



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CRIMINAL APPEAL 5 OF 2019**

***(CORAM: F.M. GIKONYO J.)***

***From the conviction and sentence by Hon. H. Ng'anga, SRM,***

***in Narok SOA Case No. 33 of 2018 on 14<sup>th</sup> January 2019***

**ALEX SAYALEL KANTAI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**The Charge.**

[1] The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the sexual offences Act No. 3 of 2006. The particulars of the offence are; that on 28<sup>th</sup> day of March 2018 at [particulars withheld] village in Narok sub county, within Narok county, intentionally caused his penis to penetrate the vagina of NM, a child aged 15 years.

[2] He also faced the alternative charge of 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 offence are; that on 28<sup>th</sup> day of march 2018 at [particulars withheld] village in Narok sub county, within Narok county, unlawfully and intentionally touched the vagina of NM a child who is 15 years with your penis.

**The appeal**

[3] Being dissatisfied with the said conviction and sentence he preferred an appeal on grounds set out in his petition of appeal but which relate to the following complaints: -

- 1) That the prosecution did not prove its case beyond reasonable doubt;**
- 2) That the trial court relied on uncorroborated evidence of a minor to convict;**
- 3) That the trial court did not consider the defence evidence.**

**Appellant's submission**

[4] The Appellant submitted that after full trial the trial magistrate sentenced him to 20 years.

[5] The appellant submitted that the victim's evidence was not corroborated by either medical evidence or other prosecution witnesses. That the trial magistrate erred by relying on section 124 of the Evidence Act to arrive at his decision. He also argued that the complainant was not of sufficient intelligence to understand the questions she was being asked.

[6] According to him, the lab test conducted on the 29<sup>th</sup> of March 2018 a day after the alleged rape showed that there was no penetration, no swelling on the vaginal walls and there was no presence of spermatozoa less than 24 hours later. He submitted that PW4 stated that there is no evidence of penetration despite the fact that the appellant was thoroughly examined and even received medication.

[7] In addition, he submitted that PW3 stated that the hymen was long standing, not fresh, that there was no tear nor swelling on the vaginal walls thus there was no evidence of penetration.

[6] He took issue with age of the complainant. He urged that PW2 the mother of the complainant told the court that the age of the complainant was 17 years on the hospital records for instance exhibit 4 the lab test. But, Pw3 assessed the age of the complainant and held to be 15 years. The appellant submitted that the court should have been cautious noting that the complainant's mother was better placed to know the age of the complainant without an age assessment. Therefore, the age of the complainant was not proved.

[7] The appellant seems to urge that the testimony of PW3 and PW4 was that the complainant was not defiled from the medical evidence they produced before court. In his view, the appellant was unfairly convicted of defilement despite evidence that showed that he did not commit the said offence. Thus, the appellant prays that his appeal be allowed and conviction and sentence be set aside and quashed.

### **Respondent's submission**

[9] M/S. Nyokabi, the prosecution counsel, submitted that **PW1** was declared to be a vulnerable witness pursuant to section 31 of the Sexual Offences Act on account of her mental condition and age and an intermediary was appointed in accordance with section 31(4) of the Sexual Offences Act.

[10] According to the prosecution counsel, PW3 who is the mother of stated that the complainant was born in 2000. But, age assessment was conducted on the minor and she was found to be 15 years. See Exh.5.

[10] The prosecution counsel continued to posit that PW2 produced a p3 form which indicated that hymen was broken confirming penetration.

[11] And, that PW1 identified the assailant by name and where he lived. Pw3 corroborated Pw1's evidence. Therefore, Pw1 positively identified the appellant as the perpetrator.

[12] She emphasized that Pw1 never at any time contracted herself. And, that her testimony was corroborated by documentary evidence adduced in court and the testimony of the other independent witnesses. As such, she submitted that the conviction was safe as against the Appellant and urged the court to uphold it.

### **ANALYSIS AND DETERMINATION**

#### **Court's duty**

[13] The duty of first appellate court is to evaluate the evidence afresh and come to own conclusions, except, it must give allowance of the fact that it neither saw nor heard the witnesses. See: **R vs. OKENO [1977] EALR 32**. In this exercise, the court is not however, beholden or compelled to adopt any particular style. Nonetheless, the court must avoid mere rehashing of evidence or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern is to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such is a style that insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed.

