



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. E003 OF 2020

JULIUS M'MWENDA GATOBU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. A.G Munene SRM in Maua Law Court in criminal S.O No. 54 of 2017 delivered on 21st August 2019)

JUDGMENT

1. **JULIUS M'MWENDA GATOBU ('the appellant')** was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (2) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on 25th August 2017 at [Particulars Withheld] Village Antuambui location in Igembe North Sub-County within Meru County, he intentionally caused his penis to penetrate the vagina of **EM** a child of 8 years. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on the same day and place, he intentionally touched the breast of **EM** a children aged 8 years.

2. After denying the charges, he was subsequently tried, convicted on the main charge of defilement and sentenced to 25 years' imprisonment in a trial where the prosecution called six witnesses while the defence gave evidence under affirmation without calling any independent witness.

3. Dissatisfied with the conviction and sentence, the appellant lodged this appeal setting out 4 grounds of appeal in which he faults the court for errors of law and fact in failing to note that the complainant herein was not taken through *voire dire* examination to know if she understood the meaning of oath, which is contended to vitiate the entire trial; in sentencing the appellant to serve 25 years imprisonment without noting that, the evidence of broken hymen is not prove of defilement and for failure to find that the investigation was shoddy coupled with the failure to call key witnesses.

4. In the submissions filed, the appellant takes the view that failure to conduct the requisite *voire dire* examination on the complainant vitiated the trial as provided under Section 125 (1) of the Evidence Act as read with Section 19(10) of the Oaths and Statutory Declarations Act. He contended that it was never indicated whether the hymen was freshly torn or not and DNA tests were never done to prove that the spermatozoa found belonged to him. The prosecution was faulted for its failure to call the other children who were alleged to have been with the complainant in the shamba as witnesses. He urged the court to set aside the conviction and sentence and set him at liberty. He relied on **Kibangeny Arap Korir V Republic (1959) EA 92, JGK v Republic (2015)eKLR, Gamaldene Abdi Abdiraham & Anor v Republic (2013)eKLR, Patrick Kathurima v Republic (2015)eKLR, PKW v Republic (2012)eKLR, Republic v Jacob Mutegi (2020)eKLR** in support of his case on the need to conduct *voire dire*, the ramifications of failure to administer it and on the standard and instance of proof of defilement.

5. The prosecution's submissions were to the effect that the conviction and sentence were deserved, should be upheld and the said appeal be dismissed. It maintained that it had proven its case beyond reasonable doubt, as all the ingredients of the offence of defilement had been sufficiently proved. On the fault that no *voire dire* examination was conducted, submissions were offered that the complainant's evidence was cogent, consistent and corroborated and cited to court the decision in **Moses Mwarimbo Dau V R [2018] eKLR, Maipett Loonkomok V Republic [2016] Eklr**, for the holding that in appropriate cases even where *voire dire* is not administered, a conviction may as well be upheld if there be sufficient independent evidence to support the charge.

Preview and Analysis of the Evidence

6. The prosecution in advancing its case against the appellant called 6 witnesses. PW1, the complainant, gave affirmed testimony that she was a class 3 pupil at a named primary school and was aged 8 years old as at the date of her testimony. On the fateful day, she was at the

farm of a neighbour's, called Kaberia, with 4 other children. The appellant approached and asked her to go with him in search of firewood. She agreed accompanied him to a different part of the farm where they were followed by another child named EM. The accused forced her to lie on a bench, removed her clothes, removed his clothes and pushed his penis inside and slept on her. On seeing what had happened, EM went and called her mother who came to the scene but found that the accused had left. The child told her mother what had happened and the mother in turn told the father and the parents took her to the police station and later to hospital. She knew the appellant prior to the incident as he was a neighbour. During cross examination, she confirmed that she was with the appellant on the bench, where the offence took place.

7. **PW2 EM**, gave sworn testimony that he was a class 3 pupil aged 9 years. He recalled being with the complainant and other children on the material day looking for firewood when the appellant invited and directed PW1 to go in search of firewood away from where the rest were. PW2 followed the appellant and PW1 and found the appellant laying on the complainant on a bench. He then informed the complainant's mother and confirmed that he knew the appellant prior to the incident. During cross examination, he affirmed that he had seen the appellant laying on the complainant. He even disclosed that the appellant was his relative and denied the existence of any bad blood between them.

8. **PW3 JN**, testified that while she was at home cooking on the material day, the children had followed the appellant in search of firewood. Later PW2 came and told her that the appellant was sleeping with the girl on the farm benches. Because she was near the scene, she called out the name of PW1 while running towards the scene and found PW1. Upon checking her thighs, she found sperms there and decided to inform PW4, the complainant's father. The complainant was then taken to the police station and later to the hospital. She knew the appellant prior to the incident because he was a neighbour. During cross examination, she confirmed that she had seen the appellant on the material day.

