REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL 31 OF 2020

JMK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgment, conviction and sentence of the Hon. E. Suter

Senior Resident Magistrate, delivered on 25.1.2019, in Makadara Chief Magistrate court,

Criminal Case No. Sexual Offences 160 of 2016)

JUDGMENT

The appellant ***JMK***, faced a charge of Incest with a child contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006. The particulars of the charge were that on diverse dates between the months of May 2016 and August 2016 at [particulars withheld] slums within Makadara Division in Nairobi country, he unlawfully and intentionally penetrated the genital organs (anus) of SM, a child aged 8 years with his genital organs (penis).

The appellant faced an alternative count of Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. That an diverse dates between the months of May 2016 and August 2016 at [particulars withheld] slums within Makadara Division in Nairobi County, he touched the genital organs (anus) of SM, a child aged 8 years with his genital organ (penis).

The case of the appellant went through full trial. And in a judgment of the court on 25.1.2019 the appellant was convicted on the main charge. On 20.2.2019, he was accordingly sentenced to serve 10 years imprisonment. Being aggrieved of both the conviction and sentence, the appellant filed this appeal before this court on 7.2.2020. He has raised upto 5 grounds of appeal as follows;-

> **1. THAT the learned trial magistrate erred in both law and fact in convicting the appellant for the offence he was charged with when there was no sufficient evidence to prove the charges.**
>
> **2. THAT the learned trial magistrate erred in law and in fact of convicting the appellant despite testimony in open court from a witness who examined the victim and testifies that at the time of examination, the victim's hymen had increased blood flow but was intact.**
>
> **3. THAT the learned trial magistrate erred in both law and fact by convicting the appellant despite testimony in open court from a witness who examined the victim and testified that at the time of examination, the victim had normal genitalia with inflamed walls.**
>
> **4. THAT the learned trial magistrate erred in law and in fact by convicting the appellant despite the lack of medical evidence linking the appellant with the offence.**
>
> **5. THAT the learned trial magistrate erred in law and in fact by convicting the appellant solely on the strength of the testimony of the victim despite it coming out very clearly during the proceedings in court that she had been coached by her mother to exaggerate some facts of the case.**

The appellant has pleaded that his conviction be quashed and the sentence be set aside. The state/Respondent has, on the other hand opposed this appeal.

The parties canvassed this appeal by way of written submissions, and both sides filed their respective sets of submissions.

For the appellant, the first issue for determination was whether there was enough evidence to prove actual penetration or an indecent act. It was submitted that the prosecution failed to prove the same. That whereas the complaint did not give any specific dates, PW2, her mother mentioned May 2016. Same as PW3, whereas PW4 and PW5 gave it a timeline of August 2016. Also Dr. Maundu, PW7. Counsel also submitted as to alleged inconsistencies in the evidence of PW1, 2, 3, 5, 6,8. It was submitted that the inconsistencies go to the substances of the charges, ranging from the dates, frequency and the medical evidence.

Secondly, counsel for the appellant submitted that there was clear evidence of coaching of the complainant when she stated that "*mum told me to say that I screamed to tell M to lit to house…. Mum told me to say it was done twice."* Also that PW7 found some of the injuries to be only 1 day old, raising the question whether it is appellant who assaulted the complainant. Counsel submitted that was bad blood between the appellant and PW2 as confirmed in the evidence of PW2.

The appellant also questioned the rationale behind the prosecution's failure to call PW15 teacher and siblings, who had apparently been present during the defilement. The appellant relied on several authorities in support of the submissions. These included;

i. Woolmington versus DPP (1935) Ac, 462, on the prosecution's burden to prove a case beyond any reasonable doubt.

ii. Peter Mwangi Kariuki Versus Republic (Criminal Appeal 57/2012), Mativo J., also on the question of proof.

iii. Okeno Versus Republic 1972)EA 32, on the jurisdiction of the first appellant court. Also **Kiilu and another Versus Republic (2005)KLR 174,** on the same point of jurisdiction.

iv. Arthur Mshilla Manga Versus Republic Criminal Appeal No. 24/2014 (CA), on need to prove penetration in defilement cases.

v. Bukenya and Others Versus Uganda (1972)EA 549, that the prosecution must avail all witnesses necessary to establish the truth even if their evidence may be inconsistent.

