REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. E021 OF 2020

MJ.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence of the Resident Magistrate's Court

at Mariakani by Hon LK GATHERU (RM) delivered on 25th September 2017

in Criminal Case No. 768 of 2014)

CORAM: Hon. Justice Reuben Nyakundi

Appellant in person

Mr. Mwangi for the State

J U D G E M E N T

The appellant, **MJ**, was arraigned in court on the 29th December 2014 and charged with the offence of defilement of a girl contrary to Section 8 (1) as read with 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 26th December 2014 at [Particulars withheld] Village, Mwavumbo location in Kinango District of Kwale County, the Appellant intentionally caused his penis to penetrate the vagina of one **AI** a child of 13 years.

In the alternative charge, the accused was alleged to have committed an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 26th December 2014 at [Particulars withheld] Village, Mwavumbo location in Kinango District of Kwale County, the appellant intentionally caused his penis to touch the vagina of one **AI** a child of 13 years.

The accused denied the charges and the matter was set down for trial where the prosecution presented 6 witnesses in aid of its case. The appellant was subsequently found to have a case to answer and put on his defense whereupon he gave unsworn testimony and did not call any additional witnesses.

Hon. LK Gatheru in a decision delivered on 25th September 2017 in the absence of the accused person who had absconded court, found that the offence of defilement contrary to Section 8 (1) as read with 8 (3) of the Sexual Offences Act had been proven beyond reasonable doubt and convicted the appellant accordingly. Noting that the accused had absconded court on the date judgment was due and considering that the accused person was HIV positive when he defiled the victim, the learned trial magistrate concluded that the accused was deserving of a penalty harsher than the minimum 20 years stipulated by the offence. The accused was thus sentenced to 30 years imprisonment. When the accused was finally arrested on 28th March 2018, he pleaded for forgiveness before the court, stating that on the date of judgement he got a call that his son had been in an accident. The Court noted that it had already imposed its sentence and directed that the sentence take effect from 28th March 2018. This is what occasioned the current appeal against both conviction and sentence.

In the instant appeal, the appellant urges a number of grounds in his amended grounds of appeal that can be restated as the learned trial court magistrate erred in law and fact by convicting the appellant:

1. ***Without considering that the voire dire examination of the minor victim was conducted improperly.***

2. ***Without considering that the prosecution witnesses' evidence was insufficient.***

3. ***Without considering that the prosecution failed to comply with Section 200 of the Criminal Procedure Code.***

4. ***Without considering the P3 Form and Age assessment report were insufficient to be admitted as evidence.***

5. ***Without considering that crucial witnesses were never called to testify.***

6. ***Without considering that the Appellant had a valid defence.***

In essence the appellant is convinced that the case against him at trial was proven beyond reasonable doubt.

Submissions on Appeal, Analysis and Determination

I have dutifully considered the import of the submissions made on appeal by the **Mr. Juma** the appellant as well as the rebuttal advanced by **Mr. Kirui**, Prosecution Counsel. I will advert to the relevant points as necessary in the forthcoming analysis. That being said, as is wont of a first appeal, I am duty bound to analyze the evidence afresh and arrive at my own independent conclusions. I must however remember that I do not have the luxury of the trial court to observe the demeanor of the witnesses. **(See Okeno v Republic (1972) EA 32).**

The case at trial was advanced by 6 witnesses. **PW1 AIA** the victim was taken through a voire dire examination whereupon the court found that she was capable of being sworn in. she thus gave a sworn statement averring that on the 26th December 2014 at around 10.00pm while at home, she stepped out of the house to close a tap that was outside their house. According to her, she saw one S, a madrassa classmate who was a few meters away and he asked her for his madrassa books. They begun discussing their madrassa classes and whilst in the midst of that discussion, the appellant appeared and chased S away. He did not bother with her at first and she thus started to walk home. However, shortly, he started chasing her and she began running. She stated that the accused caught up with her behind the house of one **M** whom she described as her uncle. **(PW1)** went on to testify that the Appellant held her and closed her mouth and took her to nearby house that belonged to one **Nurein**. No one else was in the house. The accused took **(PW1)** into the house where there was bed. He removed her clothes and undressed as well. He then had sexual intercourse with her. According to the complainant, the appellant then removed his phone and showed her pornographic images. They were in that house for about 30 minutes within which they had sexual intercourse a total of three times.

