REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. 6 OF 2019

MICHAEL KARIUKI MWANGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and sentence dated 10.4.2019 in Criminal Case No. 26 of 2018 in Wundanyi Law Court before Hon. E.M.Nyakundi –RM).

JUDGMENT

1. The Appellant was convicted by Hon. E.M Nyakundi, Resident Magistrate, of the offence of defilement contrary to ***Section 8(1) as read with Section 8(2)*** of the ***Sexual Offences Act, No. 3 of 2006***, **Laws of Kenya**, and was accordingly sentenced serve to life imprisonment. The particulars of the charge against the Appellant were that on **29th November 2018** at about 11:50am in Mwatate Location within Taita Taveta County, he intentionally caused his penis to penetrate the vagina of AK a child aged 7 years.

2. He had also faced an alternative charge of committing an indecent act with a child contrary to ***Section 2(1) as read with Section 11(1)*** of the ***Sexual Offences Act, No. 3 of 2006***. The particulars of the alternative charge were that on the same date and at the same place stated in the main count, he had intentionally and unlawfully committed an indecent act with the same child.

3. The Appellant pleaded not guilty to the charges before the trial court, and a full trial was conducted. The prosecution called Four (4) witnesses, while the Appellant, when put on defence opted to give sworn evidence and called no witness. Upon analyzing the entire evidence, the trial Magistrate found the appellant guilty of the offence of defilement contrary to Section 8(1) of the Penal Code. He proceeded to sentence the Appellant to life imprisonment for the same.

4. The Appellant was dissatisfied with the said conviction and sentence of life imprisonment that was imposed by the trial court and he lodged an Appeal before this Honourable Court on the following grounds:-

a. That the learned trial magistrate erred in law and fact in convicting the Appellant on an unsworn testimony of the complainant without a clear corroborative evidence.

b. That the learned magistrate erred in law and fact by failing to consider the inconsistencies in the prosecution evidence.

c. The learned magistrate erred in both law and fact by holding that the prosecution had proved its case against the Appellant beyond a reasonable doubt while the evidence on record did not support such finding.

d. That the learned magistrate erred in both law and fact in finding the Appellant guilt of the offence while there was no direct evidence pointing to the Appellant.

e. That the learned magistrate erred in both law and fact in failing to consider that the prosecution had applied to withdraw the charges for lack of medical evidence.

f. That the learned magistrate erred in both law and fact by failing to consider the appellants defence of alibi

g. That the learned magistrate erred in both law and fact in holding that the Appellant had not discharged his burden of proof.

h. That the learned magistrate erred in both law and fact in convicting the Appellant on crafted charges aimed at settling score between the Appellant and the complainant's family.

i. That the sentence meted out against the Appellant is harsh and excessive in the circumstances of the case.

5. This is a first Appeal and the duty of this court is a first appellate court was succinctly stated in the case of Okeno –vs- Republic [1952] EA 22. Briefly put, this court is expected to consider the evidence that was adduced before the trial court, evaluate and analyze the same and draw its own independent conclusion, while bearing in mind that it neither saw nor heard the witnesses, and make allowance in that respect.

6. Briefly, the prosecution's evidence from the four (4) witnesses was that on 29th November, 2018 at around 11.00am, PW3, who is the mother to the complainant (who is the victim and testified as PW1), sent her to bring wheat flour with Kshs.100/=. PW3 told court that the shop is about 20-30 metres from her house. PW3 then told court that PW1 did not return home within the time she was expected and out of curiosity, she went looking for her (PW1).

7. It was PW3's evidence that when she reached the shop where she had sent PW1 to buy the wheat flour, the shopkeeper informed her that PW1 had already collected the flour together with the change and left. PW3 went on to look for PW1. She said that PW1's peers told her they had seen her looking for Kshs.5/= which had gotten lost. PW3 went on to tell court that PW1 did not return home until the following night. That on being interrogating PW1, PW3 said that she told her that she had been afraid of returning home after losing the money and so she slept outside. She also told PW3 that when it got dark, she went to their neighbor known as Wangare and that is where she had spent the night.

8. It was also PW3's evidence before the trial court that the complainant, PW1 told her that she had met the Appellant, who is their neighbor on her way to W's house and she greeted him. That on the way, they were accompanied by one Kariuki and when they got to a place called **[Particulars Withheld]**, the Appellant laid PW1 in a "mtaro" and defiled her.

