



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 74 OF 2019**

**LAZARUS FRANCIS BEJA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of Hon. J. Kasam, Senior Resident Magistrate,*

*delivered on 5<sup>th</sup> day of April 2019 in Mombasa Chief Magistrate Court*

*Criminal Case No. 164 of 2017).*

**J U D G M E N T**

1. Being Appeal from Judgment in Mombasa CMC Sexual Offence Case No. 164 of 2017 which was delivered on 15<sup>th</sup> April 2019 where appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act and sentenced to serve life imprisonment.

2. The particulars of the charge are that Lazarus Francis Beja on the 30<sup>th</sup> day of January 2017 at [particulars withheld] area in Jomvu Sub-county within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of BWB a girl aged 4 years old.

3. In the alternative the Appellant was charged with the offence of indescient assault contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The Appellant was aggrieved by the conviction and sentence and he filed appeal herein on the grounds that:-

**i. The learned trial Magistrate erred in law & fact by finding a conviction & sentence without considering that the offence of defilement was proved to the required standards of law hence life imprisonment sentence as imposed was unlawful.**

**ii. That the learned trial Magistrate erred in law & fact by finding a conviction and sentence without considering Section 8(7) of the Sexual Offences Act was not put into consideration.**

**iii. That the learned trial Magistrate erred in law & fact by finding a conviction & sentence without considering that prosecution case was governed by Mass contradictions.**

**iv. That learned trial Magistrate erred in law & fact by finding his conviction & sentence without considering his reasonable defence.**

4. The prosecution's case was that the complainant 4 years old had asked for permission from class to go to the toilet when the appellant called her & defiled her in his store/room & told her not to tell anyone when PW 1 was bathing her in the evening after school the child said she was having pain in her private parts.

5. PW 2 examined her and saw her & saw injuries. The next day PW 2 took PW 1 to school & on interrogation by the class teacher. She revealed Uncle Lazarus whom he identified as the appellant had pierced her. Complainant was taken to hospital examined and PRC & P3 for Ms duty filled by Dr. Rabai and same produced by PW 4. Dr. Uba Hamed. It was established that the Complainant's hymen had been broken.

6. PW 3 EK a teacher at Nursery School – [particulars withheld] testified that on 31/1/2017 the Complainant's mother took her to school and raised concern over the child's behavior and on inquiry the child identified the Appellant as the person who had ordered her to have sex.

PW 3 said uncle Lazarus the Appellant was a labourer at the school. She accompanied the mother of the child to Port Reitz and upon examination the child had been defiled. She said that Appellant was present and he told them he did it insert his fingers inside the child's vagina. PW 3 identified the Appellant as uncle Lazarus who had been working at the school for 3 months prior to this incident.

7. The prosecution's case was closed before the investigating officer testified and appellant was placed on defence. Appellant gave sworn statement and said that on 30/01/2017 he was apprehended on allegations he had defiled a child and he was taken to Coast General Hospital, Mikindani Branch. He said the child was examined but it was established she had not been defiled.

8. That he was escorted to police station in company of Pastor Joel, a teacher and the Complainant. He said charges are fabricated. He said the chief had plotted against him. He said the Pastor was bribed and that is why he was arrested in school/church where he was living and working as caretaker. He said he didn't know the complainants neither did he know [particulars withheld] school.

9. This appeal was canvassed by way of written submissions. In his submissions the Appellant argued that it was unsafe for trial Magistrate to rely on the uncorroborated evidence of PW 2 which was doubtful and that the trial Magistrate ought to have relied on his defence of alibi.

10. The Appellant also submitted that the medical report was also a contradictory. He stated that there is no way child could not be having injuries one day after such an ordeal and yet the doctor says he had her hymen broken.

11. The Appellant submitted that the Complainants evidence was questionable as she didn't raise alarm to alert anybody and didn't volunteer information to anybody or the incident. He relied on the holding in Daud Jairo & Another vs Republic. CR. Application No. 515 of 2007 to support his position. That issue of witness credibility must be handled with due care. The Appellant argued that the prosecution did not prove its case beyond all reasonable doubt.

12. Appellant further submitted that the trial court sentenced him without considering his mitigation. He said the sentence of life imprisonment violates his fundamental rights and a definite and lenient penalty ought to have been composed. He quoted the holding in Baraka Safari – Msa H.C. CR. Appeal No. 75 of 2016 where an appellant convicted under Section 8(2) of the Sexual Offences Act had his life sentence reduced to 15 years.