It was the evidence of the Complainant that afterwards, she went home which was less than a minute away and found her family, including **(PW2)** looking for her. When they demanded to know where she was coming from, she lied that she had gone to the shops at Kafichoni. At this time, the appellant emerged from behind the house and insinuated that he had found her with two boys. She stated that the appellant had at first threatened her against telling the truth so when the appellant and her family began reprimanding her, she did not. However, the following day, she went to see **(PW2)** where she sells fish and narrated to her the events of the previous night. She testified that **(PW2)** took her to the police station and they were referred to the hospital.

In cross examination, she added that the accused used a stone to chase **S** and that some people from **M's** home saw the chase and went to enquire from the complainant's grandmother about it. She denied that it was the boy called **S** that had had intercourse with her. She stated that the scene where they were chased from had a lot of bulbs and that she was able to see the appellant. She also said that the accused had instructed her not to tell anyone lest he decide what his next course of action would be.

PW2 Meshi Hussein Mwakalawa testified that on the 26th December 2014 at 2145hrs **Kalama**, her aunt and the grandmother to **(PW1)** came calling looking for **(PW1).** The grandmother alleged that one M had seen the Appellant chasing **(PW1).** They went to the appellant's house and when they called out to him, a lady whom they take as the appellant's wife and who was inside the house answered that he was absent. According to **(PW2),** the complainant appeared later from behind the house and **(PW2)** confronted her demanding to know where she was coming from. The Appellant shortly appeared too and explained that he had found **(PW1)** with two young men and had chased them away. According to **(PW2),** she, the appellant, **M** and the grandmother thereafter reprimanded the complainant. They all left after that leaving her with the grandmother.

According to **(PW2),** she was still bothered by the fact that for about 30 minutes after 10.00pm, they could not account for the whereabouts of **(PW1).** She thus asked the complainant about it again the following day and the complainant explained that the appellant had caught up with her and had defiled her at the semi constructed house at Nurein house. She averred that **(PW1)** showed her a message on her phone where the appellant was threatening her not to tell anyone. She got bitter since the appellant is a close relative and friend. She called her husband and they took the girl to hospital for treatment together with the clothes she wore at the time. She noticed that the clothes had some discharge the dress was partially torn. They had also reported the matter at Mariakani Police Station. The appellant was then accosted by people and kept waiting for the police who went and arrested him. She explained that complainant was born on 15th February 2001 and was her niece.

Under cross examination, **(PW2)** averred that the appellant had appeared from behind the house where there is a small path and when asked where he was coming from by **M**, claimed that he was from buying cigarettes although he was panting.

PW3 Dr. Azhar Mwangi of the Mariakani District Hospital produced the age assessment report for the complainant which was done on the 29th December 2014. According to the doctor, **(PW1)** was found to be 13 years old.

PW4 Mwangolo Chigulu, a clinical officer from Mariakani District Hospital testified that he examined **(PW1)** on the 27th December 2014 when she was brought in by police escort, alleged to have been defiled by someone known to her. Though he observed that she had already showered and changed clothes, she had a torn dress with her. Upon examination, he noted her external genital was normal with whitish vaginal discharge. Her hymen was missing. There was no semen but the he opined that there was penetration though not immediate. He

recommended a further test for HIV after three months. **PW5 PC Maurice Otunga** was stood down as he was not the investigating officer.

