



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.90 OF 2018

JGM.....APPELLANT

VERSES

REPUBLIC...RESPONDENT

(BEING AN APPEAL AGAINST THE DECISION OF HON.Y. I. KHATAMBI (SRM) AT NAKURU ON THE 5TH DAY OF OCTOBER 2018 IN CRIMINAL CASE NO. 255 OF 2017)

JUDGEMENT

1. The appellant was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of Sexual Offences Act no.3 of 2006. The particulars of the offence were that on the 10th day of November 2017 at 12. p.m. at [particulars withheld] location Mirangine sub county within Nyandarua county intentionally and unlawfully committed an act by inserting a male genital organ (penis) into the female genital organ (vagina) of RWG a child aged 8 years' old which caused penetration.
2. The alternative charge was Committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act no 3 of 2006. The particulars of the charge were that on the 10th day of November 2017 at [particulars withheld] village in Mirangine Sub County within Nyandarua County intentionally and unlawfully committed an act by touching the genital organ (vagina) of RWG a girl aged 8 years old.
3. The appellant after a full trial was convicted and sentence to life imprisonment hence this appeal. The appellant has appealed against both conviction and sentence. The court shall proceed to summarise the evidence as presented and thereafter analyse the veracity or otherwise of the appeal. It is noted that the court directed the appeal to be determined by way of written submissions which the court has gladly perused.
4. **PW1** the complainant testified that she was 9 years old and on 10th November 2017 at noon he was at home with the appellant who was his father. She said that the appellant told her to give him his shoes which were under the bed. He told her to get onto the bed and that she should close her eyes. She had removed her clothes after the appellant had instructed her to do so.
5. She went on to testify that the appellant made her to feel pain and he told her not to make any noise. He then told her to wake up and she went to wash utensils. She felt pain in her vagina as she went to wash the utensils. Her brother M had gone to fetch water and when he came back she did not tell him what had happened.
6. Her mother came at 5pm and she told her what had happened. She felt pain as she tried to urinate that day. On Saturday one mama N asked her why she was walking the way she did and she told her what had happened. They took her to Tumaini police station. She was later taken to the hospital.
7. Later she was taken to Nakuru police station where she recorded her statement. She said that it was not the first time the appellant had defiled her. She said that she had good relationship with her father before the incident.
8. **PW2 MW** is the mother to the complainant as well as the wife to the appellant. On 10th November 2017 at 7.30am she left for work leaving behind the complainant and her brother M as well as the appellant. She came back in the evening and during the night she woke up the complainant to urinate but she told her that she was feeling pain in her vagina. She told her that her father had made her feel the pain.
9. She said that pw1 went to church on Sunday and she was called to go to Tumaini police station where she found her and mama P. Mama P went with the complainant and came back with her after three days. She examined her and she saw some discharge and she was in pain.
10. She produced the child's baptismal card and told the court that the appellant was the complainants step father.

11. When cross examined by the appellant she said that there was a time he tried to kill them and she told the village elder.
12. **PW3 EW** testified that she has been a village elder for 12 years. On 12th November 2017 some two ladies went to her house and informed them of the incident. The child who was brought to her told her what had transpired between her and the appellant. She said that she called the chief who referred them to the administration police at Tumaini. They traced and arrested the appellant.
13. Together with the children's officer they took the child to the hospital where she was examined and treated. They later recorded their statements. She said that she was aware of the threats by the appellant to kill pw2.
14. **PW4 SIMFAROSA WANGECHI** a children welfare officer testified that she was called by pw3 and told of the incident. She was away in Nakuru and she told her to go to the police station. The appellant was later arrested. She found the child and her mother at the station and she accompanied her to Tumaini health centre. She said that she did not know the appellant nor pw2 till that day.
15. **PW5 APC BONIFACE KIPROTICH** attached to Tumaini police post testified that on 12th November 2020 pw1 was brought by Eunice Wamutu who alleged that she had been defiled. They traced the appellant and arrested him at Tumaini trading centre. They took him to Mirangine police station.
16. **PW6 ELIZABETH NDUTA** a clinical officer from Tumaini health centre examined the complainant where she noted whitish discharge in her vagina and there was no hymen. She also concluded that she had been infected with candidiasis. The child was examined three days after the incident. She filled the p3 form as well as PRC form.
17. When cross examined she said that hymen can be broken by an object being inserted in the vagina.
18. **PW7 VALENTINE YEGON** from Mirangine police station carried out the investigation. The appellant was already in the cells. She recorded witness statements and later preferred charges against the appellant. She also produced the baptismal card of the complainant which indicated that she was born on 25th August 2008.
19. When placed on his defence the appellant gave sworn evidence denying the charge. He said that he interacted with pw2 on 5th October 2017 and he told her that he wanted to divorce her as she used to miscarry. He told her also that he wanted to have a second wife and she requested for transport back home but he did not have the money.
20. On 8th October 2017 she told him that she wanted them to divide the property and he declined. She threatened him that he would know that the law exists. He was later arrested on 10th November 2017 after the complaint from pw2. He said that he had good relationship with the complainant and that he was home on 10th November 2017 from 7am to 5pm.
21. When cross examined by the respondent he said that he had moved to his friend's home one Mwaura as at 10th November 2017. He said that he was on work on 10th November 2017.

ANALYSIS AND DETERMINATION.

