REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. E007 OF 2021

FESTUS OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, **Festus Otieno**, was convicted by Hon. Maritim, Senior Resident Magistrate, for the offence of defilement contrary to Section 8(1) and 8(3) of the Sexual Offences Act. The particulars of the charge are that on 1/1/2019 at [Particulars Withheld] area in Migori County, intentionally caused his male genital organ i.e. penis to penetrate the female genital organ (vagina) of VA, a child aged thirteen (13) years old. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

After a full trial, the appellant was convicted on the main charge and sentenced to serve fourteen (14) years imprisonment.

Being aggrieved by both conviction and sentence, the appellant preferred this appeal citing nine grounds of appeal in the petition of appeal dated 18/2/2021. The said grounds can be condensed into the following four broad grounds:

1) That the prosecution failed to prove their case beyond reasonable doubt;

2) That the court failed to consider the glaring inconsistencies in the prosecution evidence;

3)That the court failed to consider the appellants alibi defence and shifted the burden of proof onto the Appellant;

4) That the appellant was convicted on uncorroborated evidence of the complainant.

The appellant therefore prays that the conviction be quashed, sentence set aside and the appellant be set at liberty.

In support of the appeal, the appellant's counsel Mr. Sala filed written submissions on 14/11/2021.

The learned Counsel for the ODPP also filed his submissions on 16/11/2021 in which he supported the appeal.

The appellant's counsel submitted that the prosecution failed to prove the three ingredients that create the offence of defilement beyond reasonable doubt; that though there was proof that the complainant was a minor there was no evidence tying the appellant to the offence in that there was no proof of penetration; that there were two other people in the house where the alleged defilement took place and they did not witness any such act.

Mr. Sala, further submitted that penetration was not proved because no spermatozoa were found in the vaginal swab taken from the complainant on the same day the incident allegedly occurred; that the court based the conviction on circumstantial evidence which did not point to the appellant as the perpetrator. Counsel relied on the decision of **John Mutua Munyoki vs Republic (2017) eKLR,** that the appellant did not have an opportunity to commit the offence because DW2 Winny and DW3 Amum were in the said house when the defilement allegedly took place but never witnessed it; that though PW2 claimed to have knocked on the appellant's door yet she never saw the defence witnesses; that the prosecution evidence is mere allegations and not proved to the required standard.

It was also submitted that the appellant raised an alibi defence that he was in the house with three adults and they confirmed that fact, yet the court ignored their evidence and relied on the case of **Victor Mwendwa Mulinge =vs= Republic (2014) eKLR.**

It was also submitted that the prosecution failed to call crucial witnesses Winny Atieno, Albrite Oketch, the Landlord Benson Otiang, PW2's

husband and neighbours who were present. It was further submitted that the medical evidence did not connect the appellant to the offence and hence the circumstantial evidence was not proved to the required standard.

It was the counsel's submission that the court failed to warn itself of the dangers of convicting based on the uncorroborated evidence of PW1 and relied on the decision of **Samuel Godfrey Otili =vs= Republic (1992) eKLR** where the court held that in sexual offences like rape, generally the court should warn itself of the dangers of acting on the uncorroborated testimony of one witness; that the court did not warn itself of that danger of convicting based on the uncorroborated evidence of a minor. He urged the court to acquit the appellant.

Mr. Kimanthi the Senior Assistant Director of Prosecution in supporting the appeal submitted that there were doubts as to whether a defilement occurred in the appellant's house because there were other people in the house where it allegedly occurred and the prosecution failed to go further to avail an independent witness; Counsel relied on the decision in **Gerald Ndoho Munjuga =vs= Republic Criminal Appeal No. 213 of 2011** where the court held that if there is any doubt in any case then the court should acquit an accused; that though it seems an offence was committed, the court did not render the necessary warning before relying on the sole evidence of the victim. He urged that though the proviso to Section 124 of the Evidence Act does not require corroboration in Sexual Offences, there was need for corroborative evidence in this matter which could have been scientific. Counsel urged that since PW1 stated that the appellant had no protection during the act spermatozoa should have been found and hence the Doctor's findings did not correspond to the complainant's evidence as no spermatozoa was found.

Even though the State supported the appeal, this court has a duty to consider the evidence and the grounds of appeal and make its own independent findings.

This being a first appeal, this court has the duty to revisit all the evidence tendered in the trial court, analyse it afresh and arrive at its own independent findings. However, it has to bear in mind that this court neither saw nor heard the witnesses testify. I make reference to the decision of **Okeno =vs= Republic (1972)EA 32.**

Briefly, the evidence tendered before the trial court was that **PW1 (VA),** a minor then aged about thirteen (13) years, went to collect clothes from the drying line when she was called by the appellant who was a neighbour. She went believing he wanted to send her. He called her into the house, grabbed her, took her to the bedroom, took off her clothes. He in turn removed his trouser lay on her and inserted his penis into her vagina and had sex with her. When she tried to scream, he covered her mouth with his chest. She heard her mother calling and knocking on the appellants front door and he let her out through the back door. She was taken to hospital where she was treated and lab tests done. PW1 confirmed having known the appellant before as a neighbour but had never associated with him.