#### **Issues**

[14] From the grounds of appeal in the petition of appeal and submissions presented, this appeal is against conviction and sentence. Accordingly, the court should determine: -

- 1. Whether the prosecution proved the guilt of the accused beyond reasonable doubt; and**
- 2. Whether the sentence of 20 years' imprisonment was harsh or excessive in the circumstances.**

#### **Elements of offence of defilement**

[15] The appellant was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act** which provides:

*8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

*8(4) "A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."*

[16] The specific elements of the offence defilement arising from **Section 8 (1) of the Sexual Offences Act** which the prosecution must prove beyond reasonable doubt are:

- 1) Age of the complainant;**

2) **Proof of penetration** in accordance with section 2(1) of the Sexual Offences Act; and

3) **Positive identification of the assailant.**

[16] See the case of *Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013* where it was stated that:

***“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”***

[17] What does the evidence portend?

#### **Age of the complainant**

[18] In defilement charge, age of the victim is important because defilement can only be committed to a child. Age of the child has also been used to determine the sentence to be imposed.

[19] A child is defined as a person under the age of eighteen years. Is the victim herein a child?

[20] The appellant argued vehemently that age of the victim herein was not proved as required in law, for no certificate of birth was produced by PW2. He cited case law including *Kaingu Elias Kasomo Vs Republic Malindi Ca Cra No. 504 2010* to reinforce this point. Nonetheless, their argument was that the age of the complainant was 17 years; despite age assessment report which indicated the complainant's age to be 15 years. He accused the trial court of going by the evidence of the doctor instead of that of the mother who is better placed to speak on the age of the child. According to them, the disparity here suggests that age was not proved.

[21] All medical documents i.e. P3 form, lab request form, treatment notes except age assessment report indicated that the victim was 17 years old at the time of the offence. The age assessment report indicate she was 15 years old. The evidence of the mother is that she gave birth to the victim on 16/04/2000. There was clear disparity amongst the evidence by the mother, the medical documents and age assessment report.

[22] On this question of age, I am content to cite the case of *Fappyton Mutuku Ngui vs. Republic [2012] eKLR* where it was held:

**... that “conclusive” proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.**

[23] I subscribe to this school of thought. Scarcely in vast of rural areas and informal settlements do they ascribe due importance to birth certificates; although the government has now made it mandatory for any child who is joining school. But, in other instances things are grave; the service of registration of persons is unavailable or far-flanked. As such, insistence on proof of age through certificates only would be oblivious of these realities and may be a source of great injustice.

[24] Courts have accepted different mediums of evidence as proof of age in cases of defilement. In some cases, age assessment reports by medical expert is said to be sufficient proof of age. See the case of *John Otieno Obwar vs. Republic [2011] eKLR* Makhandia J (as he then was) observed:

**Defilement is a strict offence, whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly, it is important that the age of the victim be proved by credible evidence. In the circumstances of this case, the charge sheet talks of the complainant being aged 14 years. Other than that allegation, there was no other proof. The clinical officer who examined her never assessed his age. It would have been easy for the prosecution to tender in evidence the complainant's birth certificate to prove her age. This was not done with the consequence that the age of the complainant was not proved as required.**

[25] Courts have also declared the evidence of the mother to be crucial on the age of the child. For instance, in the case of *RICHARD WAHOME CHEGE –VS- REPUBLIC Criminal Appeal No 61 of 2014*, the Court of Appeal held as follows: -

***“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself”***

[26] The peculiarity in this case is that there is a disparity between the evidence of the mother and medical papers on the one hand, and the age assessment report on the other. Quite a squirm. But the court is experienced at determining even far difficult cases.

[27] The younger the victim, the harsher the penalty. From the evidence, I am persuaded beyond any reasonable doubt that the evidence in the initial medical documents which seem to be in consonance with the evidence of the mother of the complainant proves her age to be 17 years old at the time of the commission of the offence. I find the age of the victim was 17 years old. The disparity should be resolved in favour of the appellant as a way of protecting his right to a less harsh sentence.

## Penetration

[29] Section 2(1) of the Sexual Offences Act defines penetration as:

***“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”***

[30] In the case of Mark Oiruri Mose v R [2013] eKLR the Court of Appeal stated that:

***“Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.”*** (Emphasis added).

[31] PW1 told the court that the appellant removed her clothes, underpants, and then removed his clothes and did tabia mbaya on her outside under a tree. The P3 form and treatment card produced by PW2 show that on vaginal examination of the child the hymen was not intact. The doctor was clear that you may not find spermatozoa after 2-3 days of penetration. Accordingly, the submission by the appellant that absence of spermatozoa meant there was no penetration does not hold sway. See the case of Mark Oiruri Mose v R [2013] eKLR. I find that the medical evidence supports the evidence of the complainant and shows that there was penetration of the child. I so find.