9. According to the complainant who testified as PW1 herein, the incident happened when she was in class 3 and that she knew the Appellant as a barber. She stated that the incident happened on a Thursday whereby the Appellant took off her clothes and forcefully put his penis in her vagina. She went on to state that although she felt pain, she did not scream because the Appellant covered her mouth and threatened to kill her if she ever reported the matter to anyone. However, the following day, on a Friday, she told her mother what had happened.

10. The matter was reported to Mwatate Police Station by PW3 while accompanied by PW1, the complainant. According to the investigating officer (hereinafter referred to as PW4) **No.106493, PC Amana Rebecca**, the complainant was aged 9 years old then and she escorted her to the Moi Referral Hospital in Voi where she was examined by Dr. Katisya. That he confirmed that there was evidence of forceful penetration without ejaculation and both pregnancy and HIV tests were negative. PW4 interrogated the Appellant person and he denied the allegations. That she also organized for an identification parade to be conducted and PW2 positively identified the Appellant person. PW4 produced the age assessment report as Exhibit P4.

11. **PW2, Dr. Ayub Mwamari** of Moi Referal Hospital in Voi testified on behalf of Dr. Katisya who examined PW1 and produced the treatment notes, P3 form and PRC form as Exhibit P1, 2, and 3.

12. The Appellant was put on his defence and he opted to give a sworn statement in defence. He denied all the charges against him and stated that on 29th November, 2018, he was at his home in Kibwezi. He went on to state that he had had a disagreement with the complaint's family on 27th October, 2018 over cash and a water drum all totaling Kshs.3,000/=. He then said that he believed that that was the reason for his arrest.

13. After reviewing the evidence that was tendered before it, the trial court, found the Appellant guilty of the offence of defilement in the main charge, convicted and sentenced him to serve a life imprisonment.

14. The appeal was heard by way of written submissions on the directions of the court.

SUBMISSIONS BY THE APPELLANT

15. The Appellant majored on two points in his submission which are firstly, whether the prosecution had established the case against the appellant beyond reasonable doubt so as to support the conviction; and secondly, whether the sentence meted out was excessive and permissive as arrived at by the learned trial magistrate.

16. With regard to the issue as to whether the case was proven beyond reasonable doubt, the Appellant submitted that the test is laid under ***Section 107(1)*** of the **Evidence A**ct and further captured in a precept from the case of ***Miller –vs- Minister of Pensions [1947] 2ALL ER 372*** that,

"the burden of proof on every element in a criminal charge is beyond reasonable doubt and the slightest doubt in the case is to be construed in favour of the Appellant. That this burden solely rests on the shoulders of the prosecution throughout the trial save where there are admissions by the Appellant"

17. The Appellant herein submitted that the prosecution did not discharge its burden of proof firstly, because the evidence on record was only to the effect that he had defiled the complainant but nobody else except the Appellant witnesses the incident. Secondly, the complainant did not state how she had met him on the material day and where she had been before it got dark.

18. According to the Appellant, the chain of events does not connect from the moment the complainant was sent to buy flour to the moment she decided to spend her night at their neighbour's house. More specifically, that the narration does not line up with the Complainant's version of story that she feared going to their home after losing the change she had been given. As such, it cannot be said with certainty which day the incident actually happened.

19. On whether the elements of the offence were properly proved, the Appellant first referred the court to consider the provisions of ***Section 8(1)*** of the **Sexual Offences Act** which stipulates that the three elements to be proved in order to uphold a conviction in a case of defilement are penetration, age and positive identification of the perpetrator. He submitted that whereas in this case PW1 had been shown to have had a broken hymen, the version of evidence led cannot lead to a conclusion that it was the Appellant who was responsible for the broken hymen. Further, that although it had been shown that the hymen was broken, it is not per se evidence of penetration and the fact that the Appellant was known to the complainant and her family does not mean that he defiled her.

20. As regards the age of the Appellant, the Appellant submitted that the age assessment report produced as Exhibit 4 is not conclusive prove that the complainant's age was nine (9) years for the reason that children nowadays grow differently depending on their surrounding circumstances. According to Appellant, failure to produce a birth certificate leads to obvious conclusion that the complainant's age cannot be ascertained not forgetting that the complainant's mother said she was not sure of her own daughter's age.

21. The Appellant further submitted that there was a likelihood that the Complainant gave her evidence under duress to implicate him. At first she had said that she feared going home after losing the change but the story later changed that she failed to go back home because she had been defiled by the Appellant. That the prosecution did not endeavor to establish where the complainant was after 11.00am when the incident is alleged to have happened until the following night when she was taken to her home by a neighbor called Wangare. As such, the complainant's evidence implicating the Appellant cannot be trusted and the Appellant besieges this court to find that there was no sufficient case established by the prosecution to warrant his conviction.