PW6 Corporal Bernard Mwaura, the investigating officer testified that as at 29th December 2014 he was based at Taru Police Station and was given instructions to undertake investigations in this matter which had been reported at Mariakani Police Station. According to him, when he got there, the Appellant was already in custody and **(PW1)** and **(PW2)** were present. He interrogated them and the Appellant too who denied the allegations. He stated that P3 form had been issued and statements had been taken. He also confirmed that the Appellant had informed him that he was HIV Positive.

On cross examination he stated that he had been sent by the OCS, Chief Inspector **Wesonga.** That the accused was already in custody and that the P3 Form and statements had been taken.

This marked the close of the case by the prosecution. The learned trial magistrate found the accused had a case to answer and placed him on his defence. In his unsworn testimony, the appellant averred that on the 27th December 2014 he was at home with his wife and six children. At about 6.00pm, he learnt from family members that **(PW1)** had been assaulted at her home on the previous night and had alleged that he was the perpetrator. According to the Appellant at trial, he explained to his family and later to the police that he had only spotted her at a tap near his home with a young boy.

He criticized the complainant's evidence on account of her inability to give evidence at the first instance and for the reason that no exhibits were produced, in this case referring to the torn dress or injuries on her body. Further, he stated that the complainant had admitted to have been in company of another young man at the material time and that her whole evidence was mere fabrication. He also stated that neither **(PW2)** nor **(PW6)** were eye witnesses and thus they had no evidence to offer. He further stated that no semen had been found on **(PW1)** as she had been examined after 25 hours.

His version of events was that two weeks prior to the alleged incident, a dispute arose between him and the complainant's family over the water pipe close to their houses since he had intended to shift it to create a path. According to the appellant, the complainant's family had objected and issued threats that he would pay the price for shifting the tap. He averred that upon learning of the allegations against him, he personally went to the police station to follow up and found the complainant having been taken to hospital. He averred that after he had waited for about one hour, he was escorted to the cells. He was later interrogated and denied the offence.

Having set out the evidence at trial, my next task is to render an analysis of the same. This appeal turns on whether the prosecution proved its case beyond reasonable doubt and whether, in the circumstances, the sentence imposed by the trial court was sound. The burden placed on the prosecution is as set out in Section 107 (1) of the Evidence Act which provides:

> ***"(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***
>
> ***(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".***

This duty is expressed in the English authority of **Miller v Minister of Pensions 1947 2 ALL ER 372-274** as: -

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law will fail to protect the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility in his favor, which can be described with the sentence of course it is no doubt nothing short of that will suffice."***

Section 8 (1) as read with 8 (3) of the Sexual Offences Act No. 3 of 2006 provides:

> ***"8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of thirteen and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

As alluded to by **Mr. Kirui** for the prosecution, the crucial elements for a charge of defilement are proof that the victim was below 18 years, proof of penetration and the positive identification of the accused person as the person that caused the penetration. **Charles Wamukoya Karani v Republic Criminal Appeal No. 72 of 2013** and **Festus Kandu Ngome v Republic Criminal Appeal No. 18 of 2019 [2019] eKLR**.

My point of departure is the age of the complainant. In his submissions, Mr. Kirui referred the Court to **Francis Omuroni v Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000** where that court held that:

> ***"In defilement cases, medical examination, 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 parents and by observation and common sense."***

(PW2) the victim's aunt averred that she was 13 years old, having been born on 15th February 2001. **(PW3)** the doctor testified that he conducted the age assessment and formed the opinion that the victim was estimated to be 13 years old at the time of the commission of the

offence. The learned trial magistrate therefore cannot be faulted for finding that proof of age had sufficiently been met.

On the question of penetration, Section 2 of the Sexual Offences Act defines penetration to mean the *'partial or complete insertion of the genital organ of a person into a genital organ of another person.'* **(PW1)** testified that the appellant accosted her, took her to an unoccupied house, undressed both himself and her and not only defiled her three times but also showed her pornographic images on his phone. The evidence of **(PW4)** the clinical officer was that though the hymen was missing, there were no injuries on the genitalia but penetration had occurred; though he could not ascertain when it had occurred. He also noted that **(PW1)** had showered and changed clothes by the time she was being examined. Both **(PW2)** and **(PW4)** stated that the complainant's dress was torn and had some discharge.

