**RPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO. 10 OF 2017**

**GWM....................................................................................APPELLANT**

**VERSUS**

**REPUBLIC.......................................................................RESPONDENT**

***(An appeal from conviction and sentence in Original Bungoma CMCR 68/2014 delivered on 4.1.2017 by E.N Mwenda Senior Resident Magistrate)***

**JUDGEMENT**

The appellant was charged with the offence of defilement of a child contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act NO. 3 of 2006.

The particulars of the offence is that **GWM** on the 7th day of January 2014 at [Particulars Withheld] market within Bungoma county intentionally and unlawfully caused his penis to penetrate the vagina of **SW** a child aged 7 years.

Briefly the evidence before the trial court was that on 7.1.2014 the complainant SW came home in the evening after school. She went into a toilet that was outside her house. The accused person, whom she knew as a person who fetched water in the area came in and locked the door. He undressed her. He inserted his penis into her vagina. After he was finished he dressed her. She went to the house and reported the matter to her mother who then reported the incident to the police.

PW2 CNW testified that on the 7th of January 2014 at about 6.30 pm. She was in the house when her daughter (PW1) came in crying. She questioned the girl why she as crying and she reported that the she was in the toilet located in the outhouse, when G the accused (who was known to both PW1 and PW2) came into the toilet, undressed PW1 and did to her “tabia mbaya” translates to bad manners. She reported the matter to Bungoma police station. She was taken to hospital where the child was treated. She was also assessed for age and found to be approximately 7 years of age.

PW3 Dr. Harun Ombogi testified that on the 8th of January 2014 he filled a police form 3 for the complainant in this matter. On examining the genitals of the complainant he found lacerations to the labia and a whitish discharge. He was categorical in his opinion that the minor was defiled. He adduced the initial treatment card Exhibit 2 and the police form 3 as Exhibit 3.

PW4 PC Benson Wambugu testified that he is the investigation officer in this matter. On the 7th of January 2014 he received a report from the complainant’s mother that the complainant had been defiled by someone known to her. He advised the complaint be taken to the hospital and he gave them a P3 form. He carried out an age assessment on the child and this confirmed she was seven years old. The P3 form confirmed that the girl had sexual contact and therefore arrested the accused.

Upon being placed on his defence the appellant elected to give unsworn evidence. In his brief defence he stated.

> **“ My name is GW. I stay in** [Particulars Withheld]**. I was just working a boda. I brought it at 6 p.m. The time to ask for money, some paid others did not brought maize went back home. That is all I have to say”.**

After consideration of all the evidence the trial magistrate convicted the appellant on the main charge of defilement of child contrary to Section 8(1) of the Sexual Offences Act and was sentenced to life imprisonment.

Dissatisfied with the conviction and sentence the appellant filed this appeal on the following grounds;

1. **That the appellant pleaded not guilty to the charges.**

**2. That the learned magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt in spite of the glancing back of evidence.**

**3. That the learned magistrate erred in law and fact by dismissing the evidence tendered in defense by the appellant.**

**4. That the learned magistrate erred in law and fact by convicting the appellant on contradictory evidence.**

**5. That the learned magistrate erred in law and fact by relying on extraneous matters to conflict the appellant.**

**6. That the learned magistrate erred in law and fact that the evidence is inconsistent and uncorroborated.**

The appeal was canvassed by way of written submissions. Counsel for the appellant Mr. Waswa submitted that penetration was not proved; nor was the appellant examined to cross match the whitish substance alleged to have been found in the genitalia of the complainant. He submitted that the evidence relied on by the prosecution was contradictory. Counsel submitted that the sentence meted was too harsh.

Mr. Thuo for the state opposed the appeal. He submitted that the Complainant positively identified the appellant as he is a person known to her; age was assessed by a Medical officer who stated that complainant was 7 years old and that the medical evidence confirmed penetration.

The appellant was charged with the offence of defilement contrary section 8 (1) as read with Section 8(2) 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. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***

The ingredients of the offence which the prosecution must prove are:

***(a) The age of the complainant.***

***(b) Penetration.***

***(c) That it is accused who penetrated the Sexual organ of the complainant.***

In this case the complainant was taken for age assessment and the age assessment report Exh. 1 showed that the complainant was 7 years old as per date of assessment on 8.1.2014. The age of the complainant was therefore confirmed.

On penetration, the complainant testified how the appellant locked her in a pit latrine (toilet) and inserted his penis into her vagina. This evidence was corroborated by the Medical Examination which revealed that there were lacerations and white discharge in the complainant vagina.

On whether it is appellant who committed the offence. The complainant positively recognized him as it was during the day and appellant as known to her. She reported the same to her mother.

The appellant has raised issue that the victim's evidence was uncorroborated and therefore violated the provisions of section 124 of the Evidence Act. This position was discussed in the case of ***Joseph Mwangi Kariuki v Republic (2018) eKLR*** where it was held;

***The proviso to Section 124 of the Evidence Act therefore allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.***

From the above, this court is satisfied that the complainant's evidence was sufficiently corroborated. Her evidence on identification of the perpetrator is in tandem with the that of PW2. Her testimony on penetration was corroborated by the medical evidence that there was laceration on the labia. The mere fact that the appellant was not clinically examined regarding the infection found on the victim does not dispel the cogent evidence tendered.

This court therefore finds the prosecution's case was proved to the required standards and therefore the conviction safe and proper.

At the hearing of this appeal, an application was filed seeking the appellant to be afforded medical care on the grounds that he suffered from Acute Autism. This court having examined the trial court file and the Probation Officer's report filed therein, therein concludes that the appellant had had mental illness in the past and was thought by those interviewed that he had not fully recovered.

Pursuant to the orders of this court, the appellant did go to a number of psychiatric examinations at both in Kakamega County General Teaching & Referral Hospital and Moi Teaching and Referral Hospital Eldoret. The initial report from the latter Hospital dated 23/10/2017 confirmed that the appellant had mental illness.

He was put on medication under the management of the prison personnel and Kakamega County General Teaching & Referral Hospital and a further report was generated on 5th July, 2018 which concluded that he had thought disorder (Circumstenticuty) and had poor memory of events leading to his arrest. He was further examined on 25/2/2019 at Moi Teaching and Referral Hospital Eldoret and cleared to be fit to stand trial thus the current proceedings.

The defence of insanity was discussed in the case of ***Leonard Mwangemi Munyasia -Vs- Republic (2015) eKLR***, where the court of appeal in discussing **McNaugthen Rules** stated:

> ***"Under the rule insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal but under section 167 (1) (b) of the Criminal Procedure Code he would be convicted and ordered to be detained during the President's pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.***

The court further observed;

> ***Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop.***

It is tempting to conclude that at the time the appellant was charged and tried in the lower court, the appellant could have been ailing mentally. This may be inferred from the proceedings therein.

All through the proceedings, the appellant lacked representation by counsel. When crucial witnesses gave their testimony, the appellant did not bother to cross examine the witnesses. His defence as reproduced earlier in this judgement is equally a very brief statement of the occurrence of the material day.

Upon considering this appeal, I am satisfied that the appellant was properly convicted which conviction I uphold. In view of the mental challenges he exhibited, I set aside the sentence of life imprisonment imposed.

In view of the mental state of the appellant, I make a Special Finding of guilty but insane under the provisions of Section 167 of the Criminal Procedure Code, I direct the appellant GWM be detained at the pleasure of His Excellency The PRESIDENT.

**DATED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF JUNE, 2021**

**S.N RIECHI**

**JUDGE**