



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL APPEAL NO. 32 OF 2019**

**DWJ .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal from the original conviction and sentence in Criminal Case No. 52 of 2017 at the Chief Magistrates Court Kimilili by Hon. D.O. Onyango – SPM on 18<sup>th</sup> December 2019)

**JUDGMENT**

- 1. DW**, the appellant, was charged with the offence of defilement contrary to **Section 8(1) (2)** of the Sexual Offences Act No. 3 of 2006. Particulars being that on the night of 23<sup>rd</sup> August, 2017 at [Particulars Withheld] village Kamukuywa Location in Kimilili Sub-County, of Bungoma County, intentionally caused his penis to penetrate the vagina of **FWW** a child aged 7 years.
- In the alternative, he faced the charge of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. Particulars being that on the night of 23<sup>rd</sup> August, 2017 at [Particulars Withheld] village Kamukuywa Location in Kimilili Sub-County of Bungoma County, intentionally touched the vagina of **FWW** a child aged 7 years with his penis.
- Having denied the charges he was subjected to full trial, convicted for the main charge of defilement and sentenced to life imprisonment.
- Aggrieved, the appellant appeals on grounds that he was detained in police custody and arraigned after 30 days without any cogent reasons; the charge was not signed or stamped by the police, makers of the report pursuant to **Section 77** of the Evidence Act; the charge sheet was incurably defective; the trial court failed to analyze the grudge between the appellant and the complainant's mother; the appellant was not examined following allegation of sexually transmitted diseases; he was not informed of the right to representation promptly; the mandatory minimum nature of life imprisonment meted out deprived him of the right to protection and equality before the law as enshrined in **Article 50(2)** of the Constitution and **Section 216, 329,333 (2)** of the Criminal Procedure Code; Prosecution witnesses were hostile; crucial witnesses were not summoned and the defence put up was not considered for no cogent reasons.
- To prove the case the prosecution called four (4) witnesses. **PW1 FW**, the complainant, told the court that the appellant lay on her, blocked her mouth such that she could not scream and inserted his 'thing' into hers and pointed at her genitalia. Later she told her mother who escorted her to hospital. She was a child of a tender age who did not understand the nature of oath hence gave unsworn evidence and was not subjected to cross examination.
- PW2 SN**, the complainant's mother testified that she gave birth to **FW** in 2009 before meeting the appellant, a father of her other children. That on the 23<sup>rd</sup> August, 2017 in the course of their cohabitation, they had a disagreement and the appellant left their matrimonial bed and moved to share a bed with **FW**, beds that were separated by boxes. The following day, the appellant left for work. When she woke up and asked **FW** to take outside plates she noticed that **FW** had difficulty in walking. She ignored imagining that it was the skirt that she was wearing. Later on she realized that she could not sit properly and she decided to check only to find that her genitalia had bruises and some discharge. She questioned her and she revealed that the appellant had molested her. She called her mother-in-law and sister-in-law and then took the child to Danton Medical Centre at Kimilili as public hospitals were not functioning due to the strike of medical personnel. On cross examination she stated that she attempted to commit suicide when the appellant defiled her sister but the issue was settled at home and that they disagreed when he received a text message at 1:00 am.
- PW3 Catherine Akizu**, a Clinical Officer based at Kimilili Hospital examined the complainant four (4) days after the alleged incident and found her hymen broken. She had bruises on the labia minora and discharge from the genitalia. She concluded that the child had penetrative sex through the vagina.

8. PW4 No. 66640 P.C. Chepkwony Juma acted on the report made at the Police Station, investigated the case and caused the appellant to be charged.

9. Upon being put on his defence, the appellant pleaded innocent. He denied the charges and said that his family depended on him.

10. The trial court analyzed evidence and concluded that the appellant intentionally caused his penis to penetrate the vagina of the complainant and convicted him for the offence of defilement.

11. The appeal was canvassed through written submissions.

It was urged by the appellant that his constitutional rights were breached as he was held in custody for over 30 days and no explanation was given for the delay. He cited the case of *Albanus Mwanzia Mutua vs. Republic (2006) eKLR* in that regard.

12. That the charge sheet was defective, for want of signature by the maker; it was dated 30/7/2017 yet he was arraigned in court on 1/9/2017 and the particulars did not include the term 'unlawfully'

13. That the prosecution's case was framed following the grudge that existed between the complainant's mother and the appellant, who disagreed with him as a result of the text message that he received on the phone and she even admitted having attempted to commit suicide; that he was not examined to ascertain whether he transmitted a sexual disease to the complainant and no sperms were extracted as provided by **Section 36(1)** of the Sexual Offence Act.

