REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. E014 OF 2021

JACOB NTOITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence

by Hon. P.M Wechuli SRM in Tigania S.O No. 30 of 2017 on 6/11/2020)

JUDGMENT

1. The appellant, Jacob Ntoiti was charged with the offence of defilement contrary to **Section 8 (1) as read with Sub-section 3** of the **Sexual Offences Act No. 3 of 2006** which charge sheet alleged that on 23/8/2017 at [Particulars Withheld] location in Tigania West sub-county within Meru County, he intentionally caused his penis to penetrate the vagina of **BK ("the complainant")** a child aged 10 years old.

2. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006** on which the charge shee**t** alleged that on the same day and place, he intentionally touched the vagina of BK a child aged 10 years old with his penis.

3. On being presented to court to face the charge, he pleaded not guilty, was tried at a prosecution where the accuser called four witnesses while the appellant gave a sworn statement in his defence. By a reserved judgment, he was convicted on the main charge of defilement and sentenced to serve life imprisonment.

4. He was dissatisfied with the conviction and sentence and lodged this appeal setting out 8 grounds of appeal as follows;

a. The trial court erred in law and fact by failing to note that the prosecution did not prove its case beyond any shadow of doubt

b. The trial court erred in law and fact by failing to properly establish the age of the victim i.e through age assessment and/or birth certificate, yet age of the victim was a critical element to prove the offence of defilement

c. The trial court erred in law and fact by failing to observe the mandatory provisions of Article 50(2)(g)(h) of the Constitution and Section 43 of the Legal Aid Act.

d. The trial court erred in law and fact by relying on fabricated, contradictory and speculative evidence which was marred with a lot of falsehood.

e. The trial court erred in law and fact by failing to note that the vital witnesses (mother of the complainant, investigating officer and the accused boy) were not availed before the court to clear doubts.

f. The trial court erred in law and fact by sentencing the appellant to life imprisonment on the basis of mandatory sentence as stipulated by Section 8(1) of the Sexual Offences Act which was excessive, harsh and unconstitutional considering the advanced age of the appellant.

g. The trial court erred in law and fact by disregarding the facts raised in the appellant's defence of alibi.

h. The trial court erred in law and fact by convicting and sentencing the appellant on incurably defective charge sheet.

5. In his submissions filed on 31/8/2020, the appellant, cited to court the decision in **Philip Muiruri Ndaragua v R (2016) eKLR** submitted that the prosecution failed to prove its case beyond reasonable doubt, as the evidence tendered by the complainant was insufficient to sustain a conviction. He submitted that the trial court's failure to inform him of his right to legal representation under Article 50(2)(g) of the Constitution, since he was facing a serious offence, amounted to miscarriage of justice and a violation of his right. He placed reliance on **Jared Onguti Nyantika v R (2019) eKLR and Daniel Mpayo Ngiyaya v R (2018) eKLR** to support that position. He submitted further that the evidence by PW5 did not link him with the offence as the doctor did not state whether the hymen was freshly broken or not. According to him, the absence of injuries, bruises, inflammation, blood and spermatozoa was proof that penetration had not been established. He referred to **P.K.W v R (2012) eKLR** on the numerous incidences when hymen can break, and therefore its absence alone is not sufficient proof of defilement. He alluded to material contradictions in the evidence adduced by the prosecution witnesses, which, he contends, casts doubt on their credibility and cited **Rankrishan Panoya v R(1957) 339** in support of the proposition that the court should not rely upon inconsistent evidence. He submitted that he was neither positively identified as the perpetrator of the offence nor linked with its commission. He faulted the prosecution for failing to call the mother of the complainant and the accused boy, who according to him were vital witnesses, to shed light on how the complainant had been defiled. He felt that the investigating officer had conducted shallow and shoddy investigations by failing to call key witnesses to testify, then cited **Bukenya v Uganda (1972) and John Kenga v R Criminal Appeal No.118 of 1984**, on the need to call vital witnesses and the consequences of failure to call such witnesses.

