



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. EO16 OF 2020

SAFARI KAVIHU KADZOMBA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 608 of 2014 of the

Senior Principal Magistrate's Court at Mariakani Law Court-N.S. Lutta,

SPM dated 8th December, 2015)

Coram: Hon. Justice R. Nyakundi

The Appellant in person

Mr. Mwangi for the State

J U D G M E N T

The Appellant was charged with defilement 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 were that on 7th day of September, 2014 in [particulars withheld] District of Kilifi County Coast Region intentionally and unlawfully caused his penis to penetrate the anus of **KC** a child aged Six (6) years. The Appellant was charged with an alternative charge of Committing an indecent Act with a child Contrary to Section 11(1) of the Sexual Offence Act No.3 of 2006. The particulars of the offence were that on the 7th day of September, 2014 in [particulars withheld] District of Kilifi County within Coast region, the Appellant intentionally touched the anus of **KC** a child aged six (6) years with his penis.

Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds:

- 1) That the learned trial Magistrate erred in law and fact by failing to consider that the prosecution witnesses failed to discharge the burden of proof to their case as required by the law.***
- 2) That the learned trial Magistrate erred in law by imposing on him a sentence that did not take into consideration the mitigating factors existing in his case.***
- 3) That the learned trial court magistrate failed to take cognizance of the current jurisprudence in the sentencing of offenders and imposed a life sentence.***
- 4) That the learned trial magistrate erred in law and fact by discounting and not considering in detail my defensive evidence which was unrebutted, thereby casting doubt on the prosecution case.***
- 5) That the learned trial magistrate erred both in law and facts by failing to consider that there were no cogent reasons to link I, the applicant to the commission of the alleged offence hence the conviction was against the merits of the entire case.***

Background

PW1, SK, was the victim's mother. She stated that she was at home because there was a funeral. She later realized that her son **KC** was not present, she looked for him in vain. She further stated that shortly, two boys called Kahindi and Hare brought him and they said they had found him in the bush. She later asked the son and he informed her that someone called Safari had defiled him. Her testimony was that the person whom her son had mentioned was known to her, that he was from their area. She told the court that she reported the matter to the police and a P3 Form was issued which was filled in hospital. That she recorded her testimony at the Police Station and the suspect was before the court. She also said that she had not disagreed with the Appellant before.

At Cross examination, she told the court that it was at midnight and she looked for her son but could not find him. That he was found in the bush. That there were other witnesses in court and that two people found the child crying and brought him back.

At reexamination, she informed court that the people who brought back the child found the child screaming, that he was bleeding from the anus. That it was the complainant who explained to her what had happened.

PW2 HK told the court that he recalled that on the 6th day of September, 2014, at around midnight, he left home to attend a funeral in his area. That on his way back home, he heard a child crying in the bush, he decided to go and find out and when they called out he saw someone running away. He further stated that there was a small child and he was holding his clothes in his hands. That the child said that he had been defiled by the Appellant. He said that they went back to where the funeral was and traced his mother and that they also informed the village. He further said that the child was taken to hospital and the matter reported to the police. That he recorded his statement and identified the Appellant as the person they had caught.

PW3 CKN informed the court that he recalled the events of the 6th day of September, 2014, that he had left home and went to a funeral at around midnight. They heard screams in the bush and they decided to go and find out what the problem was, that once they made noise, an adult male ran away, he tried to give chase to the person but in vain. That the young boy said that he had been taken away by a person called Safari and that the said person had defiled him. He also said that he informed the village elder and they took the child to hospital and also reported the matter to the police. That he did not have a grudge against the Appellant and that it was the victim who had said the person who had defiled him. He also identified the Appellant as the one before court.

At cross examination, **PW3** stated that it was the victim who had mentioned him, he gave a chase but he was not able to apprehend the Appellant. He confirmed that indeed the Appellant was at the funeral and that he had no grudge with him. He further said that it was not true that they had a land dispute.

PW4 KC, the victim was sworn in after voir dire examination. He informed the court that he is seven (7) years old and that in 2014 he had gone with his mother to the funeral of his grandfather. That he went to sleep near the fire place and that one Safari woke him up and asked him to him. He further stated that the Appellant gave him a sweet and carried him to the bush where he removed his trouser and held him by the neck then put his penis in his anus. He started crying and some people came to rescue him. That the Appellant ran away and he was later carried home and taken to the hospital. The Appellant was identified by the victim.

At cross-examination, the victim told the court that he had told the truth, that it was the Appellant who took him to the bush and defiled him and that all this happened at night.

PW5 Police Constable Nicholas Mburugu No. 88129 attached at Mariakani Police Station informed the court that on 7th of September, 2014 while at work the victim in the company of his father came to the station to report a defilement case. He issued a P3 Form and sent them to Mariakani Sub County Hospital. That the victim was examined and the P3 Form filled and an age assessment report was done and that the complainant was found to be six (6) years. That the victim was born on the 31st day of October, 2007 as per his clinic card that was in his possession. He further stated that he wrote the statements of witnesses and learned that there was a funeral and a disco that had been held. That the victim was sleeping outside the house and his mother noticed that he was missing. Two people were able to find the victim after he had been defiled. He interviewed the victim who said the Appellant lured him with sweets, took him to the bush and defiled him. That on 24th September 2014 with the assistance of the Chief Sawasila Location, the Appellant was apprehended. He was charged with the present offence before court.