13. The Respondent on their part submitted that the prosecution proved penetration, age of the complainant and identity of the perpetrator. It was submitted that sentence imposed was legal, the evidence adduced cogent, consistent and uncontroverted. It was also submitted that the Appellant's age was assessed and he was found to be 21 years old and provisions of Section 8(7) of the Sexual Offence Act do not apply to him.

14. It was further submitted that the trial court considered the evidence of both the prosecution and defence and that it was established appellant was identified as the only perpetrator. The Respondent urged the court to uphold the trial court's verdict.

### **Analysis and Determination**

15. In the case of **David Njuguna Wairimu vs Republic [2010] eKLR** it was held:-

**“The duty of the 1<sup>st</sup> appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court”...**

16. After considering the grounds of appeal Records of the trial court and submissions by respective parties the issues for determination are:-

**i. Whether the complainant's evidence required corroboration other than by medical evidence and whether it was safe to convict based on the evidence of the complainant whose credibility was allegedly doubtful.**

**ii. Whether the offence was proved beyond reasonable doubt.**

**iii. Whether sentence was passed after consideration of the Appellants mitigation**

**iv. Whether life imprisonment violated Appellants fundamental rights pertaining to fair trial.**

17. In regard to evidence of a victim of Sexual Offence Section 124 of the Evidence Act provides as follows:-

**“Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the allegedly victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth”.**

18. This position was fortified in the case of **Mohamed vs Republic [2005] 1 KLR** where it was held:-

**“It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful”.**

19. The trial Magistrate who had the Opportunity to listen to the witnesses testify and observed the demeanor had this to say about the complainant in regard to evidence of identification:-

**“The complainant in evidence stated that accused was uncle Lazarus and was able to identify him before court. The teacher too identified the accused as a school labourer.**

**In evidence the girl appeared willing to tell the truth, she was composed and consistent with the truth of the facts contained in her own statement, she was fully subjected to cross-examination by the defence and she explained the events consistently”.**

20. The trial Magistrate therefore gave reasons why she believed the Complainants evidence. The Complainant was taken to school and upon interrogation by PW 3 she said Uncle Lazarus pierced her in her private part. She took PW 3 & her mother PW 1 to the scene and to Port Reitz Hospital where examination by Dr. Rabai revealed that indeed the child had been defiled and her hymen ruptured.

21. The medical report therefore corroborated evidence of PW 2 that she was defiled. PW 3 also corroborates fact that it was uncle Lazarus the Appellant herein who defiled the Complainant when she was on her way from the toilet. PW 3 in cross examination told the Appellant that he was present when the child was taken to hospital and he told them he used his finger to penetrate the child’s genital.

22. The Appellant on his defence didn’t deny having said he used his finger in the act. The Appellant did not point out what was not credible about the Complainants evidence that should have raised doubt on his favour. This court therefore finds that evidence of complainant PW 2 having been corroborated by the medical evidence and PW 3’s evidence it was safe to rely on it to convict the appellant.

23. From the above analysis, it is apparent the appellant was identified as the one who defiled the complainant and the Complainant’s age was proved to be 4 years by the Age Assessment report dated 23<sup>rd</sup> March 2017. The offence was therefore proved beyond all reasonable doubt.

24. Upon the Appellants conviction he gave his mitigation on 27<sup>th</sup> March 2019 and he said he was 17 years old by the time he was arrested. Age assessment report however revealed he was 21 years as at 31/7/2021 which means by the time he committed the offence he was slightly less than 21 years. His mitigation on age was therefore considered by the trial court which ordered for an age assessment report.

25. In regard to sentencing although jurisprudence is now bend towards quantifying definitive terms and moving away from life imprisonment because of its uncertainty and dehumanizing nature. In the circumstances although the punishment provided under Section 8(2) is life sentence and that the Appellant committed a heinous act, I would find that a term of 25 years imprisonment would suffice as punishment for the Appellant.

26. The appeal therefore lacks merit and is dismissed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30TH DAY OF NOVEMBER, 2021**

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**

**IN THE PRESENCE OF:-**

**TURUKI – COURT ASSISTANT**

**MS. KARANJA FOR RESPONDENT**

**APPELLANT – PRESENT IN PERSON**

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**