry. On one other occasion, he assaulted her when her mother was at home; the mother was asleep in her bedroom when the appellant forcefully pulled her to his room and defiled her. On this particular occasion she went and told her mother that she was having a strange discharge from her vagina. Indeed, her mother noticed the discharge; she wiped it off. She was taken to Mweiga police station and later to Mary Immaculate hospital for treatment.

After the complainant had testified, her mother was recalled for cross-examination after the appellant engaged counsel to represent him. When asked whether she was aware of any incident when the complainant was defiled while she was at home, she initially denied but later testified that she was not aware of such incident.

Corporal Bethwel Kibet (PW3) of Mweiga police station testified that **on** 18 August 2012 the complainant and her mother went to the police station and reported that on 17 August 2012, the complainant's mother had noticed a whitish discharge from her daughter's private parts and that the complainant had told her that the appellant defiled her. He had been defiling her on several occasions but that the latest incident was on 15 August 2012 at around 6.30 PM when the complainant's mother was away. He issued them with a P3 form. On 20 August 2012, he, together with police constable Atema visited the crime scene and arrested the appellant. He interrogated him but he denied committing the offence.

Doctor Gor Goody (PW4), a medical doctor at Nyeri Provincial General Hospital produced the P3 form. The form showed that at the time of examination, the complainant was in a fair general condition; the approximate age of injuries was three days. The external genitalia were found to be normal; however, there were lacerations on the posterior vaginal wall and bruises. There was a whitish greenish discharge from the vagina and the hymen was said to be 'absent'.

A high vaginal swab revealed a yellowish discharge, viscous pus, it was characterized as 'greater than 15 power field'; sperm cells were also noted, and urinalysis showed she had pus cells. HIV test conducted was non-reactive. The complainant was found to have been infected with a sexually transmitted infection. The complainant's underwear was stained with vaginal discharge. She was put on antibiotics and post exposure prophylaxis.

When put on his defence, the appellant opted to give a sworn testimony.

He testified that he knew the complainant and that he had been employed by her mother as her farmhand. His usual chores involved leaving the farm at around 7.30 A.M. to graze the cows; he would return at 10 A.M for milking and return to the grazing field until 6.30P.M. He knew that the complainant left for school at 7.30 A.M and she would return at 5.30P.M.

It was his evidence that the complainant's mother framed him because of the differences between them on the appellant's salary; the complainant paid him Kshs. 500 instead of the agreed Kshs. 3,500. He also testified that his employer was having extra marital affairs and had threatened to kill him if he ever disclosed her way ward conduct. The husband to her employer worked in Mau Narok and would only came back home once every month.

And even after he had been charged, he testified that the complainant's mother had visited him in prison more specifically between the 10th and 20th November 2017 demanding Kshs.200, 000/= so as to withdraw the complainant against him. But he could only raise Kshs.100, 000/= which the complainant declined.

On 15 August 2012, he attended to his chores as usual; he returned home at 5.30 P.M. to find the complainant and her mother. The complainant's mother was not working and was always at home; there is no time, according to his testimony, that the complainant would be at home alone. He testified that their home was surrounded by neighbours and that if he ever committed the offence the neighbours would have known.

He also impugned the prosecution evidence on the basis that although it was suggested that sperm cells were found yet no DNA test was done to establish whether those cells were from him.

On cross examination, he confirmed that he was earning a monthly salary of Kshs. 3,500 and had been in employment of the of the complainant's mother for a year. He also lived in the same home as the complainant and her mother. He insisted that the complainant's mother had an extramarital affair with the investigation officer and that her mother-in-law was even aware of this affair.

At the hearing of the appeal, the appellant urged that the case against him was not proved beyond all reasonable doubt. He reiterated the failure by the prosecution to conduct a DNA test which would have established whether he was connected to the offence at all. He also testified that his prosecution was as a result of a conspiracy between the complainant and her mother.