At cross examination, he confirmed that he took the victim to hospital where he was examined and that the family had no grudge with him. He also stated that the victim identified him.

PW6 Barrington Edward Charo Clinical officer at Mariakani Sub County Hospital testified on account of examination done on the victim. He informed court that he recalled on the 7th day of September, 2014 he examined and filed a P3 Form in respect of the victim who was aged 5 years Old. That the victim alleged that he was sodomized by a person known to him. He further informed court that on examination, he had bruises on the neck and chest. That the anal region was swollen and he was in pain, there was also fecal matter in the anal orifice. He eventually concluded that the minor had been sodomized. He filled the P3 Form on the same day and the same was produced as an Exhibit. That he also conducted an age assessment and found the victim to be six (6) years, the age assessment was also produced as an exhibit.

At the close of the prosecution case, the trial court found that a prima facie case had been established and the Appellant was placed on his defence. The Appellant elected to give unsworn evidence and stated that the complainant has a grudge against him that started in the year 2010, that they disagreed with the complainant's father at a Mnazi drinking den. That the police then came and arrested him over allegations that he did not know.

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyse it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. (**See Okeno v R (1972) EA 32**,

Eric Onyango Odeng' v R (2014) eKLR).

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the Appellant.

In order for the offence of defilement to be proved, the prosecution must prove all the three elements of defilement being the age of the Complainant, proof of penetration and the positive identification of the perpetrator. **(See Charles Wamukoya Karani v Republic Criminal Appeal No.72 of 2013).**

On the element of age, it is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. **(See Moses Nato Rapheal v Republic (2015) eKLR.**

It has been held that the age of the victim in sexual offences can also be proved by the direct evidence of parents or guardian or by observation by the court. **In Thomas Mwambu Wenyi v Republic (2017) eKLR** cited with approval **Francis Omuromi v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** which held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim’s parents or guardian and by observation and common sense.”

In **Richard Wahome Chege v Republic (2014) eKLR** the Court of Appeal sitting in Nyeri pronounced itself thus:

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself”

In the instant case, proof of age of the complainant was given by the victim himself. **(PW4)** stated that he was seven (7) years at the time of committing the offence. Similarly, **(PW6)** also indicated to court that he conducted an age assessment and found out that the minor was Six (6) years. There was no dispute as to the age of the complainant and I hold that it was satisfactorily proved.

On the element of penetration, Section 2 of the Sexual Offences Act defines penetration as :

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

The prosecution has a duty to establish that the complainant was partially or fully sexually penetrated by the Appellant. In determining penetration, courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng v Republic (2013) eKLR** where the court stated that:

“In cases of defilement, the court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence...”

In this case, the victim clearly recounted in court how the Appellant approached him while he was asleep, woke him up and asked him to follow him and proceeded to put his penis into his anus. Having assessed the evidence on record, the victim clearly recounted that the said act of penetration had indeed occurred.

Apart from the victim’s own evidence, **(PW6)** a clinical officer who examined the victim and filed the P3 Form told the court that upon examining the victim, it was his assessment that the anal region was swollen and that he was in pain. It is common place that penetration can be proved by the evidence of victim alone as provided by Section 124 of the Evidence Act which provides that:

“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”

This position was succinctly held by the Court of Appeal in **Williamson Sowa Mbwanga v Republic (2016) eKLR**, where it stated that:

“The import of the proviso to section 124 of the Evidence Act is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this court in GEORGE KIOJI V REPUBLIC CR APP. NO.270 of 2012 (Nyeri): “where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and record the reason for such belief”

The evidence of (PW4) was corroborated by the medical evidence adduced by (PW6). I have analyzed the evidence on record and the P3 Form produced and the victim's evidence and I am satisfied that penetration was achieved. I hold that penetration was proved.

On identification, where identification is based on Recognition, this is where the complainant knows the accused and it has been held to be more reliable than identification of a stranger. The court of Appeal in **Francis Muchiri Joseph v Republic (2014) eKLR** held that:

“In LESARAU v R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name”.

In the instant case, the victim informed the court that the Appellant woke him up, and asked him to follow him;

‘The person called Safari woke me up and said I should follow him, he gave me a sweet and carried me to the bush.’ According to (PW4) evidence the period of observation of the Appellant was over a period of time that the victim could identify him to support recognition of the Appellant positively.

From the evidence of the Appellant, he did not disapprove that he did not engage in sexual intercourse with the complainant. Though the case on identification was solely that of the complainant, I find no danger for the trial court to have convicted the Appellant as such on a single identifying witness in the circumstances of this case.

As matters stand, all essential element of the crime, which is the act constituting or linking the appellant to the circumstances of the defilement was pleaded in the charge sheet and proved beyond reasonable doubt.

The upshot therefore is that; I find adequate evidence that the Appellant was involved in the committing the offence. For the above reasons the appeal on conviction and sentence is dismissed. That is the order of the court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the DPP
2. The appellant