REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 71 OF 2018

PIUS MUTHAMA KITAVI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against sentence passed by Hon. D. Odhiambo SRM on 4.4.2018 in Shanzu CMC S.O Case no. 84 of 2017)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act and an Alternative Charge of committing an indecent act with a child contrary to Section 11 of the Sexual Offences Act.

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 life imprisonment after taking into account his mitigation and treating him as a first offender.

3. The Appellant being aggrieved by that decision lodged an Appeal to this Court against the conviction and sentence vide Amended Grounds of Appeal filed in Court on 3.03.2021, on the following grounds.

> **1. That the Learned trial Court magistrate erred in law and fact by deliberately failing to consider that the prosecution partly rested their case on a misidentify figure and left the real identity at large who was known to them as Kapu and Kapus respectively.**
>
> **2. That the Learned trial Court magistrate erred in law and fact after failing to consider that the prosecution case was under falsehood trails which rendered it inconsistent and unreliable to meet the rule of justice.**
>
> **3. That the Learned trial Court magistrate erred in law and fact by failing to consider that the prosecution evidence pertaining to the issue of medical examination was fabricative rendering it into a haze circumstances to gain any evidential value to secure the rule of justice.**
>
> **4. That the Learned trial Court magistrate erred in law and fact by not putting into consideration that the whole of persecution evidence was dominated by mass contradictions which succumbed the hon. Magistrate to fall into serious misdirection which entertained a miscarriage of justice.**
>
> **5. That the Learned trial Court magistrate erred in law and fact by not considering my sworn defence which remained unshaken by the prosecution party who owned the onus to proof their case.**

SUBMISSION

4. The Appellant filed his written submissions on 3/03/2021 and relied on the same. The Appellant submitted that there was no eyewitness to the alleged offence and therefore, the testimonies by PW1 AK and PW3 CA are purely fabrications since PW2(the victim/complainant) in her testimony clearly stated that she did not know the Appellant at the dock in court. The Appellant also submitted that the two children J and T who were playing with PW2 at the time of the alleged incident were never called as witnesses to give an account of what transpired. Therefore, the failure to call the two children was contrary to the express provisions of Section 125 of the Evidence Act.

5. The Appellant submitted that the person who allegedly defiled PW2 was called K and since PW2 did not recognise the Appellant then automatically, it means that the Kapusi being referred to by PW2 is still at large. Therefore, the opinion of the trial magistrate that PW2 was scared to look at the accused cannot be perceived as an account of PW2 of the alleged incident and the fact that the Appellant was in crutches did not in any way change his face since he was not in any way deformed. Therefore, it would not have been difficult for PW2 to identify him.

6. On the evidence by Dr. Faign Mbarak who testified as PW4, the Appellant submitted that the victim was treated between 20/08/2017 and 26/08/2017. However, the hospital PW2 was taken to after the alleged incident has not been mentioned and the treatments notes from the said hospitals were not furnished by the prosecution. However, the PRC Form was filled by Dr. Magola on 11/09/2017 when PW2 was presented before him and it is suspect that the doctor who examined PW2 on the 22/08/2017 named DR. Saida was not called as a witness by the prosecution.

7. It is also the Appellant's submission that PW4's evidence did not adhere to the mandatory provisions of Section 7 of the Evidence Act, since PW4 did not indicate how long he had worked with Dr. Magola and PW4 did not indicate to court that he was conversant with Dr. Magola's handwriting

8. **Ms. Mwangeka** Learned Counsel for the D.P.P submitted that the ingredients forming the offence of defilement were proved as was held in **Machakos HCCA 1 OF 2014 Josphat Muoki vs Republic (2016) eKLR.** Since, the Age of the Victim was proved to be 5 years old having been born on 30/3/2012. Secondly, the evidence of penetration was never challenged since PW2 testified that her neighbour by the name of Kapusi used his "dudu" and put it on her vagina, and the medical evidence by PW4 in the PRC form filled two days after the incident and the P3 Form filed three weeks after the incident corroborated PW2's testimony by stating that indeed the minor was defiled since her vagina orifice was hyperaemic pointing to defilement.

9. On identification of the perpetrator of the offence, PW1 and PW3 testified that the Appellant was their neighbour and he used to go by the name of Kapusi and the submission that the Appellant and Kapusi are different people is an afterthought and the same was never raised during trial and the allegation of there being a grudge between the Appellant and the prosecution witnesses.

10. **Ms. Mwangeka** further submitted that the fact that some witnesses were not called to testify in this matter does not create any negative inference as alleged by the Appellant since the evidence on record proves the charge and there is no knew evidence the two children, Hassan Haji and Maya Osman would have to say.