14. That the trial court failed to comply with the provisions of **Article 50 (2) (g) (h)** of the Constitution, yet, the appellant had the right to choose and be represented by an advocate assigned to him by the State at its expense. And having had no ability to defend himself on his own, and lacked knowledge to speak appropriately he was prejudiced. In this regard he cited the case of *Petty vs. Grey Hound Racing Association (1968) 2A LLER*.

15. That the child was alleged to have been treated at Danton Private Hospital but the medical officer was not available to testify hence the principle in *Bukenya and others vs. Uganda (1972); Coles Vs. Coles (1866) LRIP* was applicable; and the evidence would have been detrimental for the prosecution's case; Other vital witnesses who were not called according to him were the Head teacher of the school the complainant attended who wrote a letter dated 28/8/2017 and the Doctor who did the age assessment.

16. That the defence put up of innocence was never considered by the trial court.

17. He also complains about the mandatory nature of the sentence that had deprived him of the right to protection by the law. That it is degrading and contravenes Article 27 of the Constitution as stated in the case of *Edwin Otieno Odhiambo vs. Republic (2009) eKLR*.

And that while in prison he has undergone life support skills and training in religious affairs and he relates well with other prisoners.

18. The appeal is opposed by the State/Respondent. It is urged that the case was proved beyond reasonable doubt. That all ingredients of the offence, namely, age, penetration and identification of the perpetrator were proved. That the appellant was placed at the scene and it was proved that he committed the offence. On the allegation of the appellant that the case was a family matter targeted to destroy his life, that PW2 confirmed there having been a disagreement concerning a text message the appellant received on the material date at 1:00 am where after he went to sleep at PW1's room and defiled her. That the Clinician confirmed injuries sustained by the complainant therefore family issues could not arise as there were no reasons of doubting findings of PW3.

19. On the issue of sentence, it was urged that the age of the Victim and circumstances in which the offence occurred called for such a sentence that was neither unlawful or illegal. In that regard, they cited the case of *Simon Kipkurui Kimani vs. Republic (2019) eKLR*.

20. This being a first appellate court, it is duty bound to re-analyze and assess the evidence as a whole subjecting it to an exhaustive examination and come up with independent conclusions. In *Okeno Vs. Republic* it was stated that

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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, see Peters v. Sunday Post, [1958] E. A. 424.”**

21. The appellant complains that he was held in custody beyond the timeline set by the constitution. **Article 49(1) (f)** of the Constitution provides thus:

**An arrested person has the right—**

(f) To be brought before a court as soon as reasonably possible, but not later than—

(i) Twenty-four hours after being arrested;

or

(ii) If the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

22. It is a requirement for an individual who has been arrested to be produced in court within 24 hours. If the police have to hold a suspect beyond the given time, then an order for further detention must be sought. In this case, looking at the charge sheet the appellant was arrested on the 30<sup>th</sup> July, 2017 and produced in court on 1<sup>st</sup> September, 2017. In the case of *Julius Kamau Mbugua vs. Republic, criminal Appeal No. 50 of 2008*, it was stated that:

**“The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum.”**

23. Therefore, even if the appellant’s rights were violated, the breach cannot warrant an acquittal. He may sue the State for damages.

24. It is urged that the charge sheet was defective. That the charge sheet was not signed by the police officer who presented it. The argument does not hold any water since the charge sheet was signed and it bears a stamp impression of the officer in charge of the police station.

25. Another aspect of defect according to the appellant is the description of the name of the complainant as **Fa We** which the complainant testified that she was **Fa Wa** and PW2 having indicated in evidence her daughter was **Fai**.

26. Section 134 of the Criminal Procedure Code provides thus:

**Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.**

27. In the case of *JMA vs. Republic (2009) KLR 671* it was held that:

**“It is not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.”**

28. The name of the child appearing in the charge sheet is what appears on the P3 form, the age assessment report and the letter authored by her Head teacher. The contradiction in issue alluded to is what was recorded by the trial magistrate. At the outset during voir dire examination, the child sated the name appearing in the charge sheet. This would depend on the pronunciation of the witness testifying and how it was captured by the trial court. Having known the nature of the offence that he faced and answered the charge at the outset, then having been able to prepare and conduct his defence, the charge was not defective. The appellant was the complainant’s step father, he knew the minor, a name deviating from the one indicated on the charge sheet, as long as it referred to the complainant, the credibility of the charge was not affected, therefore, the appellant was not prejudiced.