On the side of the Respondent, it was submitted the prosecution proved the vital elements of the offence i.e, proof of penetration or an indecent act, relationship between the appellant and the victim and the age of the victim.

Counsel cited section 2 of the Sexual Offences Act, that;

> **"Penetration means the partial or complete insertion of the genital organs of a person into the genital organ of another person."**

And that genital organs in the Act are defined as;

> **"Includes the whole or part of a female or male genital organs and for purpose of this Act, includes the anus."**

That penetration was proved by the evidence of PW1 and corroborated by PW3. Same was later confirmed upon examination by PW5 and PW7.

On the 2nd issue of relationship, it was noted that it was denied that the appellant was father of the complainant, and even the child's birth certificate (Exh 1) showed name of appellant as father. The age of the child was also accordingly proved as 7 years at the time of the act. And in direct response to the submissions of the appellant, counsel re-stated the position of the prosecution side that there are no inconsistencies in the evidence of the prosecution which was well corroborated. She cited the case of ***Philip Nzaka Watu Versus Republic (2016)eKLR,*** on the issue on minor inconsistencies and their effect on the issue of proof. And on the issue of the complainant being coached, counsel maintained that the evidence of PW1 was clear, eloquent and consistent as well noted by the trial court.

I have carefully considered the submissions put across by both the appellant and Respondent's side and the authorities cited. This court is seized of this matter as a first appellant court. The appellant has relied on the case of Okeno Versus Republic (1972)ea 32, WHERE THE COURT HELD;

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion … In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness."**

The Court of Appeal of Kenya in the case of ***David Njuguna Kariuki Versus Republic(2016)eKLR***, echoed and adopted the same directions, in holding that;

> **"The duty of the 12st appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion."**

As a 1st appellate court, it is therefore the duty of this court to analyse and re-evaluate the evidence tendered by both sides before the trial court and come up with its findings. Of course the court must have it in mind that as an appellate court, it has not had the benefit of observing firsthand the witnesses and their demeanor.

The case for the prosecution herein commenced with the evidence of PW1 SM, 8, that the appellant is her father and she used to stay with him, her mother, sister and brother. That the appellant chased her mother away and remained with them. That while sleeping at night, the appellant removed her clothes and defiled her. In her words he did tabia mbaya to her where she goes for long calls. It was 2 times. When she bled, the appellant wiped it and applied oil on it. The incident had taken place where she had slept with the appellant and her other siblings who were asleep.

It was further the evidence of this witness that when she cried, he ordered her to keep quiet. He also hit her. She later told her teacher and mother. Also her grandmother after she frequently messed herself.

The appellant had the opportunity to cross examine this witness at length. Her testimony was that she started messing herself while at the house of her grandmother. However that her mother told her to say that she screamed and tell M to lit the house. She denied that her mother told her what she told the police. But that the appellant used his thing for urine to put in her anus twice.

PW2, BA, is the mother of PW1. Her evidence was that PW1 is 8 years. that her mother called her in May 2006 that PW1 was passing stood on herself and that the appellant had defiled her on the anus. She has separated with him, leaving him with the children. She reported the incident to the police and also took the child to Hospital. This witness gave a long account of their troubled 9 years stay, but denied making PW1 hate her dad, nor that this is a matter of revenge.

And JAO, PW3, gave evidence that in May 2016, she had been with PW1, her grandchild, when the child dirtied herself on 1st and 2nd day, making her beat the child. That is when PW1 told her what appellant had gone to her. She is the one who then told PW2. She also gave details of the poor relations with the appellant. The chief of South B, Solomon Muraguri, was PW4. His evidence was terse that he received this report and referred the child for treatment. He noted that the child was in pain.

