REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 37 OF 2019

EVANS MOGENI OMWANDO…….……..APPELLANT

VERSUS

REPUBLIC……...…….PROSECUTOR

(An appeal from the judgment of the Senior Resident Magistrate, Hon. Ogombo, at Ngong in Criminal Case No. 5041 of 2016)

Introduction

Evans Mogeni Omwando, the Appellant, was charged with defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act whose particulars read that:

On diverse dates between 29th April to 1st May 2016, at [Particulars Withheld] Road within Ongata Rongai Township in Kajiado County, he intentionally caused his male genital organs (penis) to penetrate the female genital organ (Vagina) of MM (MM), a girl aged 14 years.

He was charged with an alternative charge of Indecent Act contrary to Section11 (1) of the Sexual Offences Act with the particulars that on diverse dates between 29th April and 1st May 2016 at [Particulars Withheld] Road within Ongata Rongai Township in Kajiado County, he intentionally and unlawfully touched the female genital organ (vagina) of MM (MM) a child aged 14 years with his penis.

The Appellant was tried and convicted for the main offence of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act (Act No. 3 of 2006). He was sentenced to serve 20 years imprisonment.

Memorandum of Appeal

Dissatisfied with both the conviction and sentence, the Appellant has preferred this Appeal. He has filed a Memorandum of Appeal on 24th July 2019 which he has amended and filed together with the Submissions on 5th November 2021. The grounds of Appeal in his Amended Memorandum of Appeal are reproduced here below:

1. THAT, the Learned trial Magistrate erred in law and fact by failing to find that the elements of the offence of defilement were not proved beyond reasonable doubt as required by the law.

2. THAT, the learned trial Magistrate erred in law and fact by relying on the evidence of PW2 who was an incredible witness and her evidence was contradictory and inconsistent.

3. THAT, the learned trial Magistrate erred in law and fact by failing to find that the evidence of PW2 was obtained through coercion and intimidation.

4. THAT, the learned trial Magistrate erred in law and fact by failing to find that essential witnesses necessary to prove basic facts did not testify.

5. THAT, the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and relied on the insufficient, uncorroborated and incredible evidence and came to the wrong decision that the Appellant had defiled the minor.

6. THAT, the trial Magistrate erred in law and fact in failing to note that the burden and standard of proof by the Prosecution was not discharged and thus the Prosecution case was not proved beyond reasonable doubt as provided for under the law.

Submissions

The Appellant submitted that the prosecution did not prove beyond reasonable doubt the elements of the offence of defilement namely that the victim is a minor; that there was penetration and the identification of the Appellant as the person who committed this offence. He cited ***Charles Wamukoya Karani v. Republic Criminal Appeal No. 73 of 2013*** to support the submissions on proof of the elements of defilement. He submitted that the prosecution has a duty of proving all the elements of the offence beyond reasonable doubt. He took issue with the evidence of PW2 that 29th April 2019 was a Friday and not a Thursday as testified by her; that it is not possible for the victim to accompany a person who is a stranger to her to his house; that it is not possible for the offence to have been committed in a plot with many people and the victim fail to her scream.

He submitted that the trial Magistrate erred in relying on the evidence of PW2 to convict him. He questions the evidence of PW2 and terms her evidence as incredible. He cited **Mohamed Swale Kaeze v. Republic [2005] eKLR** to support his submissions that the credibility of a key witness is important as it goes to the core of the evidence of identification.

He submitted that vital witnesses were left out and singled out the Festus and her father were not called to testify. Nor did the Appellant's next door neighbour, the man mentioned in evidence who went to Appellant's house on Sunday. He submitted that failure to call a vital and reliable witness by the prosecution could lead the court to presume that the evidence of that witness, would have been unfavourable to them. He cited **Paul Kanja Gitari v Republic (2016) eKLR** to support his submissions.

He submitted that the trial court failed to analyse the evidence tendered to determine the criminal culpability of the Appellant; that there was no direct, cogent, convincing and compelling evidence to warrant the conviction of the Appellant and that the evidence tendered fell short of the standard required in a criminal trial. He prays that this Appeal be allowed and that he be set free.