The state opposed the appeal urging that indeed the case against the appellant was proved beyond all reasonable doubt. Ms. Ndungu, the

learned counsel for the state urged that a certificate of birth was produced to prove age and there was sufficient medical evidence showing that the complainant had been defiled. The appellant, according to the learned counsel, could not have been mistakenly identified because the offence was committed in broad daylight and the appellant was well-known to the complainant. She urged further that based on the provisions of section 124 of the Evidence Act, cap. 80, the learned magistrate was entitled to rely on the evidence of the complainant. Again, the trial court took the complainant's demeanor into account and came to the conclusion that she was telling the truth.

Section 8 (1) and (2) of the Sexual Offences Act under which the appellant was charged reads as follows: -

> ***8. Defilement***
>
> ***(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.***

Two critical elements that must be proved in order to sustain a conviction for the offence of defilement under this section are first, the act of penetration and second, the age of the victim.

> "Penetration" as a term of art is defined under Section 2 of the Act to mean "*the partial or complete insertion of the genital organs of a person into the genital organs of another person*".

Looking at the record, it is reasonable to conclude that there was sufficient evidence to prove 'penetration' as defined in law. This evidence not only came directly from the complainant herself who testified that she had been defiled on several occasions culminating in the episode of 15 August 2012 that formed the basis of the appellant's prosecution and subsequent conviction but there was also medical evidence to corroborate the fact of penetration. The findings that there were lacerations on the posterior vaginal wall and bruises and that there was a whitish, greenish discharge from the vagina and the hymen was said to be 'absent' would point to the fact that there was penetration. Added to this evidence was the evidence that a high vaginal swab revealed a yellowish discharge, viscous pus, that was characterized as 'greater than 15 power field'; sperm cells were also noted, and urinalysis showed she had pus cells. Again the complainant was found to have been infected with a sexually transmitted infection. Either of these facts would be sufficient to prove that there was partial or complete insertion of the genital organs of one person into the genital organs of the complainant as understood under section 8(1) as read with section 2 of the Sexual Offences Act.

There was no controversy about the age of the complainant and indeed there ought not to have been any because a birth certificate was produced showing that the complainant was aged eight at the time the offence was committed.

The main bone of contention was whether the appellant was the person who had defiled the complainant. Apart from the complainant's testimony that she was defiled, there was no other witness who testified as having seen the appellant defile the appellant. It follows that the evidence of the complainant was crucial in unravelling the answer to the question whether the appellant was the person behind the crime perpetrated against her. Equally important was her mother's testimony; her testimony was important because she is recorded as the person to whom the complainant reported her ordeal in the hands of the appellant. With this background it is necessary to interrogate the evidence of these to witnesses.

According to the complainant's mother the incident for which the appellant was arrested and charged occurred on 17 August 2012 between 6 P.M. and 6. 30 P.M. Her testimony of how she discovered her daughter's problem went like this:

> ***"On 17/8/12, I do recall at about 6 PM, it was about 6.30 PM I found my child, E, in my bedroom. When I found her, I found she had removed her inner wear and put a piece of cloth between her legs…. She was standing. She told me "mum come and see". She told me to see, I laid her on my bed, and I looked in between her legs on her vagina and I saw my child had big pimples on her vagina with pus… I had an opportunity to talk with my daughter and asked her what had happened the same day. My daughter informed me that the person I had employed, Moses Munene, as a farmhand had been defiling her on days when I was not at home. When she came home from school, Moses would take her to the kitchen, there is a chair, he would defile her on that chair."***

Upon cross-examination, she testified as follows:

> ***"When I found my child lying on the bed, she was in my bedroom. I removed the piece of clothing between her legs and later she told me what had happened."***

Talking about the same incident, the complainant testified as follows:

> ***"The third time again he did the same to me. I was washing my hands, I had come from toilet, he held my hand, I tried screaming but the accused covered my mouth, my mother was sleeping in the bedroom. He carried me and took me to his bed and closed his room. He once again inserted his penis into my vagina… he had sex with me and when he had finished he opened the door. I went and told my mother I had a vaginal discharge which was smelling bad. My mother wiped me and the following day took me to Mweiga police station."***

The evidence of the mother would suggest that she found her daughter in her (the mother's) bedroom, standing; in answer to questions put to her during cross-examination, she insisted that she found her daughter in the bedroom, lying on her bed. There is a clear contradiction on

whether the complainant was found standing or lying on bed in her mother's bedroom. This, in itself may not be a material contradiction but it says a lot about the credibility of the witness and hence her evidence. Change of testimony from one version to the other would create the impression that the witness is not truthful and hence his or her evidence would be doubtful.

The complainant's testimony appears to have compounded matters even further. Contrary to what her mother said, her evidence suggested that in fact she is the one who found her mother in the bedroom immediately after the appellant assaulted her; her mother, according to her, had been sleeping that particular time in her bedroom.

Again, as much as the complainant testified that the appellant had threatened her with death, it is difficult to understand that all she could report to her mother immediately after she had been assaulted was that she had a vaginal discharge. If it is true, as she testified, that she attempted to scream, apparently for help or raise some sort of alarm, when the appellant pulled her to his room and defied her, I see no reason why she did not immediately tell her mother that the appellant had sexually assaulted her when she finally regained her freedom. To me that would have been the natural thing to do for any child regardless of her age, as long as she is able to communicate effectively.

One other thing which I note from the record is that there is some contradiction between the particulars of the offence and the evidence in support of those particulars. According to the charge sheet, the offence was committed on 15 August 2012. The evidence of the complainant's mother, on the other hand, was to the effect that the offence occurred on 17 August 2017. The P3 form, on its part, speaks of unknown date in August when the offence is alleged to have occurred. If the offence was committed on 17 August 2012 then the evidence was obviously contrary to the particulars of the offence; put differently, there was no evidence to support the allegation that the alleged offence was committed on 15 August 2012. Particulars aside, if the complainant's mother was not only certain that the offence was committed but she went to report the matter to the police the following morning, I find no plausible reason why the police would indicate in the P3 form that the offence was committed on some "unknown date" in August, 2012.

All these contradictions or inconsistencies would appear to be minor when looked at in isolation but their cumulative effect is that they raise reasonable doubt whether indeed it was proved beyond all reasonable doubt that the appellant committed the alleged offence. It is trite that the prosecution must prove its case beyond all reasonable doubt but the severity of the sentence, in this case life imprisonment, would place an even heavier burden on the state to satisfy this threshold of proof.

I must note that there was some lapse in the investigation of this case. According to the doctor's evidence, a high vaginal swab of the vagina revealed a discharge, sperm cells and pus cells; spermatozoa was also noted. In the P3 form, the complainant's underwear was noted to have been stained with a PV discharge. The complainant herself was also established to have contracted a sexually transmitted infection.

Had these body fluids or tissues been subjected to a DNA analysis, the outcome would have certainly cleared any doubt whether the appellant was the person who had defiled the complainant. Yet no attempt was ever made to establish whether the appellant was in any way linked to these tissues or fluids. Neither was he ever examined to establish whether he could possibly be the person who infected the complainant with the sexually transmitted infection.

While there is every possibility that the appellant could have perpetrated the crime in question, these lapses in the prosecution case also present the possibility that he may not have been the culprit. In short, there was reasonable doubt that the appellant committed the offence for which he was prosecuted and eventually convicted. Whenever such doubt emerges an accused would be entitled to an acquittal. **See Woolmington versus Director of Public Prosecution (1935) UKHL 462.**

I am therefore satisfied that the appellant's appeal is merited. His conviction is quashed and sentence set aside. He is set at liberty unless he is lawfully held. Orders accordingly.

Signed, dated and delivered on 22 January 2021

Ngaah Jairus

JUDGE