REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 10 OF 2017

PETER MURIUKI MACHARIA......APPELLANT

-VERSUS-

REPUBLIC.................................RESPONDENT

(Appeal against conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 57 of 2015 (Hon. Joan Wambilianga, Principal Magistrate) on 14 February 2017)

JUDGMENT

The appellant was charged with the offence of defilement contrary to **section 8 (1)(2)** of the **Sexual Offences Act No. 3 of 2006** particulars being that on the 29th day of September 2015 within Nyeri County, he unlawfully and intentionally caused his penis to penetrate the vagina of MWW, a child aged seven.

In the alternative, he was charged with the offence of committing an indecent act with a child contrary to **section 11(2)** of the **Sexual Offences Act No. 3 of 2006** and here the particulars were that on the 29th day of September 2015 within Nyeri County, the appellant unlawfully and intentionally touched the vagina of MWW, a child aged seven with his penis.

He pleaded not guilty to the charge; however, at the conclusion of the trial, the court found him guilty on the principal count and sentenced him to life imprisonment; it is this conviction and sentence that the appellant has appealed against. He raises the following grounds in his appeal:

1. The trial magistrate erred in law and fact in relying on the evidence of the of the complainant alone in convicting the appellant yet section 124 of the Evidence Act, cap. 80 was not applicable to the appellant's trial.

2. The learned magistrate erred in relying on the evidence of a clinical officer to convict the appellant yet the medical officer who examined the complainant did not testify; the learned magistrate was therefore in breach of sections 34 and 77 of the Evidence Act.

3. The learned magistrate erred in law and in fact in convicting the appellant when the charge against him was not proved to the required standard.

4. The learned magistrate erred in law in rejecting the appellant's defence yet it was not challenged by the prosecution; accordingly, she flouted section 212 of the Criminal Procedure Code, cap. 75.

The complainant gave unsworn statement, the learned magistrate having come to the conclusion that she could not understand the importance of telling the truth or the meaning of evidence on oath.

According to her, on 29 September 2015, she was playing around their house at Chaka when somebody called her allegedly to send her. Rather than send her, the assailant pushed her into a rabbit pen and defiled her. He threatened to beat her if she informed anybody. The complainant returned home and washed her pants. Although she did not tell her mother of the ordeal, she noticed that the complainant could not control her urine. It is then that the complainant opened up and told her that 'somebody who does welding work' had 'caught' her. Although she knew this person she had never talked to him before. Her mother took her to the police station at Kiganjo where she was referred to Nyeri Provincial General Hospital for examination and treatment.

Upon cross-examination, the complainant informed the court that she was playing with other children when the appellant assaulted her and besides children, there were other people with whom she shared the same plot. However, she chose not to tell her parents, neighbours or even her playmates.

The complainant's mother, TN (PW2) testified that the complainant was her third born child and that she was born on 16 May 2008. On 2 October 2015, she complained of stomach pains and on the following day, she noticed that the complainant could not hold urine and was literally urinating on herself. On 6 October 2015 she threatened to beat the complainant unless she told her what had happened. But upon cross-examination, she admitted that she not only threatened the complainant, but she had also beaten her before the complainant revealed that the appellant 'had taken her to the rabbit house'. It was her evidence that she caned the complainant because she felt the complainant was hiding some information from her.

It was also her evidence that the she initially shared the same plot with the appellant at Chaka but that he left and lived in a different plot nearby because it was connected to electricity which the appellant needed for his welding works. Her point was that the appellant was somebody she knew very well.

A police officer who is identified in the record only as Inspector Hilda (PW3) testified that a report of defilement of the complainant was made at Kiganjo police station on 7 July 2015 though she later changed to say that the report was in fact made on 6 October 2015 when she issued the complainant with a P3 form. She arrested the appellant on 15 October 2015.

Dr. Martin Macharia (PW4) of Nyeri PGH produced a duly filled P3 form in respect of the deceased. It was his evidence that the P3 form was filled by a different doctor whom he named as Dr. Kiiru. According to the form, upon examination of the complainant, her hymen was established to have been freshly perforated; there was no discharge, but pus cells were seen. These cells, according to her, would suggest that there was an infection. The frequency of urination which the complainant complained of would also lead to the same conclusion.

In his defence on oath, the appellant testified that indeed he worked at Chaka as a welder. He admitted knowing the complainant and her mother; however, on 29 September 2015, when the offence is alleged to have been committed, he was working elsewhere, at Naromoru to be precise. He denied having defiled the complainant or even touched her as alleged.

The appellant's witness Joseph Mwangi Maina (DW2) testified that he was with the appellant in Naromoru on 29 September 2015 from 8.30 AM till 5.00 P.M.

Section 8(1)(2) of the **Sexual Offences Act** under which the appellant was charged reads 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.**

Subsection (1) defines the offence of defilement while subsection (2) prescribes the sentence.

As a term of art, the act of 'penetration' is defined in 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.'

It follows that, in order to convict and sentence an accused under section 8. (1) and (2) of the Act, the trial court must be satisfied that the victim is a child and there has been partial or complete insertion of his or her genital organs.