22. The Appellant also raised concerns on the prosecution's failure to call the said "W" as a witness. He submitted that the evidence by the complainant was not corroborated and there is a possibility that she had been defiled at Wangare's place where she had spent the night. The Appellant lamented that as a matter of fact, no one can tell why Wangare did not take the complainant immediately after noticing changes on her. He sought the court to find that the prosecution case concealed material facts and the doubt was not cleared. And also could it be taken that had they called Wangare as a witness, their evidence could have been damned.

23. Further, the Appellant pointed out inconsistencies in the prosecution's case right from the testimony of PW4, the Investigating Officer. PW4 stated that the Complainant, PW1, and her mother (PW3) reported the defilement case on ***29th November, 2018*** at around 11.00am which according to the evidence on record is the same time and date when the Appellant is alleged to have the defiled PW1. He also pointed out that PW3 testified that PW1 came back home a day after she was allegedly defiled which means it is a day after ***29th November, 2018*** and she reported the case after PW1 had been brought home. The Appellant further argued that it was claimed by the prosecution's witnesses that he was well known to the complainant and her family, hence the identification parade done had no probative value. According to him, it was intended to cast blame on him.

24. It is the Appellant's further case that his defence was not considered and the same was called off by stating that he never called a witness but only made allegations of mere denial. To that extend, the Appellant averred that he was at a disadvantaged situation which trampled upon his right to a fair trial.

25. The final part of the Appellant's submission seeks to challenge the constitutionality of the provisions for minimum sentence on sexual offences especially as he was convicted by the trial court. He placed much reliance on the ***Francis Muruatetu case*** which declared the mandatory nature of sentencing as unconstitutional and argued that a first time offender should not be subjected to life imprisonment but to a lesser option on sentencing like probation, community service among other such forms of punishment.

RESPONDENT'S SUBMISSIONS

26. On its part, the state submitted that whereas it has been contented that it did not discharge its burden of prove beyond reasonable doubt, it was only bound to prove the age of the minor, penetration and whether the Appellant was the perpetrator. As per the age of the complainant, it was submitted that the doctor analyzed the age of the complainant to be 9 years old and an age assessment report produced in evidence. It argued that the assessment was based on medically proven fact and therefore credible for consideration.

27. Secondly, on penetration, it is submitted that the same was proved by way of oral testimony and medical evidence. The prosecution argued that PW1 in her testimony stated that the Appellant removed her skirt and proceeded to defile her. Nonetheless, the examining doctor found the hymen of the complainant broken and the prosecution relied on that finding to show that the Complainant had been defiled.

28. Thirdly, it is submitted that the Appellant was positively identified by the complainant as a neighbor and a person who used to shave her hair. The prosecution maintained that the complainant never lost sight of the perpetrator and reported the incident to her mother.

29. The Prosecution also submitted that the evidence of PW1 was not obtained under duress as alleged by the Appellant and one of the factors that aroused her fears was the threats of being killed as allegedly uttered by the

Appellant. In answering the concerns by the Appellant that PW1's evidence was not corroborated, the prosecution submitted that those allegations cannot hold water because the medical evidence pointed to the fact that PW1 was actually defiled.

30. On the inconsistencies pointed out by the Appellant, the prosecution reiterated that what was important was to prove the elements for a case of defilement which it did. However, the prosecution conceded that PW1 did not explain her whereabouts immediately after the alleged incident of defilement until she went to her neighbor's house. As to why the prosecution did not call the said neighbour by the name

Wangare as a witness, it is submitted that the prosecution had already proven the case of defilement to the required standard of proof and there was no need to belabor the court with unnecessary evidence or witnesses.

31. With respect to the argument that the Appellant's Defence for alibi was not considered, the prosecution relied on the cases of ***Charles Anjere Mwamusi –vs- Republic*** and ***Republic –vs- Sukha Singh S/O Waziri Singh*** to canvass the argument that whereas the an Appellant person after putting forward a defence of alibi bears no burden of prove thereof, such Defence ought to be raised at the earliest opportunity available to the Appellant. In this case, the prosecution argued that the Appellant has raised the defence of alibi late in the day that it should therefore be disregarded.

