



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 11 OF 2018

AJM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence passed by Hon. P. K Mutai RM

on 10.06.16 in Kwale CMC S.O No. 775 of 2015)

JUDGMENT

Introduction.

1. The appellant herein was charged with defilement contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act No. 3 of 2006 and an alternative charge of Indecent assault of a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.
2. The Appellant pleaded not guilty and the case proceeded to full hearing. He was convicted of the main count and the trial court sentenced him to serve twenty (20) years imprisonment, after taking into account his mitigation.
3. The Appellant being aggrieved by that decision lodged an Appeal to this Court against the conviction and sentence based on amended Grounds of Appeal filed in court on 16.02.2021, as follows:-

- i. That the learned Magistrate erred in law and facts by failing to find that 20 years' sentence was manifestly harsh and excessive in the circumstances of this case.**
- ii. That the learned Magistrate erred in law and facts by convicting me without proper finding that the evidence adduced by the prosecution witness did not support the particulars of the charge.**
- iii. That the learned Magistrate erred in law and facts by failing to find that the prosecution case was not proved beyond reasonable doubts.**
- iv. That the learned Magistrate erred in law and facts by failing to find that crucial witnesses were not summoned during the trial.**
- v. That the learned Magistrate erred in law and facts by failing to find that the police did not conduct conclusive investigation in this matter.**
- vi. That the learned Magistrate erred in law and facts by rejecting my defence.**
- vii. That the learned Magistrate erred in law and facts by failing to consider the period spent in remand custody prior to conviction and sentence.**

4. The prosecution's case was that the complainant was defiled by the appellant sometime between the months of March, 2015 and July, 2015. PW 1 MN who was the complainant testified that she is eleven years old, a class two student at [particulars withheld] primary school

and that she lives with her mother and two siblings. She stated that on 21st July, 2015 her step-father A asked her to sleep at home since he was going to the beach to fish. She identified the appellant in court as the person who defiled her. She further testified that the appellant came back at about 10.00 am, went to where she was sleeping and asked her to keep quiet, at this time her mother was absent.

5. PW 1 stated that he found the appellant on top of her and at this point he had already removed her underpants. The appellant promised to buy her a lesso and inserted his penis into her vagina, but she did not shout for help because she was afraid. That the appellant then put on his clothes and left. PW 1 testified that she alerted his brother who later on informed her mother who was absent at the time but came back after three days. It was her testimony that this was the third time he was performing the said act and she used to alert her brother.

6. PW 1 further stated that she was taken to the chairman by her father where they reported the matter and the following day they visited Lungalunga police station and were referred to Lungalunga hospital where she was treated and discharged. On cross examination, PW 1 testified that she informed her brother the following day evening and there was no money to take her to the hospital immediately after the incident

7. PW 2 GB the complainant's mother stated that the complainant is eleven years old. On 22nd July, 2015, she went to the farm at Munugulo area at around 8.00 a.m. She was then informed by her neighbor Kitsaga that the appellant who is also her husband had defiled her daughter. She stated that she came back home and on inquiry her daughter confirmed that she had been defiled by the appellant. She further testified that she has been living with the appellant for six years.

8. It was PW 2's testimony that she took the complainant to the village chairman where she was advised to report the matter at Lungalunga police station and later on took her to her to the hospital. On cross-examination, she stated that her neighbor informed her on the night of the matter and she came back the same day, interrogated the complainant who confirmed she was sickly. She further stated that the complainant was taken to the hospital on 20th July, 2014

9. PW 3 P.C Godfrey Mobisa testified that at the time of the offence the complainant was 11 years old. It was his testimony that he issued a P3 form which confirmed that the complainant was defiled. He arrested the appellant and preferred charges against him. He produced the age assessment report as Prosecution Exhibit 1 which indicated the age of the complainant as 12 years. On cross examination, the investigating officer testified that the offence was committed between March and May, 2015.

10. PW 4 Mary Kabicheru Kombe a clinical officer at Lungalunga Sub-County Hospital testified that she filled the P3 form on 23rd July, 2015. She also testified that the offence started in March and the last time was 15th July, 2015 and the complainant was eleven years old. It was her testimony that on vaginal examination, the complainant's hymen was broken, and was penetrable with ease and there was slight vaginal tear. That there was tenderness on inserting the examining finger but there was no spermatozoa noted. The P3 form was produced as Prosecution Exhibit 2

11. The appellant gave an unsworn statement in his defence stated that on 18th July, 2015 at about 8.00 a.m. he went fishing, he came back later and found his children playing. He was informed that his wife was at the farm. When he went to the farm he found his wife with one N her former husband, they both escaped and his wife did not come back home that day. Later on, she came with the said N and others and interrogated him. He was informed that he had committed an offence.