On the question of who a child is, section 2(1) of the Sexual Offences Act adopts the meaning assigned to such a person in section 2 of the Children Act, cap. 141 which defines a "child" as "any human being under the age of eighteen years".

The prosecution evidence that the complainant was 'a child' was satisfactory; a birth certificate was produced showing that the complainant was born on 16 April 2008, meaning that as at 29 September 2015 when the offence is alleged to have been committed, she was a little over seven years old.

Going by the appellant's grounds of appeal, the major contention is whether there was partial or complete penetration and if there was whether it was perpetrated by the appellant.

By its very nature, defilement is an offence that involves some sort of assault on the person of another and therefore medical evidence in its proof and, in particular, proof of that aspect of penetration is usually critical. More often than not, this evidence would corroborate the complainant's evidence.

In her unsworn statement, the complainant stated that the appellant inserted 'his thing of urinating into my thing of urinating.' She not only felt pain but that she was afterwards incapable of controlling her urine. She was referred to hospital for examination and treatment and therefore to prove the injuries she may have sustained, a medical examination report or P3 from was produced.

The appellant complains that this piece of evidence was improperly admitted in evidence. As I understand him, the form was not produced by its maker or, to be precise, the doctor who filled it after examining the complainant.

The record shows that the P3 form was produced by Dr. Macharia (PW4) yet it was his evidence that it was filled by Dr. Kiiru. It was Macharia's evidence that Dr. Kiiru was not working during that particular week when he testified and, presumably, that is why she was not in court produce this crucial document herself.

The P3 form may very well have been produced by any other medical personnel than its maker if the latter could not be found, or had become incapable of giving evidence or his attendance could not be procured, or even if it was procured it could not be procured, without an amount of delay or expense which in the circumstances of the case appeared to court to be unreasonable. (See section 33 of the Evidence Act).

However, there does not appear to have been any foundation laid for production of the P3 form on the basis of any of the prescribed circumstances. I would agree with the appellant that if section 33 of the Evidence Act was not complied with, then the P3 form was improperly admitted in evidence.

Be that as it may, assuming that the complainant was defiled, I find the prosecution evidence implicating the appellant as the perpetrator of the sexual assault not to have been that convincing. I say so because, going by the complainant's own unsworn statement, she implicated the appellant only after she was beaten by her mother.

Initially, the complainant's mother herself testified that she only threatened the complainant but on cross-examination, she admitted that she not only threatened the complainant but that she also beat her. To quote her answers to questions put to her in cross-examination, the complainant's mother testified as follows:

> **"She (the complainant) did not say at first. I asked her if she played with boys. I asked her because it was unusual. I imagined smelling unusual on her private parts. I threatened to beat her. I did not beat her. My statement says I started caning her. I caned her. I caned her because I felt she was not disclosing something."**

It is worth noting that the complainant was threatened and beaten on 6 October 2015, a week after the alleged defilement. While it was the complainant's mother's evidence that as early as 2 October 2015 she noticed something amiss with her daughter which may have required medical attention, it is not clear why it took her several days after that to extract the information regarding the complainant's source of pain.

All in all, what emerges from the complainant's unsworn statement and her mother's evidence is that whatever the complainant stated and which eventually formed the basis of the charges against the appellant was not only obtained by threats and intimidation but also after some considerable period after the alleged offensive action. In my humble view, it would be unsafe to convict the appellant on the basis of such evidence and in this regard I am persuaded by the words of Harrison JA (as he then was) in a Jamaican case of **R versus George Dingwall SCCA No. 124/1996** cited with approval in **Jamaica's Supreme Court Criminal Appeal No. 34 of 2013 (2015) JMCA Crim 28)** where he stated:

> **"On a trial of a sexual offence the learned trial judge must warn the jury, that in practice it is dangerous and unsafe to convict the accused on the uncorroborated evidence of the complainant and the reasons for that warning. If the complainant is a child of tender years, the said judge as matter of practice is obliged to give an additional warning of the danger of acting on such evidence unless it is corroborated, for the reason that such child may be subject to, (a) flights of fantasy, (b) the influence of adults or (c) unreliability, due to fallibility of memory. However, the jury should be told that in each case, despite the warning if they believed the witness they may act on the evidence of such a child."**

While trial by jury is not part of our criminal justice system, the need for the trial court to be cautious on relying on uncorroborated evidence of the complainant in sexual offences particularly where such a complainant is a child of tender years is necessary. The reasons given for the need for caution are to, a great degree, universal; besides 'flights of fantasy' and 'fallibility of memory', the danger of influence by adults is ever real as the case against the appellant would show.

The totality of the evidence of the complainant, her mother and the doctor leaves some room for doubt whether the complainant was defiled and if so, whether she was defiled by the appellant as alleged. Put it differently, I am not satisfied that the prosecution proved the case against the appellant beyond all reasonable doubt.

I would for the foregoing reasons allow the appellant's appeal. His conviction is quashed and sentence set aside; he is set at liberty unless he is lawfully held.

Signed, dated and delivered on 22 January 2021

Ngaah Jairus

JUDGE