DETERMINATION

11. 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** where the Court of Appeal held that:

> **"An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1st Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1st Appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, only then can it decide whether the Magistrate's finding should be supported. In doing so it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses. ….**

12. The Appellant seeks to challenge his conviction and sentence for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The Section reads;

> **(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(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.**

Issue for determination

13. After careful analysis, the main issue for determination is **whether the prosecution proved its case beyond any reasonable doubt.**

(a) Whether the prosecution proved its case beyond any reasonable doubt

14. The essential ingredients of the offence of defilement include the proof of the minority age of the complainant, proof of penetration and proof that the Appellant was the assailant of the offence. ***(see CHARLES KARANI VS REPUBLIC, Criminal Appeal No. 72 of 2013).*** Therefore, the prosecution had the burden to proof the three ingredients under the charge of defilement which are:-

1) Penetration

2) Age of the complainant

3) Identity of the perpetrator

15. On the issue of penetration, the victim gave evidence that the Appellant penetrated her genital organ with his penis. The testimony of the victim on the fact of penetration was corroborated by medical evidence adduced by the medical officer Dr. Faign Mbarak. The evidence of the victim was not challenged. It is evidence which was in fact reliable. The Appellant was given an opportunity to cross-examine the victim but he opted not to ask her any question. The court had no reason not to rely on the evidence. **Section 124 of the Evidence Act** provides:-

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), 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."**

16. The evidence of the victim on penetration or attempted penetration was credible and the testimony was confirmed by medical evidence which indicated that the victim's vagina was hyperaemic on the vaginal orifice. **Section 2 of the Sexual Offence Act** defines penetration as follows:-

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

17. In the case of **Mark Oiruri Mose vs R (2013) eKLR** the Court of Appeal stated thus:

> **'…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ….'** (emphasis added).

18. The provisions of Section 77 of the Evidence Act state as follows regarding the admissibility of documentary evidence in criminal cases–

> **"(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, Medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.**
>
> **(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.**
>
> **(3) When any report is so used, the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist as the case may be and examine him as to the subject matter thereof."**

19. The above provisions reveal that any other relevant person other than the maker of the documents specified therein can produce the same if the court believes the authenticity of the documents. The court however reserves the right to summon the makers of such documents. In this case, I find that doctor Mogola relied on the PRC form filed by Dr. Saida on the 22/08/2017 and PW4 produced the P3 form and the PRC form on behalf of the two doctors. Therefore, this court has no reasons to doubt the medical evidence.

20. From the foregoing, I find that the prosecution adduced sufficient evidence to prove penetration.

21. The 2nd ingredient is the age of the complainant. The age of the complainant in Sexual Offences is fundamental and requires prove due to the fact that it determines the provision under which an offender will be charged and the sentence to be meted out. Under **Section 8(1) (2**) a person is charged if the victim of the Sexual Offence was below the age of eleven years, it provides in part, ***"aged eleven years or less".*** It can therefore be concluded that what the prosecution set out to prove is that the complainant was below the age of eleven years. In this case, the charge stated that the child was aged five years. The prosecution produced a birth certificate, which shows that the complainant was born on 20/3/2012. Simple calculation will show that by 20/08/2017 when the offence occurred the victim was five years old.

22. The Appellant on the other hand did not challenge the age of the complainant during the trial. I find that the prosecution discharged the burden to prove the age of the complainant beyond any reasonable doubts.

23. On the issue of identification, the victim told the court that someone by the name of Kapusi who was their neighbour did bad manners to her. However, when told to identify whether the Appellant was the said Kapusi she was scared to look at the Appellant in the dock.

24. It is noteworthy that PW1 was in the house when the incident is alleged to have happened and therefore, she did not see the Appellant carry PW2 into his house. PW3 had also left her sister playing outside the house when "KAPUSI" took her and went to defile her. On cross-examination, PW3 confirmed that she did not see what happened. However, in consideration that PW 1 & PW 3 identified the Appellant as the Kapusi that the Complainant said carried her into his house and did bad manners to her and in consideration that it was established that the Complainant was defiled by a person known to her as shown in both P3 form and PRC form I do agree with the trial Magistrate that the Appellant was properly identified as the perpetrator.

25. Failure by the prosecution to call the other children who were playing with the Complainant to cannot be said to be fatal to the prosecution's case for reasons that sexual offences can never be committed in the open as they are secretive and the said children could not have seen the Appellant sexually abusing the Complainant. In any event Section 143 of Evidence Act provides that:-

"No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact".

26. It has not be shown that the prosecution harboured any bad motive prejudicial to the Appellant when they failed to call the alleged witnesses.

27. The Appellant in his 5th ground of Appeal argued that his defence was not considered by the trial Magistrate I have looked the judgment of the trial Magistrate and noted that the Appellant defence was thoroughly analysed and conclusion made on the same.

28. Having evaluated all the evidence on record afresh, and having considered the issues at hand, I find that the prosecution proved all the ingredients of the offence of defilement and therefore the finding of conviction by the trial Magistrate was proper and is therefore upheld.

29. The appeal is therefore dismissed save that the sentence of life imprisonment is substituted with a definite sentence of 25 years of imprisonment to take effect from 28th August 2017.

Orders accordingly.

Right of appeal – 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT /ONLINE THROUGH MS TEAMS, THIS 23RD DAY OF JULY, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

<u>In the presence of</u>:-

Ogwel – Court assistant

Appellant – present in person - virtually

Ms. Karanja for Respondent – present in person

Hon. Lady Justice A. Ong'injo

Judge