PW2, DA, PW1's mother confirmed that PW1 went to collect clothes from the drying line, she saw her but while talking to somebody, PW1 suddenly disappeared. A neighbour informed her that Festus had called PW1. PW2 wanted to send PW1 and while waiting, she heard a scream from Festus's house that sounded like PW. PW1 went to knock on the appellant's door after a while; that the appellant later opened the door and that PW1 came out crying and informed her that he had slept with her without trust. She screamed, her husband and neighbours and the landlord Benson Otiang came and they took PW1 to hospital and police station.

PW1 was examined by **PW3, Muindi Justus Magati**, a clinical officer at Migori County Referral Hospital. He found that the complainant had fresh bruises on the labia majora and a visible whitish vaginal discharge. On analysis, the discharge had no spermatozoa. PW3 was of the view that there was possible forceful penetration as the external genitalia had fresh bruises and the vagina was tender and there was some bleeding.

PW4 PC(W) Risper Boyani took PW1 to hospital after the report was made at the police station. She recorded the witnesses' statements and visited the scene.

When called upon to defend himself, the appellant gave a sworn statement and called two witnesses **Winny Atieno** and **Alberine Madeline Oketch (DW2 and DW3)**. He admitted to having been a neighbour to PW1 and that on 1/1/2020 PW1 went to his house where he was with DW2 and DW3; that later, PW1's mother burst into his house, started screaming asking why the appellant had done that; that she grabbed him by the neck, a crowd gathered and the caretaker and landlord intervened and DW2 and DW3 left while PW2 grabbed PW1 and left with her. He denied defiling PW1.

DW2 also stated that she was in the appellant's house with DW3 and two children when PW1 joined them about 3:00 p.m. Suddenly, PW2 came making noise asking what PW1 was doing there and that PW2 then landed on DW1 and started beating him. She denied seeing DW1 doing anything to PW1.

DW3 confirmed having been with DW1 and DW2 when PW1 joined them in DW1's house. She said that when PW2 came, she beat up PW1, then dragged DW1 out of the house. She denied that anything happened to PW1 unless it was on another day.

As was held in the case of John **Mutua Munyoki (supra**) three critical ingredients that need to be proved by the prosecution in a charge of defilement are:-

1) **The age of the victim;**

2) Proof of penetration;

3) Proof of the identity of the perpetrator.

On age, PW2, the complainant's mother testified that PW1 was born on 12/5/2005. PW2 produced a birth certificate (PEXhibit 4). As of

1/1/2019 when the offence was allegedly committed, the complainant was about to turn fourteen (14) years old. No doubt she was a minor.

Of Penetration:

It is the appellant's contention that penetration was not proved. Penetration is defined under Section 2 of the Sexual Offence as:

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

From a reading of the above provision, it is clear that penetration does not need to be complete. Even if the act is only partial, it still amounts to penetration under the Act.

PW1 narrated in detail how, after her clothes were removed, the appellant inserted his penis in her vagina.

PW3 examined PW1 later on the same day and found fresh bruises on the labia majora of the complainant, some bleeding and tenderness, and formed the opinion that there was forceful penetration of the complainant.

Both the counsel for the appellant and respondent argued that penetration was not proved because no spermatozoa was found. However, I do not think that is the correct position in law. There is no requirement that the perpetrator of the offence should discharge his seminal fluids into the victim. This is in line with the definition of penetration, it need not be complete and therefore there need not to have been ejaculation. This is because courts have generally accepted that penetration in sexual crimes of either rape or defilement are usually committed in a hurry and the offenders usually do not have sufficient time to achieve full penetration or even ejaculation. In this case PW1 explained that PW2 started knocking on the door meaning they were interrupted. So partial penetration is still penetration.

The complainant was examined by PW3 on the same evening the offence was allegedly committed. He found the bruises to the complainant's labia majora to have been fresh. There was also bleeding and tenderness. He opined that there was forced penetration and I arrive at the same conclusion as the trial magistrate, did, that penetration was proved. The injuries to the complainant's genital organs go to corroborate her evidence that she was defiled.