9. PW4, JM, testified that he knew the appellant as he was his neighbor. On the material day, he received a call from his wife, PW3 to the effect that the appellant had defiled the complainant. He rushed home, only to find that the appellant had run away. He then took the complainant to Laare Hospital but they were referred to Nyambene District Hospital where she was examined and treated. The appellant was subsequently arrested, handed over to the police and charged. He produced the baptismal card of the complainant to show that she was seven years at the date of the incident and eight as at the date he gave evidence. In cross examination, he told the court that he did not witness the act but that the child was examined and that he was arrested at home

10. PW5. APC Elizabeth Mutuko, **was a police officer** based at Laare police Station, Gender Office and the investigating Officer. She told the court that on 25/8/2017 at about 5:00 pm, the complainant in the company of her father reported to her office that she had been defiled by the appellant. She then escorted PW1 to the hospital where she was examined and P3 form filled. The appellant was arrested the next day by members of the public and brought to the station to face these charges. She produced the birth certificate of the complainant as exhibit in court. When cross examined, nothing material emerged save that he said there were eye witnesses and that the complainant had been medically examined.

11. **PW6 Samson Kobia**, a clinical officer at Laare Health Centre produced the P3 forms for the complainant and the appellant on behalf of her colleague, who had since proceeded on transfer. The report showed that the complainant's clothes were blood stained with overstretched underwear. On examination, the complainant had a bruise on the labia majora, the hymen was broken, and she had smelly brownish vaginal discharge. The laboratory investigation revealed that there were pus cells as a result of bacterial infection. There was a bacterial infection on the cervix and spermatozoa were detected. On examining the appellant, he detected presence of pus cells and bruises on his penis. During cross examination, he denied knowledge of any dispute between the complainant's parents and the appellant.

12. When placed on his defence, the appellant denied committing the offence as he was at work where he reports in the morning and work till night. He stated that there existed grudges with the complainant's father who had killed his father and took their land. On cross examination, he said that he did not personally know the complainant and was never with her on the material day but knew her father who was a neighbour. He however could not remember the date he had gone for work and denied ever reporting the death of his father to the police.

13. This being a first appeal, the court is duty bound to re-appraise and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See **David Njuguna Wairimu v R (2010) eKLR**.

14. There cannot be doubt that *voire dire* examination was never conducted on the complainant. The issue is the ramification of such a failure. The general rule, drawn from the statutory provisions, is that where the court is to take the evidence of a child of tender years, *voire dire* examination is essential to enable the court satisfy itself that the child is conscious of the truth and understands the nature of an oath. It is only after the examination that the court can decide whether the witness is intelligent enough to give evidence in accordance with the provisions of **Section 19 (1) of the Oaths and Statutory Declarations Act**.

15. However, that rule has known exceptions as was reiterated by the Court of Appeal in **Maripett Loonkomok v Republic (2016) eKLR** to the effect that *'in appropriate case, where voire dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction*.

16. Here, there was the evidence of PW2 recorded and shows that some questions were put to the witness, a minor aged 9 years, which would amount to *voire dire*. The record shows the witness to have told the court while affirmed that: -

"I am EM. Am 9 years old.

I know the meaning of oath.

If one lies he goes to hell. I go to MCK church at Kaelo."

17. One may fault the recording as not being so elegant but I discern that attempt was made to test the intelligence of the child and know if he understands the nature of an oath. That to me was sufficient for what viore dire is purposed to achieve and I find that the trial court was satisfied to have had the child give evidence under affirmation as all other witnesses in the matter did.

18. Going forward, it is not a choice for the trial court to conduct viore dire. It is a statutory requirement. I consider it mandatory. Once a child is presented to court as a witness, the first business of the court must be to conduct viore dire. Having done so, the court must indicate on the record its opinion on the outcome of that inquiry. The record ought to indicate whether the child is possessed of sufficient intelligence and understands the nature of an oath. This must be done so that the requirement of sections 125(1) of the Evidence Act and 19(1) of the Oaths and Statutory Declarations Act are complied with.

19. Having said that, to this court there was enough material for the court to hold that the child was possessed of sufficient intelligence and appreciation of the solemnity of oath. He narrated how he had found the appellant laying on the complainant on the material day. He remained firm even during cross examination of what he had seen the appellant doing to the complainant. I find that the testimony of PW2 was cogent, consistent and corroborative of that of PW1 and tallied with that of PW3. The fact that the other children were not called to testify does not weaken PW1 and PW2's testimonies and cannot invite an adverse inference against the prosecutions case.

20. On the ingredients of the offence of defilement, I find that there was sufficient evidence that the complainant was aged 8 years at the time of commission of the offence as shown by the baptism card indicating that the complainant was born on 14/12/2008 (exhibit 2). There was also evidence by the complainant that the appellant forced her to lie on a bench, pushed his penis inside and laid on her. That fact was reiterated by PW2 who saw the appellant lie prostrate upon the complainant before he went to inform PW3. In addition, the evidence of PW 6 supported by the P3 form was clear that the complainant had a bruise on the left side of the labia majora, which coincided with a bruise on the right side of the appellant's penis. It is therefore, my finding that penetration was proved beyond reasonable doubt and the participation of the appellant was equally proved.

21. On the sentence, the complainant having been proved to have been aged 7 years, the sentence the law provides is set at life imprisonment and being a discretionary matter, when the trial court meted out twenty-five years, that cannot qualify as harsh nor exorbitant. I find the sentence to have been lenient. I see no justification to intervene.

22. On the whole therefore, I find this appeal is without merit and accordingly dismiss it.

Dated signed and delivered virtually via MS teams this 29th day of September 2021

Patrick J.O Otieno

Judge

In presence of

Appellant in person

Mr. Maina for the respondent

Patrick J.O Otieno

Judge