



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 52 OF 2019

BRIAN WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising from the original conviction and sentence by Hon N. N

Barasa (S.R.M) in Webuye S.P.M Sexual Offence Case No. 17/2018 delivered on 10/5/2019)

JUDGMENT

1. The Appellant was charged in the subordinate Court with the offence of defilement contrary to **section 8(1) (2) of the Sexual Offences Act No. 3 of 2006**. The facts were that on the 11th day of April, 2018 at [Particulars withheld] Market Namarambi Location, Webuye East Sub County he intentionally and unlawfully caused his penis to penetrate the vagina of MNN, a child aged 6 years.
2. He faced an alternative charge of committing an indecent act contrary to **section 11(1) of the Sexual Offences Act No. 3 of 2006**. The facts were that on the 11th April, 2018 at [Particulars withheld] Market Namarambi Location, Webuye East Sub County he intentionally and unlawfully caused his penis to penetrate the vagina of MNN, a child aged 6 years.
3. PW1 MNN stated that the minor is her sister's daughter and that her mother, who was staying with the minor, called her and told her that the minor was sick. She informed the minor's mother. On the fourth day, the minor and the minor's mother passed by PW1's home. PW1 examined the victim's genitalia and noticed a discharge of mucus with blood and pus. She interrogated the minor who told her that she had been defiled by Brian DJ in the video room. They took the minor to Misikhu AP Post and later Webuye District Hospital. She knew the perpetrator as a person who had operated a Barber and Video Shop in her compound since 2017.
4. The minor's mother BN testified as PW2 that the minor was born on 20th June, 2011 and was a pupil attending Top Class at the [Particulars withheld]. That she was informed by PW1 that her daughter, whom she had left with her mother, was unwell. When she got to the child she noticed a lot of discharge from her genitalia when she tried to wipe her. She interrogated the child who eventually disclosed that uncle Brian DJ had defiled her. She took her to the police station and later the hospital for examination. She said the Appellant was known to the minor since he lived in PW1's compound.
5. PW3, MNN a school going child aged seven (7) years testified that she was standing outside PW1's house, when the Appellant beckoned her. He took her to the video hall and defiled her on the bench. The Appellant threatened to stab her if she told anyone of the act. Her mother later took her to hospital in Misikhu. She also said she used to see the appellant at PW1's place. Prior to her testimony, the court subjected the minor to voir dire on account of her age.
6. On his part, PW4 CPL Elisha Yego attached to Webuye Police Station gender office stated that he was in the office on 18th April, 2018, when he was informed by the OCS of a suspect at the County Commissioner's office. He together with DDCIO Mike and a driver went and picked up the suspect and brought him to the Station. He discovered that a complaint had already been filed against the suspect at Misikhu Police post and the Complainant had already been issued with a P3 form filled at Webuye County Hospital. He consequently charged the suspect.
7. PW5 Leticia Mbalwa a clinical officer attached to Webuye County hospital stated that the minor was examined by her colleague Rebecca who she had worked with for a period of one (1) year. She recognized her colleague's handwriting and signature. The minor was examined at the facility on 15th April, 2018 where she presented with a history of defilement. Upon examination, she was found to have a yellowish discharge from the vaginal area and pus cells in the urine. The hymen was missing and she was in a lot of pain when touched. PW1 filled the P3 form with regard to the minor.
8. At the close of the Prosecution case, the Appellant was put on his defence. He gave an unsworn statement and said that he lived with and

worked for M, the mother of the Complainant without pay in April 2018. That the Complainant's mother began making sexual advancements towards him, and he was arrested because he declined those advances.

9. In the end, the Appellant was convicted on the main count and sentenced to life imprisonment. Being dissatisfied, he proffered the instant appeal anchored on the grounds that:

i. He pleaded not guilty to the charges.

ii. The prosecution failed to examine him to prove the truth.

iii. The trial court failed to consider his defence and therefore breached section 168(1) of the Criminal Procedure Code.

iv. he was not accorded a fair trial as stipulated by Article 50 of the Constitution.

10. On 5th August, 2021, the Appellant filed further grounds of appeal, albeit without leave of the court, in which he states that:

i. The Charge Sheet was incurably defective contrary to Section 214 of the Criminal Procedure Code.

ii. The prosecution evidence was contradictory, particularly on the alleged scene of crime which was not corroborated by the prosecution's evidence.

iii. He was not accorded a right to fair trial as provided for by Article 25(c) and 50(2) of the Constitution of Kenya 2010 particularly given that he proceeded without a lawyer on the state expense as held in the case of *Thomas Alugha Ndegwa Vs R Criminal Appeal (CA) No. 2/2004*.

iv. The learned trial magistrate erred on points of law by convicting the appellant to life sentence contrary to Article 26(1), 29(d), (h), 25(c), 20(1)(2) and 2(1) of the constitution.

11. The appeal was disposed of by way of written submissions. Both parties filed their respective submissions.

Analysis and determination

12. The duty of this court in a first appeal is to analyze and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are however instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision. (See – **David Njuguna Wairimu vs. Republic [2010] eKLR**).

13. In a charge of defilement, the **Sexual Offences Act** under **section 8(1)(2)** states thus:

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

(2) person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

14. In determining this appeal, the court is duty bound to subject the entire evidence to a review to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved beyond reasonable doubt as required in law.

15. The key ingredients of the offence of defilement are proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. This was recently restated by the Court of Appeal (W. Karanja, Gatembu & M'noti, JJ.A.) in **Mwarome Munga Janji vs. Republic [2021] eKLR**.