On its part, the prosecution has submitted that the case against the Appellant has been proved beyond reasonable doubt and that all the elements of defilement have been proved. It is submitted that the victim testified that the Appellant had sex with her and that she felt pain because this was her first sexual encounter. It is submitted that there is evidence from the doctors who attended to the victim after defilement showing that the victim suffered lacerations on her genitalia and that the hymen had been broken with foul smelling discharge probably due to dried blood.

The prosecution submitted that the age of the victim has been proved through her birth certificate to be 15 years of age and that the identity of the accused person as the culprit that committed this offence. It is further submitted that the victim was locked inside the Appellant's house for three days all this time being defiled and therefore she had ample time to observe the Appellant during this time and later identify him to the police. It is submitted that there is no discrepancy in identifying the perpetrator. It is submitted that this Appeal lacks merit and ought to be dismissed.

Analysis and Determination

As the first appellate court, I am required to consider and analyse all the evidence produced before the trial court and determine the matter with a view to arriving at an independent conclusion. I have taken time to read all the evidence presented in the lower court. I have given myself some allowance that I did not see the witnesses testify to observe their demeanour. I will deal with the issues as raised.

The offence of defilement is defined under Section 8 (1) of the Sexual Offences Act as follows:

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

"Penetration" is defined under Section 2 of the same Act to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

From the definition of defilement captured above, it is clear that the following are the ingredients that make the offence of defilement complete:

(i) Identity of the person committing defilement.

(ii) Act causing penetration.

(iii) A child as the victim of that act causing penetration.

Put differently, the prosecution in a trial for the offence of defilement must prove the age of the complainant; they must proof penetration and positive identification of the assailant. These are the elements that the Appellant claims were not proved. The State on the other hand submits that these elements were proved. I have considered the evidence of MM, the victim. She testified that she was sheltering from the rain. It got late and she feared going home lest her mother accost her for coming home late. She told the court that on 29th April 2016, she was standing next the Tusky's when the Appellant approached her and asked her whether she was waiting for someone to which she said she was. He asked her where her home was. She told him that her home was in Kware to which he told her that they go to his house which was nearby. She then accompanied him to his house. according to her evidence she believed the Appellant had a family. This was not so and on arriving at his home, he defiled her under threats of a knife. He kept her in his house from Friday 29th to Sunday all the time defiling her. According to her testimony, the Appellant locked her inside and stayed with her until Sunday when he allowed her to leave.

Further evidence shows that M.M led police to the house where she had been kept captive and identified the Appellant to the police.

I have considered the issue of identification of the Appellant as the culprit. I have read the well-reasoned judgment of the lower court. On this issue the trial magistrate stated as follows:

> ***"From the evidence it has been established that the complainant was defiled repeatedly over a period of 3 days. While she met the accused for the first time, on the day she went missing on the 29/04/2016 she was in his company for a period of about 72 hours before he released her. There is no evidence that he concealed his identity at any time. She had ample time to see his face during the 3 days he held her and repeatedly defiled her. She was clear that it was the accused who defiled her."***

On the issue of identification, I have considered the evidence tendered in the lower court and I am satisfied that the Appellant was positively identified by the victim. For three days, the victim was in the presence of the Appellant, defiling her and confining her inside his house. The victim has all the opportunity to see the Appellant and be able to identify him to the police for arrest and to the court during the trial. I harbour no doubt in my mind that the Appellant was positively identified and the perpetrator.

On the issue of age of the victim, the record is clear that a copy of her birth certificate was produced in evidence as Ex. 1. I have seen it. It shows that MM was born on 21st September 2001. This makes her age at as 2016 when this offence was committed to be 14 years. The same finding was made by the trial court in stating that:

> ***"The age of the complainant has not been contested. I am satisfied that age has been sufficiently proved. As at 2016 when offence was committed, she was 14 years old."***

I have considered the issue of penetration. The evidence by MM is that the Appellant defiled her subjecting her to pain and suffering for the entire time he held her captive in his house. There is evidence that the Appellant used a knife to threaten her to submission. There is medical evidence confirming penetration took place. MM was examined both at the Nairobi Women Hospital by Clinical Officer Mbugua. This officer testified as PW3. He found lacerations on the girl's genitals measuring 2cm, bruises and broken hymen. He also found foul smelling discharge from her vagina indicative of dried blood. He concluded that the girl has suffered traumatic penile-vaginal penetration injury consistent with the history and surgical finding.