PW5, Peninah Agwanyi, produced the post rape care form filed for PW1 as exhibit together with the medical certificate. She noted that on examination, her extern genitalia was normal, had old tear in posterior, vagina was hyperemic with increased blood supply, the anal sphincter muscle was weak and no fresh injury on anal region. In her opinion, increased blood flow indicates trauma or if there is infection.

The 6th witness, PW6, was Emmanuel Ochieng Wanyonyo, who recalled that on a date in May 2016, he had gone to the house of PW2 and the appellant. He found when appellant had beaten PW2 on the leg and insisted she leaves. She left, leaving the children behind. He later witnessed PW1 mess herself in the house of PW3. Dr. Joseph Maundu, PW7, examined PW1 on 25.8.2016. He noted that she had bruises on the left upper back and right thigh. She also had normal external genitalia with inflamed vaginal wall, and hymen was torn lose and no discharge was noted. He produced the PW3 form that he had filed. in his opinion, the child was defiled.

The investigating officer of the case, PW8, was Corporal. Teresia Ndigirwa. Her evidence was that she interrogated the witnesses, investigated the case and later arrested the appellant.

Appellant, on the other hand, gave a very long unsworn defence in which he stated that she had slapped his wife who then went to her parents, leaving him with a 3-year-old child and the others. He also testified as the various differences he had with his wife and her family, including non-payment of dowry. He went on that PW1 had been taken to hospital and that she had used bathrooms used by many people and the urine splashed on her, hence the ointment. Also that PW2 had threatened him that he would rot in jail as she would rule his life with papers. He denied ever holding. He called no witness.

I have considered the evidence on the record, the exhibits produced, the judgment of the trial court, and also the submissions made by the 2 sides regarding this appeal. In my view, the following issues come up for determination of this appeal.

i. Whether the complainant (PW1) was defiled?

ii. Whether it was the appellant who defiled the complainant.

iii. Relationship between the complaint and the appellant.

iv. Defence of the appellant.

v. The issue of sentence.

On the first issue of whether PW1 was defiled, it is important to first understand what defilement mean. The same is defined under section 8 of the Sexual Offences Act, as

"A person who commit an act which causes penetration with a child is guilty of an offence termed defilement."

The ingredients of defilement are therefore penetration and the fact of the victim being a child. For penetration, section 2(2) of the same Act defines same thus;

> **"penetration means the partial or incomplete insertion of the genital organs of a person into the genital organs of another person."**

Genital organs, are on the other hand defined under section 2 of the Act to include the whole or part of a male or female genital organs and for purposes of the Act, includes the anus.

In our instant case, the complainant, PW1 a young girl aged 8, testified on a number of material facts. Her evidence was that the appellant is her father. And that together with her 2 siblings, they stayed in their house with the appellant after their mother PW2, moved out after a disagreement with the appellant. That on different dates, variously stated as 2 or 3 times, the appellant defiled her. In her evidence, the appellant inserted his thing that he uses to pass urine into her where she uses for long calls. Of course, there was no eye witness to all these incidences who testified in court. Her testimony went further as to state that thereafter she bled on going for long calls only for the appellant to wipe her and apply oil on her, while ordering her to keep quiet. She however, told her teacher and mother who came and took her to her own mother (PW3).

It is noted that the complainant herein was only 8 years. In her testimony she could not even remember the defilement took place, nor the number of times. She was however, clear on a number of material facts which remained totally unchallenged even in the face of cross examination by the appellant. First, her age. Second, that the appellant, and nobody else is the one who defiled her.

This is a child of relatively tender years and her evidence was corroborated in various ways. The first witnesses to corroborate the evidence of this witness was her mother PW2 who rushed and picked her from the house of the appellant. PW3 and PW6, also corroborated the evidence of PW1. Both of the witness testified that after was brought to stay with PW3, she would consistently mess in her clothes. PW3 had to cane her in the first times, only for the child to tell her that the appellant had defiled her.

There was further corroboration of the evidence of PW1 by the 2 medical officers who testified in the case. PW5 Peninah Agwanyi, produced the post rape care from, while PW7, Dr. Joseph Maundu, examined the child and filled in her P3 form. Both were categorical that on examining the child, they found evidence of defilement. They accordingly produced the relevant medical reports as exhibits in court.