6. On sentence, he submitted that the mandatory life sentence imposed on him was harsh, excessive and unconstitutional as was stated in **Christopher Ochieng v R (2018) eKLR, Jared Koita Injiri v R(2019)eKLR and Francis Karioko Muruatetu & anor v R(2017)eKLR**. He faulted the trial court for rejecting his defence which not only contained some reasonable facts to support his acquittal, but also was unshaken by the prosecution case. He urged the court to scrutinize the evidence tendered by the prosecution witnesses and arrive at a different conclusion.

7. In praying for his appeal to be allowed, he concluded that the charge sheet was fatally defective because he was erroneously convicted with the section he was not charged with, which occasioned miscarriage of justice and prejudiced him.

8. The respondent/prosecution's submissions were to the effect that it had proved the inextricable elements of defilement as outlined in **Moses Mwarimbo Dau v R (2018) eKLR**, hence the sentence meted out to the appellant was within the law. On the age of the complainant, it was submitted that the clinical card produced as Exh.5 together with the P3 form proved that the complainant was aged 10 years and the decision in **Joseph Kiet Seet v R (2014) eKLR**, cited for the proposition that the age of a victim can be determined by medical and other cogent evidence. The respondent then took the position that the evidence of PW1, that she had been defiled, was corroborated by PW2, PW3 and PW5. On the identification, it maintained that the evidence by PW1 on who had defiled her was corroborated by PW2 and PW3, who found him in the act in broad day light, and therefore there was no margin of error as to the identity of the assailant, who was well known to PW1. It was concluded that the appeal should be dismissed and the sentence upheld, as the evidence adduced was solid.

9. In advancing its case against the appellant, the prosecution called 5 witnesses. **PW1, the complainant,** gave sworn testimony that the appellant, whose home was far from theirs, told her to go to his place to fetch cooking flour and she went with him. The appellant then locked the door to his one roomed house, which had plates, cups, plastic containers, a bed but there no seats. The appellant removed her biker, panty and using his "thing" did bad manners to her on the bed, at the place she used to urinate with (pointed out her crotch). She felt pain in her private parts as he did bad manners. He then left after the act and PW2 and PW3 came to look for her. They told the appellant, who was in the house, to leave her alone. She told her mother what the appellant had done and was taken to the hospital, where tests were done and she was given medicine. She went to the police station to record her statement.

10. During cross-examination, she admitted that she was in the company her 2 brothers but denied taking the appellant's cooking flour and that it was the appellant who gave her the flour. She denied having run away leaving her friend back with some sugar. During re-examination, she stated that it was the appellant who called her and did bad manners to her after he had requested her to go and make tea for him.

11. PW2 BM, a minor gave sworn testimony that on the material day, he was looking after animals. He went to the old man's house, where he found PW1 and the old man, sleeping on the bed without clothes. The old man was on top of PW1 and he knew they were doing bad manners. When the old man saw him, he told PW1 to wake up and make them tea. He was with PW3 when PW1 and the old man put on clothes and she made tea. They left PW1 and the old man there and went to look after goats. They came back the 2nd time and found that PW1 and the old man had removed clothes again. PW1 told their mother. They had never been to the appellant's place before and what the old man did was wrong. He did not know the old man before but the old man had passed their home after the incident while going to the shops. After pointing at the appellant on the dock, he stated that did not know when he was arrested. The old man had told PW1 to go for cooking flour and that is how they knew she was there. The door was not locked and PW1 was not crying and she stayed at the appellant's place for a long time.

12. During cross examination, he stated that he was with PW3 and PW1 was already in the appellant's house. The appellant called PW1 as he came from the shops to go for cooking flour. The appellant had bought 2 kilos of flour and he wanted to give him 1 kilo. The appellant told PW1 to pick the flour and take it to PW2's elder married sister to make porridge. He stated that the appellant usually greeted them as he passed by their home. He stated that the appellant knew the husband of his married sister and that PW1 left first while they went for the goats. He denied that they had stolen any sugar and stated that their mother had told them to go and tell PW1 to go home.

13. PW3 EM, a minor gave sworn testimony that on the material day at 2 pm, he and PW2 had gone to look after goats when they found the appellant, the old man in bed with PW1, their sister, in the appellant's house. PW1 and the old man did not have clothes on and he found the old man lying on PW1. He did not know the appellant before. When the appellant saw them, he put on clothes and told PW1 to make them tea, which she did. They left PW1 and went back to the goats only to return again where they found the appellant and PW1 sleeping again. They left with goats, PW1 went home and PW2 told their father. He recorded his statement at the police but he could not remember when the appellant was arrested.