MM was examined again on 5th May 2016 by Dr Maundu (PW5) at the Police Surgery. She was found with bruises on her vagina with broken hyment with fresh heals. The doctor also concluded that she had suffered trauma.

I have noted that the specimens taken to the Government Chemist for analysis did not yield any positive results. It seems that the specimen were not properly preserved and stayed for long before they were analysed. I however do not harbour any doubt in my mind that the act of penetration has been proved beyond reasonable doubt.

There are other issues raised by the Appellant in respect of this Appeal. He has raised the issue that the prosecution failed to call certain witnesses. I have considered this issue. It is true the father of Festus was not called to testify. Nor was the neighbours of the Appellant, or even Festus. In my view, though it would have enriched the case for the prosecution to call these witnesses, failure to call them is not fatal to their case. In my view, there is ample evidence to point to the Appellant as the perpetrator; to proof penetration took place and that the victim is a child as defined by law. I have also noted that the trial court was alert to the dangers of relying on a single identifying witness and has addressed that issue. The trial magistrate stated as follows:

> ***"I have analyzed the evidence and looking at the case in totality, I am persuaded that the complainant had sufficient opportunity to clearly see and identify the perpetrator. She is the sole identifying witness. The accused extensively cross-examined the minor complainant in court. She did not falter and was clear that it was the accused who defiled her. She was repeatedly defiled in a traumatic manner over a period of three days. She was a persuasive witness. I am satisfied that she was telling the truth."***

This court did not have a chance of observing the girl testify. I am however satisfied that her demeanour impressed the trial court. The trial magistrate applied the law on the risk of relying on the sole evidence of a single identifying witness. On this point, she stated that:

> ***"I have duty warned myself of the risk of relying solely on her evidence. I am duly guided by Gikonyo J who in Julius M'birithia vs. Republic Meru Criminal Appeal No 111 of 2011 eKLR stated thus…..****the court before convicting on evidence of identification by a single witness should warn itself of possibility of mistaken identity. The trial court should carefully evaluate such evidence with utmost thoroughness in order to be satisfied that it is safe to convict****…"***

I am satisfied that the law has been followed and that the trial court was conscious of the dangers of relying on the evidence of a sole identifying witness.

The Appellant has submitted that there were contradictions in the evidence of the complainant and that her evidence was incredible. He gives as an example evidence that the complainant left home on Thursday thereby contradicting her mothers evidence that it was a Friday. I have seen the evidence of the complainant especially on cross-examination. I have noted that she states that she left home on 29th April 2016 a Friday. I find no contradictions in her evidence. She has clarified that she was defiled from Friday to Sunday when she went home.

Turning to the grounds of appeal listed by the Appellant, it is my finding that there is sufficient evidence to prove beyond reasonable doubt that the elements of the offence of defilement have been proved.

On second ground of appeal, I find no fault in the evidence of the complainant. She is a credible witness. Her evidence has been tested through cross-examination and was found not wanting. Her evidence on penetration has been corroborated with medical evidence. Failure to

call the people identified as witnesses did not weaken the prosecution case and is not, in my view, prejudicial to the Appellant; the trial court properly evaluated all the evidence tendered before her, analysed the same and properly relied on the law to arrive at the conclusion she did. Lastly, the trial court arrived at the correct conclusion that the prosecution discharged the burden of proof and the threshold of the standard of proof was met.

Section 8 (2) of the Act provides that:

> ***"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. (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

The penalty for defilement of a child aged between 12 and 15 years is provided under Section 8 (3) of the Act:

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

The Appellant was sentenced to serve 20 years imprisonment. This is the minimum sentence allowed by the Act. I find no merit in this appeal. The Appeal is hereby dismissed. The Appellant shall continue serving sentence as pronounced by the trial court. Orders shall issue accordingly.

Dated, signed and delivered this 25th November 2021.

S. N. MUTUKU

JUDGE