A birth certificate was also produced in court which proved the fact that the complainant was a minor aged 8 years.

From the above evidence, I have no doubt in my mind on the fact that the complainant minor was defiled.

The next issue is whether it was appellant who defiled the complainant. Indeed this was the evidence of the child. There is no doubt that the child knows the appellant since he is in fact her father. It is worth noting that the child gave the same statements to her mother (PW2) grandmother (PW3), the area chief (PW4) the 2 medical officers (PW5, PW7) her uncle PW6) and even the investigating officer (PW8). Nowhere did she mention any other person. And in her testimony, whenever she screamed, he would beat her and order her to be quiet and not to tell anybody about the matter. This would clearly show that the child would be awake during the acts. Worth noting also is the fact that the appellant lived alone with the complainant and her 2 siblings, one as young as about 3 years old. There is no evidence of any other man staying in the same house with this young family.

These factors put together clearly point to the appellant, and nobody else, as the one who sexually assaulted PW1. And the relationship between the appellant and the complainant as father and daughter is not in dispute. The appellant has also admitted to the same.

Appellant chose to give an unsworn defence with respect, the defence of the appellant dwelled much on the alleged differences with his wife (PW2) and her family. During the trial, at least 3 witnesses from his wife's family testified, PW2, PW3 and PW6. I do not find any plausible reason why the appellant chose not to raise any of the issues he raised in his defence with these witnesses. In the defence, the appellant alluded to the fact that he had himself taken the child to hospital and that the finding was that she had a urine infection. In this, the appellant in fact acknowledged the fact that the child had suffered at least an infection. He however failed to even name the hospital, if, at all, that he took the child to. Neither did he produce any records to support his claim. To say the least, the defence of the appellant was an afterthought, unbelievable and totally incapable of challenging the well corroborated evidence of the prosecution.

In the submissions by counsel for the appellant, it was noted that the prosecution's case was full of inconsistencies. In my view the appellant has not pointed out any material inconsistency in the evidence of the prosecution that could go to the root of this case, that the complainant (PW1) was defiled by her father, the appellant. This issue has been considered in the past with a firm position that inconsistencies which do not go to the root of the matter would not be material to the outcome. In ***Joseph Maina Mwangi Versus Republic (2000)eKLR***, the court noted;

> **"In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."**

As stated above, I am not convinced that alleged inconsistencies, if at all, are material as to be of any consequence herein.

An issue was also raised on alleged couching of PW1. In my view, the answer to this lies in the fact that the appellant had the opportunity and indeed cross examination the prosecution witnesses. Indeed the essence of cross-examination is to help in ascertaining the veracity of the evidence a witness gives. The appellant therefore ought to have raised the various areas he suspected a witness to have been coached on through his cross examination. The records do not show if he did so otherwise the decision of the court is based on the evidence adduced. This, the trial court did.

In all, this court is convinced that the trial court properly analyzed the evidence presented by both the prosecution and the defence sides

before arriving at the decision. On my part, I am convinced that the prosecution discharged its burden and proved the case against the appellant beyond any reasonable doubt as required by the law (Woolmington Versus DPP).

Lastly, on the issue of sentence, it is noted that the appellant was charged with Incest contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006. The sentence therein provided is up to life imprisonment.

The learnt trial magistrate, basing it on the mitigation raised and the pre-sentence report, sentenced the appellant to serve 10 years' imprisonment. I find this sentence to be both legal and lenient. I have no reason to interfere with the same.

Lacking in any merit, I dismiss the appellant's appeal filed herein on 7.2.2020 wholly. For avoidance of doubt, appellant is ordered to serve his sentence as ordered be the trial court.

D. O. OGEMBO

JUDGE

25.5.2021

Court:

Judgment read out in court (on-line) in the presence of Mr. Makau for appellant, the appellant and Mr. Kiragu for the state.

D. O. OGEMBO

JUDGE

25.5.2021