



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL APPEAL NO. 11 OF 2019**

**STEPHEN MWAURE NZAI..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from Original Conviction and Sentence in Criminal Case No. 202 of 2015 of the Principal Magistrate's Court at Lamu Law Court-J.W. Onchuru, PM dated 5<sup>th</sup> January, 2016)*

**CORAM: Hon. Justice R. Nyakundi**

**The appellant in person**

**Okaka 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 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates in the month of March 2015 and 4<sup>th</sup> day of April, 2015 at [Particulars Withheld] Village, within Lamu West Sub County of Lamu County, the Accused intentionally caused his penis to penetrate the vagina of **MN** a child aged 10 years old. The Appellant was charged with an alternative charge of indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on diverse dates between the month of March 2015 and 4<sup>th</sup> April, 2015 at [Particulars Withheld] Village, within Lamu West Sub County of Lamu County, the Appellant intentionally touched the breasts and vagina of **MN** a child aged 10 years old.

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 Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006 fetters the discretion of the court to give a minimum sentence under Section 329 of the C.P.C.***
- 3) That the learned trial Magistrate erred in law by sentencing him to 20 years imprisonment without proper finding that the charge of defilement was not proved beyond reasonable doubt.***
- 4) That the learned trial magistrate erred in law and fact by no considering there were massive contradictions from the prosecution's 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 MN**, the victim was sworn in after a voire dire examination. She informed the court that she was 10 years old and in Class two at [Particulars Withheld] Primary School. She stated at she stays with her grandmother and that her mother stays at Mpeketoni. She further

stated that she assists her grandmother in fetching water, collecting firewood and washing utensils. She informed court that she sometimes takes the goats to the bushes to graze with S. That there was a day the accused came and found her and S grazing goats. The Appellant later told S to look at the goats, he then got hold of her, carried her to the bushes and did bad thing to her. She stated that she was wearing a trouser and blouse which the Appellant removed. She further stated that the Appellant also removed his trousers, he lay her on the ground, he removed her pant after which he tried to give her money which was in note form but she refused. She told the court that the Appellant later threw the money at S.

The victim went on to inform the court that she did not know the Appellant before and that she went home but did not find her grandmother at home as she had taken another child to hospital. She also said that **Sammy** took the money that the accused had thrown at him and took it to his mother.

She stated that the man who is the Appellant came the second time and found her in the kitchen and gave her money. That her grandmother was hiding by the main house with a panga. That the grandmother then came out of the house and confronted him. That a vehicle came and the man was taken away. That she went to the police and recorded her statement. That her grandmother took her to hospital where they checked her private parts.

Upon cross examination by the Appellant, the victim confirmed that he gave her money and that she was with Sam. That she screamed when he did bad things to her and that she did not go to school the following day, she felt pain. She stated that she informed her grandmother and was taken to hospital. She further confirmed to court that the accused gave her a lot of money and that she could not recall how long her grandmother took in Mombasa. She further stated that she was with Sam and that the accused did bad things to her.

**PW 2 SM**, told the court that he knew the Appellant, that he saw him when they were grazing goats. That she was with the victim grazing goats in the bushes. He stated pointing at the Appellant that he came and took the victim and did bad things to her. He went ahead to state that the Appellant got hold of the victim and carried her to the bushes on his shoulders. He also said that the Appellant threw money at him and that he gave the money to his mother.

**PW3 MNK**, was the victim's grandmother. She informed the court that the victim was her granddaughter who was 10 years old. That she was born in January, 2003 and that she did not have her birth certificate. She stated that in April, 2015 she travelled to Mombasa with a sick child leaving P aged 20 years old with M and S, that she returned after two weeks. That while in Mombasa the two children called her and informed her how a man had been taking the victim to the bushes and defiling her. She further said that she left the child in Mombasa and travelled. That on arrival, S gave her Kshs.1,500/- which he said the Appellant had given the victim but she has declined, that she threw the money at him.

She told the court that she laid the ambush in the house after creating a hole. That the man (pointing at the accused person) came and gave her Kshs.200/- and that she later confronted him with a panga. She stated and courageously informed the court that she cut him on the leg and back, that they struggled and she held him. People later came and he was arrested and taken to the police where a report was filed. That the victim was later taken to hospital and the Appellant was arrested a month later. She told the court that the victim's pants had stains and an ordure smell. That they later recorded statements and the victim later taken to hospital by a police Officer. She further told the court that she was shown a form that was filled by the doctor and she also saw some treatment notes.

On cross examination, (**PW3**) stated that she knew the Appellant when she cut him and had been his friend, he would not have defiled the young child.

**PW 4 Police Constable Zippora Rono No. 96455** based at Mokowe Police Station. She informed the court that she recalled that on the 9<sup>th</sup> day of April, 2015 at around 8:00 pm, while at her house, she was called to the Station to handle a case of defilement. That she went to the station and found a man who had been cut. She informed court that she was given Kshs.1,700/- as an exhibit and the man was the Appellant. She stated and confirmed that she issued the victim with a P3 Form and she visited the scene the following day. She also said that Kshs.200/- was given to the victim in the kitchen and it was at this point that the accused was confronted by the grandmother. Her testimony was that a P3 Form was filled and the accused was thereafter charged.