29. The appellant authoritatively argues that he lacked the knowledge of the right to representation and he was not properly informed about it as required by law. He also faults the court of not ensuring he was assigned a State retained Counsel. Article 50 (2) (g) (h) of the Constitution provides thus:

(2) Every accused person has the right to a fair trial, which includes the right—

(g) To choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

30. Section 43 of the Legal Aid No. 6 of 2016 provides that:

**Despite the provisions of this section, lack of legal representation shall not be a bar to the continuation of proceeding against a person.**

31. It is a requirement for the court to inform an accused person of the right to legal representation. But, failure to comply by the court cannot prevent a court from proceeding with the matter as provided by the procedure to be adopted by the court. The contention would be if an injustice would result. In the case of *Karisa Chengo & 2 Others vs. Republic (2015) eKLR* the Court of Appeal stated that:

**“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result’ and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”**

32. It therefore behooved the appellant to establish that he was prejudiced as a result of a substantial injustice if any. The appellant herein understood the charges that were presented by the prosecution. He participated in the trial by cross examining witnesses and subsequently defended himself. The penalty provided for the offence does not result into his life being taken away. Consequently, this ground of appeal fails.

33. To prove the case the prosecution had to prove the age of the complainant, the act of penetration and positive identification of the perpetrator of the offence. (See **section 8(1)** of the Sexual Offences Act).

34. In the case of *Charles Wamukoya Karani vs. Republic Cr. Appeal No. 72 of 293* the court stated that:

**“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”**

35. In the case of *Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000* the Court of Appeal stated that

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

36. The complainant was examined by a dental specialist who concluded that the minor was approximately 6 – 8 years old. The appellant however faults the prosecution for not calling the doctor who did the age assessment as a witness.

37. According to **Section 77** of the Evidence Act, the court may receive and act on a document signed by a medical practitioner without necessarily calling the person for purposes of examination on the same.

38. The appellant herein having not objected to the production of the age assessment report of the complainant, he cannot challenge it at the appellate stage.

39. Other than the medical evidence, we had evidence of the complainant’s mother PW2 who stated that she was born on 5<sup>th</sup> December, 2009. In the case of *Mwalengo Chichoro Mwachembe Vs. Republic (2016) eKLR* it was stated that:

**“The question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof”**

40. The issue of the child’s age was not questioned in cross examination. Therefore, it was proved beyond reasonable doubt.

41. On the question of penetration, it is defined as:

**The partial or complete insertion of the genital organs of a person into the genital organs of another person.** (See **Section 2** of the Sexual Offences Act)

42. The appellant complains that he was not examined to ascertain whether he transmitted a sexual disease to the complainant and that **Section 36(1)** of the Sexual Offences Act was not complied with. The alluded to provision of law provides that:

**Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.**

43. There is no obligation on the part of the court to order for forensic examination. It is worth noting that no such application was made by the appellant at trial therefore the complaint raised is mislaid. Similarly, the prosecution was not obligated to adduce forensic evidence to prove the case against the accused person. The proviso to **Section 124** of the Evidence Act 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.**

44. What was important was whether the victim was telling the truth. The trial court had the opportunity of noting the demeanor of the complainant and it was of the view that she had no reason to lie against the accused. Having not doubted her integrity and credibility it found her truthful.

45. The minor was subjected to medical examination by a clinical officer who found her having sustained bruises of her genitalia and her hymen was broken. She opined that the child had been defiled. The appellant did not deny having gone to sleep on the same bed with the complainant on the material night. Therefore, he had the opportunity of molesting the child.

46. On the question of the head teacher of the child having not been called to testify; In the case of *Keter vs. Republic 207 EA 135* the court stated that:

**“The Prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt”**

47. This decision is anchored on **Section 143** of the Evidence Act that provides that:

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

48. The Headmaster was not an eye witness to the fact of defilement. His evidence was of the fact of the minor being a pupil at the school and the investigation officer produced the document in evidence without any objection being raised.

49. Throughout the case it was not suggested that the clinical officer gave false evidence regarding the fact of injuries sustained by the complainant therefore failure to call the medical personnel who first examined the complainant prior to being taken to Kimilili Sub-County Hospital was not fatal to the prosecution’s case.

50. The court took into account evidence adduced by the defence but found the evidence adduced lacking probative value. For reasons recorded it did find the prosecution’s case overwhelming.

51. On the question of sentence, **Section 8(2)** of the Sexual Offences Act provides thus:

**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.**

52. In the case of *Bernard Gacheru vs. Republic (2002) eKLR* the Court of Appeal stated that:

**“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist”**

53. The trial court having acted on proper principles, I have no reason to interfere with the sentence imposed.

54. The upshot of the above is that the appeal is devoid of merit. Accordingly, it is dismissed.

55. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 29<sup>TH</sup> DAY OF OCTOBER, 2021**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Appellant

ODPP – Mr. Ayekha

Court Assistant - Immaculate