32. Lastly, the prosecution was opposed to the connotation by the Appellant that the sentence imposed by the trial court was excessive and unconstitutional for fettering the court's discretion by imposing a minimum sentence threshold. Although the prosecution did not comment on the finding of the court in the highly debated case of ***Francis Muruatetu case***, it is submitted that the trial court imposed a sentence provided for by the statute and there is no justification to impose a sentence outside the expressly provided statutory provision.

ANALYSIS AND DETERMINATION

33. In determining this Appeal, I have considered the Appellant's grounds of appeal, submissions by both parties, the law and the authorities cited. This is a first appeal and the duty of the first Appellate court was succinctly stated in the case of ***Okeno Vs. Republic (1972) EA 32***. Briefly put, this court must reconsider the evidence before the trial court, evaluate it itself and draw its own conclusion though it should always bear in mind that it neither saw nor heard the witnesses and should make due allowance in that respect.

34. In my considered view, the issues which standout for determination are: -

a. Whether the offence of defilement was proved beyond reasonable doubt.

b. Whether the Appellant's defence was considered.

c. Whether the conviction and sentence is proper.

35. However, before delving into the substantive issues for determination as highlighted above, I will first address the concerns by the Appellant with regard to the age of the Complainant. The Appellant submitted that the age of the complainant could not be established without the presentation of an original copy of the Appellant's birth certificate and the assessment report was inadequate prove given that children grow at different rates. He was also perplexed by the fact that the complainant's mother did not know the age of her daughter. The Prosecution on the other hand, submitted that the age assessment report is a scientific proof of the age of the complainant and it is as sufficient as copy of birth certificate would be.

36. I must first appreciate that defilement is a strict offence, whose 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 describes the complainant as a child aged 7 years old. Other than that, she was examined by a doctor on **26th February, 2019** and issued with the age assessment report dated on even date. The age assessment report was produced by the investigating officer as Exhibit No. 4. I have looked at it very carefully. The medical report indicates the complainant's age to be nine (9) years. The assessment was done barely three (3) months after the offence.

37. As the court record reflects, there was no objection from the Appellant to the production of the medical report. Infact, he went on to cross-examine the investigating officer after she had produced the age assessment report.

38. However, I disagree with the Appellant's insinuation that the assessment report is not an appropriate proof of the complainant's age. Instead, I hold a view similar to the finding in the Ugandan Court of Appeal case of **Francis Omuroni –vs- Uganda, Criminal Appeal No. 2 of 2000**, where it was held that:-

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."**

39. The court of Appeal of Kenya has also expressed its jurisprudence on the issue of age assessment. In the case of **Richard Wahome Chege –vs- R, Nyeri Criminal Appeal No. 61 of 2014,** the said court held that the age of a complainant is not proved primarily by production of a birth certificate but found that an age assessment report is supportive evidence in proving the age of the complainant.

40. In the same vein, this court in an earlier case of ***Joseph Seet –vs- R, Machakos High Court Criminal Appeal No. 90 of 2011*****,** relied on the Clinic Health card of the child in a defilement case to uphold a conviction in a case where proof of age was an issue.

41.Guided by the above authorities, I am of the view that that the complainant's age was sufficiently proved. Accordingly, I have no reason to interfere with the trial magistrate's finding that the complainant's age was 9 years at the time of the alleged commission of the offence.

Whether the offence of defilement was proved beyond reasonable doubt

42. It is should be noted that to secure a conviction in an offence of defilement, one should be mindful of the ingredients of defilement as highlighted in the case of **Kyalo Kioko –vs- Republic [2016] eKLR** are that: -

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

43. On age, PW 4, the investigating produced in evidence the age assessment report which indicated that the complainant was approximately nine (9) years of age at the time of the incident. As discussed above, I am convinced that the trial court correctly exercised its discretion in relying on the age assessment report to ascertain the age of the complainant. Therefore, I find that the fact that the age of the complainant was proved beyond reasonable doubt.

44. On the issue of penetration, the complainant (PW1) testified that the Appellant removed her clothes, her skirt and underwear then inserted his penis into her vagina. Although she said she never knew what the penis is used for she told the court that the Appellant put his penis where she urinates from, that is her vagina. PW2 (the Medical officer) corroborated her evidence. He produced a P3 form which showed that there were bruises and lacerations on the vulva of the vagina. That the vulva of the vagina appeared hyperemic with signs of inflammation and according to PW2, this could only happen when a person has an injury. The P3 form further showed that the hymen was broken affirming that the minor had been defiled. I therefore find that penetration was proved to the standard required.