### **Was the appellant the perpetrator?**

[32] The Appellant was a person known to the complainant and there was no element of any delusion on her part in recognizing the Appellant as the person who penetrated her genitalia. Her evidence on identification alone may even found a conviction as long as the court records reasons for believing the truth of the evidence in accordance with **Section 124 of the Evidence Act** which provides as follows:

***“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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.”***

[33] I am aware that the appellant claims that the complainant was not possessed of sufficient intelligence to justify reception of her evidence. He based his argument on the fact that the complainant when asked whether she knows what to speak the truth, she answered that “I do not. I now it is to lie”. The appellant also noted some few discrepancies in her evidence which do not go into the core of her evidence. These are discrepancies which are easily reconcilable in law and in light of the evidence adduced. The appellant’s approach was quite narrow and the conclusion made of her understanding the questions put to her and giving rational answers thereto was hasty and oblivious of the evidence she gave. From the evidence she gave, it is clear that she was not prevented by her condition from understanding the questions put to her and giving rational answers to them.

[34] Be that as it may, the above section does not require corroboration of evidence of a victim of sexual offence where conditions in the proviso to section 124 of the Evidence Act are satisfied. All that is required is for the Court to record the reasons for believing the victim where the only evidence is that of the alleged victim.

[35] She narrated to the court the events and how they occurred and she was categorical that the appellant removed his clothes and penetrated her. I do not find anything to show that she was under any delusion or of mistaken identity, for she knew the appellant well. Her evidence was cogent and consistent as to what happened and the identity of the assailant.

[36] I am aware that the appellant offered evidence of alibi. In law, the prosecution bears the burden to and is expected to unravel the alibi either by checking it out or through cogent evidence of its witnesses. The defence alibi was completely routed by the evidence of the complainant whose evidence is believable and coherent. Nothing shows that she was lying. There was also no grudge between the mother of the complainant and the accused. The evidence by the complainant places the appellant at the scene. Thus, the alibi is unraveled.

[37] The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement namely, penetration and minority age of the victim was proved beyond doubt. The conviction was therefore proper.

[36] In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

## On sentence

[37] The appellant argued that the sentence is manifestly excessive in the circumstances of this case. The trial court applied Section 8 (3) of the Sexual Offences Act to convict. The section provides:

***“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon***

*conviction to imprisonment for a term of not less than twenty years.”*

[38] Following my finding that the complainant was aged 17 years at the time of the commission of offence, the appropriate penalty clause is section 8(4) of the Sexual Offences Act which provides as follows: -

***8(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

[4] I will therefore pass appropriate sentence on the basis of the said section and upon consideration of the circumstances of the case. I am aware that Muruatetu decision freed courts from the shackles of mandatory sentences prescribed by legislation; courts retain discretion to mete out appropriate sentences dictated by the circumstances of the case. However, minimum sentences prescribed in Sexual Offences Act are indicative of the seriousness of the offence. This legislative intent is relevant consideration.

[40] The complainant is a child. She is also suffering from disability and therefore a vulnerable person. The appellant took advantage of these vulnerabilities and dealt her cruel treatment and sexual attack. Of depravity of sexual offences, I have stated elsewhere in **R vs. JEREMIAH KOILEL [2021] KLR** that: -

***“Sexual Offences Act is a special Act enacted to deal with the menace of sexual offences including defilement. Doubtless, the nature of sexual offences depicts moral debauchery; a cruel attack on a person’s dignity and person; and, an indelible corrosive hurt of the victim’s life. This reality makes sexual offences serious offences, hence, need for protection of victims of sexual offences”.***

[41] The Court of Appeal in **Thomas Mwambu Wenyi vs. Republic [2017] eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira vs. State of Maharashtra** at paragraphs 70-71 where it was held on sentencing that: -

***“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”***

[42] The offence is serious. The foregoing factors may warrant enhancement of sentence. Nonetheless, I take into account that the accused is first offender. I also take into account that he showed remorse and regret. In the circumstances, 20 years’ imprisonment is not excessive but appropriate sentence. I see no reason of interfering with the sentence imposed by the trial court. His appeal on sentence fails.

[43] In the upshot, the appeal herein is dismissed.

[44] Right of appeal 14 days.

**Dated, signed and delivered at Narok through Microsoft Teams Online Application this 11<sup>th</sup> day of February 2021**

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**F. GIKONYO**

**JUDGE**

In the Presence of:

1. Ms. Koima for DPP
2. The appellant
3. Mr. Okinyi holding brief for Mr. Kariuki for appellant
3. Mr. Kasaso – Court Assistant

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**F. GIKONYO**

**JUDGE**