**PW5 Dr. Joseph Nderitu** was a medical officer from Lamu County hospital. He confirmed that he had a P3 Form for the victim who had been defiled on the 9<sup>th</sup> day of October, 2015 at [Particulars Withheld], that the victim had an itching near her private parts. That she was injured on her private parts. He told court that the victim had a foul smell and her hymen was broken and she had traces of a venereal disease called gonorrhoea. She also stated that she filled the P3 Form which she produced as an exhibit. She also produced a PRC form as well as medical treatment notes. She further directed the court to the lab tests which were also produced as exhibit.

She told the court that the Appellant was also examined and she had in her possession his treatment examination report, that his private parts showed that he suffered a bacterial infection and traces of blood. She also confirmed that the victim was taken for age assessment and her age established to be 11 years.

At cross examination, PW5 confirmed that the Appellant had the same infection as that of the victim.

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 sworn evidence and stated that he did recall that on the 9<sup>th</sup> day of April, 2015, a certain lady came to his house and asked who was in the house. That the said lady is one **Mama Nyambura**. That they talked and she invited him to her house. He informed court that he did what he was doing and later went to her house. That on the same day, the said **Mama Nyambura** asked for money which he gave her the following day, the 10<sup>th</sup> of April, 2015. He stated that she had asked for Kshs.5,000/- which he did not have but instead he gave her Kshs.200/-. That her son came and the two were talked, the son went to the house and came out with a rungu and started chasing him. He was later arrested and taken to Mokowe and charged. He further stated that he was taken to hospital where he was treated.

## 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 analyze 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 Omurimi 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 as well as the guardian. (PW1) stated that she was 10 years at the time of giving her testimony and at the time of committing the offence. Similarly, (PW3) who is the victim’s grandmother informed the court that the victim was ten years old having been born in January 2003. 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.”*

Section 9 (1) of the Sexual Offences Act provides as follows;

*‘A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed as attempted defilement’.*

The prosecution has a duty to establish that the Appellant attempted to defile the victim. In determining attempted 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 removed his trousers and removed her trouser and blouse and did bad things to her. In addition to the evince of the victim, (PW5) informed the court that the victim’s hymen was broken and she suffered a venereal disease, gonorrhoea and that a similar test done on the Appellant showed that he suffered from the same venereal disease. Having assessed the evidence on record, the victim clearly recounted that the said act of penetration was committed by the Appellant. It is common place that penetration can be proved by the evidence of (PW1) 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 (PW1) was corroborated by the medical evidence adduced by (PW5) as well as that of (PW2) who was with the victim on the day the alleged offence was committed though he did not witness the act. (PW2) informed the court that indeed the Appellant approached them while they were grazing goats, took the victim and did things to her in the bush. I have analysed the evidence on record and the P3 Form produced and the victim’s evidence and I am satisfied that the Appellant indeed penetrated the victim.

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 came and found them grazing goats, he got hold of her and carried her to the bushes. According to (PW1) evidence the period of observation of the Appellant was over long period of time to support recognition of the Appellant positively.

Another ground raised by the Appellant was that the prosecution’s case was riddled with inconsistencies and contradictions. The role of an appellate court in dealing with discrepancies was discussed by the Court of Appeal in **Naftali Mwenda Mutua v Republic [2015] eKLR** where it was held that:-

***“In Vincent Kasyla Kingo versus Republic Nairobi Criminal Appeal No. 98 of 2014 this Court ruled that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so an appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not. See Josiah Afuna Angulu versus Republic CRA. No. 277 of 2006(UR) where in, this Court sitting as a first appellate court reconciled discrepancies and contradictions that the trial court had failed to reconcile resulting in a doubt being created in the appellants commission of the offence charged and proceeded to substitute conviction for the disclosed offence.”***

In **Jackson Mwanzia Musembi Vs Republic( 2017) eKLR** the Court of Appeal cited with approval the Ugandan case of **Twahangane Alfred Vs Uganda , Cr. Appeal No. 139 of 2001( 2003) UG CA,6** where the court held that:

***“... with regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.” (Emphasis mine)***

Having carefully looked at the lower court record, I am of the opinion that no such contradictions were made in the prosecution’s case as has been alleged by the Appellant.

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.

From the material placed before me, there is no evidence and it is also not clear what part of the Appellant’s defence was not considered. There is also no evidence that the trial court took into account wrong material or acted on wrong principles in order to reach the preferred conviction and sentence.

Considering the facts outlined above, the circumstances of the case is that the Appellant acted inhumanely when he took advantage of a child who was going about her business. He has also not shown any remorse for his actions. It is ostensible that the Appellant deserves a sentence that would serve as a deterrence to other would be offenders.

Having said this, the appeal is hereby dismissed for want of merit on both conviction and sentence.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT GARSEN THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

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