45. Finally, on issue of identification, PW1 testified that she knew the Appellant and further stated that the Appellant used to shave her hair. This was corroborated by her mother (PW1) who stated that they had lived with the Appellant in the same plot for a period of six (6) months before shifting. She also confirmed that the Appellant was a barber and used to shave the complainant. The Appellant did not dispute that he was known to the Complainant and her mother. I find that the Appellant was positively identified through recognition. The only question that remains is as to whether the Appellant was the perpetrator of the offence. He submitted that the period between 11.00 am when the Complainant was allegedly defiled until the following day at night when she returned to her mother was not explained. He further submitted that the prosecution left out W, the neighbor where the Complainant is alleged to have spent the night and stated that there is possibility that she had been defiled at her neighbour's place. He also averred that the evidence as to whether he was the one who defiled the complainant was not corroborated since no one else saw the alleged offence being committed on the complainant. It is only the complaint's evidence against his.

46. Section **124 of the Evidence Act** Cap 80, Laws of Kenya provides that:-

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), 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 Appellant 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 Appellant person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

47. From the plain reading of the above section, it is clear that corroboration is not a requirement. Under ***Section 124*** of the ***Evidence Act,*** the evidence of the complainant is sufficient to convict the Appellant provided the court believes her to be telling the truth and records the reasons for doing so.

48. The trial court in its judgment delivered on 10/4/2019 only stated that the after conducting *voire dire* examination on the complainant, it was satisfied that the complainant was competent to testify but did not record the reason for convicting the Appellant based on the evidence of the complainant.

49. In my view, this is a case where the evidence was barely sufficient to warrant the court to draw an adverse inference from the prosecution's omission to call the alleged witness and to be more specific,Wangari the neighbor. I say so firstly, because the complainant did not describe the circumstances under which the offence happened, where she met the Appellant and how he ended up defiling her. What she told the court is simply that she knew the Appellant as a barber, that he removed her clothes and inserted his penis on her vagina. Her mother seemed to expound on PW1's story by stating that the Complainant met the Appellant and decided to go and greet him since he was a neighbor but when they got to a place with no houses, the Appellant laid PW1 in a ***"mtaro"*** and defiled her. Interestingly, she explained that she learnt of all these happenings after interrogating PW1. However, in her testimony PW1 said nothing about being laid in a ***"mtaro"*** or the place where she was defiled at. She even never mentioned that one Kariuki had accompanied them on the way to Wangari's at Singila.

50. Secondly, Pw3 testified that when she first questioned the Complainant after she had been brought home by their neighbor, she said told her that she feared coming home after losing money. PW3 stated that PW1 told her she slept outside but when it got dark she decided to go to their neighbour's house. According to PW3, the complainant was defiled while on her way to their neighbor's place. I find this part of evidence not supportive of the charge sheet presented before the trial court. While PW3 testified that it was already dark when PW1 was defiled, the Charge sheet provides the particulars of the charge as that; "**on the 29th day o November, 2018 at about 11.50 AM AT [Particulars Withheld] Village,…….** In a nut shell, the charge sheet described the offence as having happened at around 11.50 am contrary to the evidence of PW3 who stated that the minor was defiled while it was already dark and that of PW2 who testified that the minor was defiled at around 7.00pm. Had the prosecution called the said Wangare, whose house the Complainant is alleged to have spent the night after being defiled, then the court would have had the opportunity to ascertain whether it was indeed true that the complainant spent the night at Wangare's home and what time she went there, so as to appreciate the evidence on the time she alleges to have been defiled.

51. In view of the discrepancies in the evidence of the child (PW1) and that of her mother (PW3), it was unsafe to convict the Appellant solely on the evidence of the minor. The circumstances and the exact time in which the Appellant committed the said offence remain unclear to this court, hence the same is doubtful. The doubt that has been raised in the credibility of the complainant's evidence goes to benefit of the Appellant. Having reached a conclusion that it was unsafe to convict the Appellant on the evidence before the court, this Appeal succeeds.

ORDERS

52. Accordingly, for the reasons set out above, the conviction and sentence of the Appellant for the offence of defilement contrary to **Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*** are respectively quashed and set aside.

53 There shall, therefore, be an order for the immediate release of the Appellant unless he is otherwise lawfully held on account of any other criminal proceeding.

It is so ordered.

DATED, SIGNED AND DELIVERED AT VOI ON THIS 24TH DAY OF MARCH, 2021

D. O. CHEPKWONY

JUDGE

24/3/2021

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020,** this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O CHEPKWONY