The appellant has rubbished the evidence of the clinical officer on account of the P3 Form being filled on 27th December 2014 while the offence allegedly occurred on the 26th December 2014. Her further submits that since the clinical officer could not confirm when penetration occurred, there was no conclusive evidence that it actually did. This defence does not hold water. It was impracticable that the P3 Form be filled on the night the offence took place as it was only the next day when the matter was reported to the police and the victim taken to hospital. On penetration, the evidence of the complainant was that it was the appellant that engaged in intercourse with her three times, showed her pornographic images on his phone and later warned her not to divulge that information to anyone lest she faces the consequences. The clinical officer further noted that there had been penetration, though he could not pinpoint when it had occurred. The absence of semen was also not detrimental to the case by the prosecution as the trial magistrate correctly held. In totality therefore, I agree with the finding of the trial court that penetration was sufficiently proven.

Finally, regarding positive identification, the Court in **Anjononi & Others vs Republic, (1976-1980) KLR 1566** held that when it comes to identification, the recognition of assailant is satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other. In the instant case, that the appellant was well known to the complainant is a fact which he cannot run away from. He acceded to the fact that they are neighbours whose houses were barely 60 meters apart. The testimony of the complainant was that he was the one that chased her and the boy named Salim from near the tap where they were. She stated that the area was well lit since there were light bulbs around. In any case, it was further her testimony, which testimony was corroborated by **(PW2),** that she knew the appellant well. This is thus a case of recognition as the appellant was no stranger to the victim. The learned trial magistrate was therefore correct in finding that the identity of the appellant had been sufficiently proven and I agree with that finding.

Regarding the issue of corroboration of witness testimony and the assertion by the Appellant that crucial witnesses to the case were not called, it is not in contest that where the prosecution fails to call certain witnesses a negative inference may be drawn against it by the court assuming that their evidence would be detrimental. **(See Bukenya vs Uganda [1972] EA 547).** However, in this case, as correctly noted by the learned trial magistrate, the failure by the trial magistrate to call the complainant's grandmother, Munga and Salim was not detrimental. Their evidence would have only served to corroborate what information was already before court on account of the testimonies of **(PW1)** and **(PW2).** Moreover, since it was only the complainant who saw the Appellant commit the act, per Section 124 of the Evidence Act Cap. 80, the learned trial magistrate would still have been correct to convict the appellant on this evidence alone as long as they were satisfied as to the truthfulness of the evidence and recorded their reasons for being so. In sum, the submissions made by the appellant on the probative value and reliability of a single identifying witness is in these circumstances incompetent to impeach the findings of the trial Court.

The upshot is that the conviction by the trial court was safe.

On the matter of sentencing, the trial court considered that the appellant defiled the complainant knowing full well he was HIV positive. It considered that the minimum sentence was 20 years but on consideration of the gravity of the offence, sentenced the accused to 30 years imprisonment. In considering the propriety of the sentence I am guided by the provisions of Section 382 of the Criminal Procedure Code and other settled principles on this subject matter. To this end, I only have to consider whether the trial Court acted regularly, legally, correctly and justly in the exercise of its discretion. I can only interfere with a sentence of the trial Court in a case where the sentence is wrong, inappropriate, outside the ambit prescribed by parliament or disproportionate to the offence. **(See Ahamad Abolfathi Mohammed v R {2018} eKLR).**

I am of the view that the trial court considered the relevant aggravating factors in the imposition of the sentence. As regards mitigating factors, it is of note that the appellant was not in court to give his mitigation as he had absconded court on the date judgement was first due and was only arrested on 28th March 2018. Against these factors, I have no doubt that there is no other reasonable hypothesis inconsistent with the appellant's guilt and conviction. The appeal in its entirety be and is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the DPP

2. Appellant in person