22. The appellant's grounds of appeal can be summarised as; **failure by the trial court to accord him opportunity to cross examine the complainant; that the offence was not disclosed; the court failed to consider his defence and that the medical evidence did not corroborate the charge.**
23. In his submission the appellant stated that the proceedings clearly indicate that he did not cross examine the complainant and it was the responsibility of the trial court to ensure that he was given that chance.
24. He also submitted that there was no evidence that there was any penetration as expected and that the child simply failed to establish that the appellant did so. She simply said that she felt pain. On his defence he said that the court failed to take into consideration the fact that he had issues with pw2 who had in fact promised to deal with him. In other words, there was an embedded grudge between him and his wife to the extent that he went to live elsewhere.
25. The appellant as well faulted the trial court on sentencing which according to him failed to take into account the principles espoused by myriad of authorities after the Supreme Court case of **Francis Muruateteu and another.**
26. The respondent in its submission agreed with the trial courts findings. The learned state counsel Odera Vena found that all the three ingredients of defilement had been proved by the respondent. She said that it was however not true that the appellant was not given a chance to cross examine the complainant as there was no such evidence. At any rate he went ahead to cross examine the rest of the witnesses without any let or hindrance.
27. The duty of this court was spelled out in the case of **OKENO VERSES REPUBLIC (1973)E.A. 32** where the court stated that;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide

whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.

28. The three ingredients of the offence of defilement are now clear namely, the age of the victim, whether there was penetration and the identity of the perpetrator.

29. The age of the minor in this case is not disputed namely as at the time of the incident she was 8 years old. The production of the baptismal card was sufficient evidence for that matter.

30. The next issue is whether there was proof of penetration. The minor's evidence to appreciate this ground ought to be partially reproduced.

31. She said that **"... he then told me to get on top of bed. I did. He told me to close my eyes. He made me feel pain over here, "touches her (watch). I had removed my clothes when I felt pain. At the time I felt pain, I did not have my panty. I removed my panty before I entered the bed. My father is the one who told me to remove my panty.**

Dad made me feel pain when I was lying on the bed. My father was also on the bed. I lay on bed facing up(demonstrates). At the time dad made me feel pain here(points)dad had told me to close my eye. I did not scream. My father told me not to make any noise at time I felt pain my legs were apart."

32. She went on to testify that **"...my legs were apart. The thing that made me feel pain was inside here (touches(watch). It was first time my father made me feel pain. The thing was inside my vagina for a short while. I felt pain. I did later remove the thing. After a short while my father told me to open my eyes."**

33. The court taking cognisance of the age of the minor is unable to comprehend from the proceedings what is the meaning of the words, **"made me feel pain"**. If the appellant indeed defile the minor did he use his genital organ namely penis? Did he use something else let's say an object for example his finger or such a thing that caused the minor to feel pain as she stated.?

34. The definition of penetration under the Sexual Offences Act section 2 is **"partial or complete insertion of the genital organs of a person into the genital organs of another person."**

35. From the description by the minor of the incident, the appellant did not lay on top of her. How then did he use his genital organ to insert into her genital organ? Although the minor had been told to close her eyes, there was no suggestion that the appellant undressed whether fully or not during the act. In the absence of such evidence this court finds that although the minor felt some pain, it may have been from another source or object and not as per the definition given above.

36. Indeed, the evidence of the rest of the witnesses especially the medical report indicates that there was some discharge and infection which indicates some injury to her private parts. The fact that she was urinating in pain clearly demonstrates that there was some injury.

37. On the identity of the perpetrator, this court does not find that there was someone else who was with the minor. The appellant although in his defence claims that he was not at the scene, there was no doubt that the minor was truthful. The provisions of Section 124 of the Evidence Act especially the *proviso* thereof comes in handy. The same states that;

"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act , where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

38. The minor was consistent throughout her evidence despite the failure on the part of the appellant to cross examine her. There was nothing to suggest that he was stopped or denied the chance to cross examine the complainant.

39. In the premises, the court is of the view that there was no evidence of defilement by the appellant. The evidence on record points to the offence of indecent assault. The pain felt by the complainant and the subsequent production of the p3 form which indicated the absence of hymen points out to an assault.

40. There is no evidence that the appellant assaulted her using his genital organ. The trial court at the same time failed to have the matter clarified during hearing. It was not very sufficient to state that the **"minor, "touches, (watch)"**. The court should have sought clarity on where she was pointing at. Just as the minor demonstrated how she lay on the bed she should have gone ahead to clarify what kind of object she felt inside her vagina.

41. As a matter of fact, she went ahead to state that **"I did later removed the thing"**. What **thing** did she remove? In my view a little bit of description and or clarification would have been necessary.

42. The above observations are crucial for the reason that the charges facing the appellant were dire as it meant that he was going to serve his entire life in prison.

CONCLUSION

43. For the reasons stated above the appeal is hereby allowed to the extent that the charge against the appellant on defilement is hereby set aside and substituted with the Alternative charge of Indecent assault contrary to section 11(1) of the Sexual Offences Act.

44. The appellant life sentence is hereby set aside and substituted with a ten years' imprisonment from 14th September 2017. The court takes note that the appellant did the case while in custody throughout.

Dated signed and delivered electronically at Nakuru this 25th day of February 2021.

H. K. CHEMITEI.

JUDGE.