12. It was the appellant's testimony that he was arrested and taken to community policing chairman where he was asked for Kshs. 40, 000/= which he was unable to raise. On Monday, he was taken to Lungalunga police station, he was interrogated on 23rd July, 2016 and was taken to the hospital.

Submission

13. This appeal was canvassed way of written submissions. The Appellant filed his written submissions on 16th February, 2021 and relied on the same. He submitted that the section under which he was convicted with was section 8 (3) which provides for a term of not less than 20 years' imprisonment for an offence of defilement with a child between the age of 12 and 15 years. He relied on the case of Kichajele S/O Ndamungu VS Republic [1949] EACA 64 on construction of the words liable to where the Court held that use of the words "*shall be liable to*" does not import that the sentence mentioned in any particular in which these words occur is merely a maximum and that the Court may impose a lesser sentence below the limit indicated.

14. The Appellant further submitted that the word is liable to imprisonment gives room for the exercise of judicial discretion. He submitted that Article 50 (1) (2) (p) of the Constitution of Kenya, 2010 guarantees everyone the benefit of the less severe punishment therefore, the 20-year imprisonment meted out upon the appellant was harsh and excessive. It was submitted by the appellant that once the trial magistrate found that the age quoted in the charge sheet did not correspond with the evidence adduced, he ought not to have convicted the appellant under section 8 (3) of the Sexual Offences Act, unless the anomaly was corrected by way of an amendment of the charge sheet. He submitted that evidence adduced must support the charge sheet and in this case, the evidence adduced did not support the particulars of the charge sheet.

15. The Appellant further submitted that the date of the offence is a question that remains undetermined since PW 3 testified that he investigated the offence on 11th July, 2015 and issued a P3 form yet PW 1 in her testimony indicated that the offence took place on 21st July, 2015. PW 1's testimony on when the offence occurred was also controverted by the evidence of PW 4 the doctor who testified that the offence started in March and the last incident of defilement took place on 15th July, 2015. It was submitted by the Appellant that PW 1 in her testimony stated that the offence of defilement took place in her brother's presence yet the said brother was not called to testify for the prosecution, therefore, one is left to wonder whether the prosecution failed to call the complainant's brother since he would tell the Court that the Appellant did not defile his daughter.

16. The Appellant submitted that the Court is empowered under section 150 of the Criminal Procedure Code to call the said brother and relied on the case of *Bukenya vs Uganda* [1972] EA 549 where it was held that the prosecution had a duty to avail all witnesses to establish the truth even if such evidence may be inconsistent with their case, the Court too has the right to call witnesses whose evidence appears essential to the just determination of the case, where the called evidence is barely adequate, the Court may infer that the uncalled evidence would have been adverse to the prosecution case.

17. It was the Appellant's submissions that PW 1 testified that this was the third time he was performing the act, the complainant also made the decision to inform her brother and report to the police after the third incident on her own volition. There is no evidence that after the 1st and 2nd incident, the Appellant threatened her not to tell anyone therefore the reasons for failure to report the first and second incident are not convincing.

18. The Appellant relied on the provisions of Section 124 of the Evidence Act. He submitted that the trial Magistrate believed PW 1's testimony since it was supported by the P3 form which indicated that the hymen was missing and there were slight vaginal tears and tenderness on the private part, however, it was not established that the said injuries were as a result of the appellant having penetrated the complainant on 15th July, 2015 and/or 11th July, 2015.

19. The Appellant relied on the provisions of section 333 (2) of the Criminal Procedure Code and urged the Court to consider the period he has spent in remand custody prior to conviction and sentence, he also urged this Court to allow the appeal.

20. The Respondent's submissions were filed on 1st March, 2021. Ms. Mwangeka learned Counsel for the D.P.P submitted that the critical ingredients forming the offence of defilement such as the one the Appellant was charged with are; age of the complainant, proof of penetration and positive identification of the assailant. She submitted that the trial Court relied on the age assessment report in determining the complainant's age, reliance was placed in the case of *Thomas Wenyi v Republic* [2017] eKLR where the Court of Appeal held that medical evidence is paramount in determining the age of the victim and in the absence of any other evidence, the doctor is the only person who could professionally determine the age of the victim.

21. Counsel submitted that the oral evidence of PW 1 on penetration was adequately corroborated by the medical evidence produced by PW 4. Ms. Mwangeka submitted that the evidence on identification was that of recognition which is more reassuring than the identification of a stranger as held by the Court of Appeal in *Ajononi v Republic* [1980] KLR 54. She submitted that the appellant was well known to the complainant as her stepfather whom they live with in the same house.

22. Ms. Mwangeka submitted that Section 143 of the Evidence Act does not require any particular number of witnesses to be called to prove a certain fact and that the evidence adduced before the trial Court proved the elements of the offence in totality to the required legal standard thus no negative inference arises.