16. On the age of the victim, PW3 testified that her child was born on 20th June, 2011 and was therefore aged six and half (6½) years on the material date. The notification of birth was also produced in evidence. The charge sheet indicates the complainant's age as six (6) years. Both the P3 form and the medical notes indicate that the child was aged six and a half (6½) years at the time of the offence. Additionally, PW3 the complainant was subjected to voire dire examination whereupon the court concluded that she was intelligent in the manner in which she answered questions but was too young to understand the meaning of oath.

17. It is therefore clear that the complainant was a child of tender years. In any case, there was no dispute on the age of the complainant at the trial. In the circumstances, I find that the age of the complainant was proved to the required standard.

18. On proof of penetration, PW1 testified that she found the minor lying down and in pain on 2 occasions. The minor stated that she had pain in the head and stomach. When she examined the minor's genitalia, she noticed bloody, pus-like discharge. Upon inquiry, the minor told her what uncle Brian DJ had done to her. In narrating the ordeal, the minor stated that the Appellant "*placed me on the bench and removed my pant, he also removed his trouser, he inserted his thing. I felt pain*".

19. PW1's testimony found support in the testimony of PW2 who stated that the minor had pains when she tried wiping her genital area. She noticed bruises on the genitalia. When she interrogated her, the minor disclosed that Uncle Brian DJ had defiled her in the video room.

20. PW5 on her part stated that she filled the P3 form which was produced as Pexh 2. She observed that upon examination of the child, the hymen was missing, there was yellowish discharge from the vaginal area and in the panty and the minor experienced pain in the private parts when touched. She also had pus cells in the urine. She concluded that the minor had been defiled.

21. All this when put together points to one thing, that the minor was defiled. The evidence of the minor was corroborated by that of PW2 and PW5. In the circumstances, this court is satisfied that the element of penetration was proved as by law required.

22. On identification there was only one witness and I am alive to the dangers of the evidence of identification coming from a single identifying witness, who was also a minor of tender years. The proviso to **section 124** of the **Evidence Act** took care of this in the following words:

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.

23. It is not in dispute that the minor and the perpetrator were well known to each other, since it is clear from the testimony of PW1, PW2 and PW3 that the Appellant lived in the same compound with the minor. In his own defence, the Appellant stated that he lived with and worked for the minor's mother. This may be the reason why the minor easily trusted him when he called her to the video hall. I observe that the minor named her assailant the moment she revealed what had been done to her. Identification was therefore by recognition which is a safer mode of identification and I find that the identity of the perpetrator was proved to the required standard.

24. On the ground that the charge sheet was defective, the Appellant submitted that whereas the victim was seven (7) years old at the time of offence, the Appellant was charged under **section 8(1) 4** of the **Sexual Offences Act**. That the charge sheet ought to have been amended pursuant to the provisions of **section 214** of the **Criminal Procedure Code**. To this end, he cited the cases of **Sigilai & another vs. R (2004) eKLR** and **Jason Akumu Yongo vs. R (CA) Criminal Appeal No. 1 of 1983**.

25. The Appellant submitted that the evidence adduced by the Prosecution offended the provisions of **section 163(1)** of the **Evidence Act**. That PW4, Elisha Yego placed the scene of crime in the video room, while PW5, the clinical officer, stated that the scene was at the Kinyozi. He relied on the case of **Ramkishan Pandya vs. R [1957] EALR 336** and urged that where the evidence is inconsistent, it should not be relied on.

26. It was the Appellant's further submission that the court rejected his defence yet it was plausible, and was not contradicted by the Prosecution. He faulted the trial court for relying on the Prosecution's evidence, urging that it was doubtful and could not sustain a conviction. That in any event, he was aged 16 years at the time of his arrest and ought therefore not to have been convicted.

27. The Respondent on its part submitted that the provisions of **section 8(1)** of the **Sexual Offences Act** were proved beyond reasonable doubt. That the victim of this case was a child of tender years hence the offence of defilement the ingredients of which were set out in **G O A vs. Republic [2018] eKLR**. It was urged that it is on the strength of the victim's age, alongside the witness testimonies and medical evidence presented that the trial magistrate convicted and sentenced the Appellant to life imprisonment. That since the section under which the Appellant was charged provided for a statutory penalty, the trial magistrate had no other option but to abide by it. Therefore, that the appeal should be dismissed in its entirety and the conviction and sentence upheld.

28. The Appellant was charged under **section 8(1) (2)** of the **Sexual Offences Act** as reproduced elsewhere above. As I have also analyzed hereinabove, the key ingredients of the offence of defilement were properly proved to sustain the conviction. **Section 8(1) (2)** provides for a life imprisonment upon conviction. That is the law.

29. In mitigation, the Appellant stated that he had a young family of three (3) children and sought to be assisted by the court. A pre-sentencing report was availed and showed that the Appellant had no family, was not remorseful and committed the offence as revenge for money owed by the complainant's mother.

30. The Court notes that the minor was of tender years and was a neighbour to the Appellant. The ordeal traumatized the minor and may have a bearing on her future life.

31. Having carefully considered the totality of the evidence adduced in the subordinate court, the submissions on appeal and the law, I find no reason to interfere with the conviction and sentence. The appeal therefore fails and is hereby dismissed.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 15TH DAY OF OCTOBER, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Appellant in Person.

In the presence of.....State Counsel.