Whether the appellant was the perpetrator:

We have only the word of PW1 as against that of the appellant, DW2 and DW3 that he did not defile the complainant. The proviso to Section 124 of the Evidence Act 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."**

In interpreting the above provision, the **Court of Appeal in JWA =vs= Republic (2014) eKLR** held that corroboration in sexual offences is not a mandatory requirement. **Mr. Kimanthi** relied on the decision of **Benard Kabiba =vs= Republic Criminal Appeal No. 104 of 2000** in submitting that it was mandatory that the court warns itself of reliance on uncorroborated evidence of a minor. The above cited decision cited by the Respondent in **Bernard Kebiba supra** was decided before the amendment to Section 124 of the Evidence Act which added the proviso to the Section which does not make corroboration mandatory for in Sexual Offences. The appellants counsel also relied on the decision of **Samuel Godfrey Otili (supra)** on the issue of corroboration. Again, this is a case decided in 1992, before the amendment to Section 124 of the Evidence Act in 2003. Corroboration would only be necessary if the evidence adduced by the prosecution is insufficient to found a conviction. In this case corroboration would be necessary of the court did not believe PW1's evidence or found gaps' in the evidence.

There is no requirement in law that the offence of defilement be proved through medical evidence. In **Kassim Ali =vs= Republic Criminal Appeal No. 84 of 2005**, the Court of Appeal held that absence of medical evidence to support the fact of rape or defilement is not decisive as rape can be proved by oral evidence of a victim or by circumstantial evidence. The submission that there should have been medical evidence was necessary to support PW1's testimony is therefore misplaced.

It was the appellant's submission that the prosecution failed to call crucial witnesses who included DW2 and DW3. The Court of Appeal in **Bukenya =vs= Uganda (1972) EA 549** the former East African Court of Appeal held that the prosecution has a duty to call all witnesses necessary to establish the truth even though their evidence may be inconsistent and that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case. The court also said that it was however unnecessary to call a superfluity of witnesses. See also **Donald Majiwa Achilwa & 2 others =vs= Republic (2009) eKLR**. In the case of **Mwangi =vs= Republic (1984) eKLR 595**, the court said:-

> **"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."**

The prosecution is not therefore duty bound to call all persons involved in the transaction like the neighbours or the crowd, and the failure to

call them is not necessarily fatal to the case unless it is demonstrated that the prosecution evidence is insufficient.

In this case the neighbours, the husband of PW2 and the landlord, were called to the scene after PW2 allegedly attacked the applicant, asking what he had done. Their evidence would only relate to the period after PW2 allegedly accosted DW1 and were therefore not relevant witnesses and failure to call them was not fatal to the case. Although DW1, DW2 and DW3 claim to have been seated in the appellants house when PW2 attacked, PW1 told the court that when the appellant called her into his house, the two girls, DW2 and DW3 were not in the house but they entered the house when she was already in the bedroom because the appellant went to open for them and that they never entered the bedroom; that when she left the bedroom, they were already outside. PW1 went further to state in re-examination that the appellant opened for them when she was in the bedroom and that the two had come to collect children who were in the house. PW1 confirmed that is what she had stated in her statement to the police. That evidence was not challenged. It means that it was unnecessary to call DW2 and DW3 as witnesses.

Having evaluated all the testimonies of PW1 as against that of DW1, DW2 and DW3, there is no doubt that PW1 was in the appellant's house on the fateful day. In my considered view, I do not believe that PW2 would have acted, like a possessed mad woman, just to attack the appellant and make unfounded allegations for no reason. By then, PW2 had not known what had happened to PW1. From the appellant's house, both PW1 and DW1 were taken to the police station, then for medical checkup. The question is, where else would PW1 have been defiled, so that PW1 and PW2 would frame the appellant with this offence? The trial court believed the testimony of PW1, having had a chance to observe her demeanour. The court said at paragraph 18 of the Judgment:

> **"The court had a chance to examine the minor in her demeanor and decisiveness, this court is convinced that she was telling the truth and nothing but the truth…"**

There is no reason at all for the complainant to have falsely implicated the appellant, a person she knew as a neighbour but had not interacted with or disagreed with. The same applies to PW2. I believe DW2 and DW3 merely testified to help bail out their friend, the appellant. This offence occurred in broad daylight and the identity of the perpetrator is not an issue.

Having evaluated all the evidence on record and all the grounds of appeal, I am satisfied that the conviction is well founded and I affirm it.

The appellant was sentenced to serve fourteen (14) years old. Under Section 8(3) of the Sexual Offences Act, where the victim conviction of defilement is between eleven and fifteen years, one is liable to imprisonment for not less than twenty years upon conviction. The appellant did not complain about the sentence and the court has no reason to disturb it.

In the end I find no merit in the appeal and it is hereby dismissed in its entirety.

DATED, SIGNED and DELIVERED at MIGORI this 30th day of July, 2021

R. WENDOH

JUDGE

Judgment delivered in the presence of:

Mr. Owuor State Counsel

Ms. Kijana holding Sala for appellant

Ms. Nyauke court assistant