23. On the date of the offence, Counsel submitted that the offence occurred between the months of March and July 2015 according to the charge sheet, the P3 form on the other hand was filled on 23rd July, 2015. PW 1 stated that the offence occurred on 21st July, 2015 while the investigating officer stated that the file was handed over to him on 11th July, 2015. This shows that the offence occurred on diverse dates in the month of July which is consistent with the charge sheet. Ms. Mwangeka further submitted that the contradictions raised are minor and in no way disprove the prosecution case against the Appellant. Reliance was placed on the case of *Erick Onyango Ondeng' v Republic* [2014] eKLR.

24. On sentencing, Ms. Mwangeka submitted that the appellant was sentenced to 20 years' imprisonment as provided for under Section 8(3) of the Sexual Offences Act after his mitigation was considered, therefore the said sentence was neither harsh nor excessive. Counsel submitted that the prosecution proved its case to the required legal standard therefore the Court should uphold the conviction and sentence herein and dismiss the appeal for lack of merit.

5. This being the first Appellate Court, it is imperative that I must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including **Kiilu & Another V. Republic** [2005] 1 KLR 174.

26. Having re-examined and analyze all the evidence adduced in the trial court together with the judgment of trial Magistrate and having considered the grounds of Appeal and respect submissions of the parties, the issues for this court to determine are whether the prosecutions at trial prove all the ingredients of defilement under Section 8(1) as read with Section of 8(2) of the Sexual Offences Act namely:-

i. Penetration

ii. Age of complainant

iii. Identity of perpetrator

27. In the present case, the prosecution successfully proved that there was actual penetration. This was done through the evidence of PW 1, PW 4 and the P3 form that was produced as prosecution Exhibit 1. From the P3 form it was clear that the hymen was broken, penetration was noted and there was slight vaginal tear and tenderness on the private part.

28. The age of the complainant is also a crucial element in an offence for defilement since in the event an accused is found guilty, it determines the punishment. The complainant testified that she was 11 years old, the complainant mother PW 2 also testified that the complainant was 11 years old and the Investigating officer PW 3 also testified that the child was 11 years old at the time of the offence. The clinical officer who examined the complainant for the purpose of examining the P3 form also noted that the child was 11 years old in exhibit

2. The appellant who was the step father to the complainant did not dispute that the complaint was 11 years old in his unsworn testament in his defence. The trial Magistrate noted that there was a slight variation of age in that the complainant said she was 12 years old and the age assessment reported that she was 12 years old and he opted to rely on the age assessment report as the age of the complainant and found that the element of the age of the complainant have been proved by the prosecution. On finding that the appellant was guilty of the offence of the defilement the trial Magistrate sentenced the appellant to serve 20 years which he noted was provided by the law. The appellant appears to have been convicted under section 8(1) as read with section 8(3) of the Sexual Offences Act pursuant to provision of Section 1792 of the Criminal Procedure Code which provides that:-

“When a person is charged with an offence and facts are proved which reduced it to minor offence he may be convicted of the minor offence although he was not charged with it”

29. The appellant was initially charged under Section 81 as read with Section 8(2) of the Sexual Offences Act which provides that a convicted offender shall be sentenced to imprisonment for life. The sentence meted against the appellant was therefore not harsh considering that he would have been sentenced to life imprisonment if the initial charge was maintained or if he had been properly charged with the offence of incest considering he was a stepfather to the complainant. I do not find any fault with the trial Magistrate’s conviction of the appellant having established the age of the complainant as twelve years.

30. On whether the appellant was properly identified as the perpetrator the complainant testified that the appellant was her father and that she walked up and found him on top of her having removed her underpants and he told her not to shout and promised her to buy a lesso after which he inserted his penis into her vagina. That she reported to her brother who in turn reported to his mother but when the appellant was approached by the complainant’s mother he denied that this is the 3rd time that the appellant was performing his acts on her. The appellant in his defence did not deny that he was the stepfather of the complainant and that PW 2 had left him at home with the children. He did not deny that he defile the complainant in his unsworn statement he said that he found his wife with the former husband and he escape but did not explain how his allegations were connected with the complainant’s injuries in the genitalia. He did not tell the court whether the child was coached to frame him. The court therefore finds that the complainant’s evidence was firm and consistent and was not shaken during examination by the appellant. PW 2 testified that she had been married to the appellant for 6 years and there was no chance the complainant who was the daughter of PW 2 could have mistaken someone else for the appellant.

31. The Appeal lacks merit and is dismissed. The conviction and sentence are upheld.

32. It is so ordered.

Right of appeal in 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF MAY, 2021

HON. LADY JUSTICE A. ONG’INJO

JUDGE