14. During cross examination, he stated that the appellant had gone with PW1 to his house then PW2 and him and went later. The appellant, who neither sold flour nor had a shop, told PW1 to go for cooking flour. The appellant gave PW1 1 kilo and they left her at the appellant's

place and went with goats. There was a day the appellant had called them. It was not on Sunday the 20th but it was a Saturday.

15. During re-examination, he stated that they did not steal anything from the appellant but he gave PW1 1 kilo of flour.

16. PW4 PC (W) Petronila Mua based at Tigania police Station, the takeover investigating officer stated that all witnesses had testified save for the doctor. She stated that it was alleged that the appellant had defiled a minor.

17. During cross examination, she stated that she was not present during the incident.

18. PW5 Geoffrey Muthomi from Miathene Hospital produced PW1's P3 form as PEx.1, Treatment notes as PEx.2, Lab form as PEx.3, Post Rape Care form as PEx. 4 and Clinical Card as PEx. 5. It was alleged that PW1 had been defiled but at the time of examination, she had taken a bath and washed her clothes. On examination, her hymen was torn and no positive lab results were seen. He made a conclusion of defilement based on the torn hymen.

19. During cross examination, he stated that the appellant was not taken to the hospital for examination.

20. When placed on his defence, the appellant, a resident of [Particulars Withheld], denied committing the offence. He stated that he left children at home and went to look after goats. One of them came to call him and inform him that PW1 and 2 others had taken food. They ate the food, took away maize flour and ran away. The 3 minors testified as witnesses. He followed them to their home and informed their father M. One week later, they said he had defiled the girl after which he was arrested. He stated that it was a cover up.

21. During cross examination, he stated that on the material day, he was at home. He denied seeing PW1, going with her to the house, defiling her or asking her to make tea on that day.

22. This being a first appeal, the court is duty bound to re-appraise and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See ***Collins Akoyo Okemba & 2 others v R (2014) eKLR.***

23. The issues for determination are whether the offence of defilement was proved beyond reasonable doubt and whether the the sentence meted out was too harsh to call for disturbance.

24. The key ingredients of the offence of defilement are proof of the age of the complainant, proof of penetration and proof that the person before court was the perpetrator of the offence.

25. On age, PW5 produced the complainant's P3 form where her age was estimated to be 10 years. He also produced the complainant's Clinical card as PEx 5 indicating that she was born on 9/2/2007. I am therefore satisfied that the complainant was at the time of commission of the alleged offence aged 10 years old and thus a minor.

26. The next element is penetration which is defined under **Section 2 of the Act** to mean ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person".***

27. The evidence on record which the trial court relied on to convict the appellant was the complainant's own testimony together with the corroborative evidence of PW2, PW3 and PW5 along with the medical documents adduced therein which I have critically analyzed. In his evidence, PW5 told the court that besides the missing hymen there was no positive lab results seen. The only reason why he concluded that there was defilement was the torn hymen.

28. It is clear from the P3 form that the labia minora and labia majora were intact although the hymen was torn. There was nothing else noted as the complainant had taken a bath. I must state that a missing hymen *per se* is not proof of penile penetration, as there are many causes of a missing, torn or broken hymen in a child. The Court of Appeal in ***PKW v R [2012] eKLR***, observed that:

> **"Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen."**

29. However, PW2 and PW3 told court that they had found the appellant lying on the complainant in his bed while they were both naked. That in my view, coupled with the complainant's own testimony is proof of penetration. Consequently, I find that penetration was established beyond reasonable doubt.

30. On whether the appellant was the perpetrator, PW2 and PW3 found the appellant in the act. They testified that they left the house only to return to find the appellant and the complainant had undressed again. PW1 in her testimony narrated how the appellant had removed her biker and pant and that she felt pain when he inserted his "thing" into her private parts. That evidence was not subjected to any cross examination. PW2 and PW3 were brothers to PW1and upon cross examination told the appellant that he would pass by their home and greet them. They deemed him the person who had married their sister. From the totality of the evidence, it is clear that the appellant was well known to PW1, PW2 and PW3 prior to the incident. Evidence was also led that the offence took place in broad day light, and therefore the

circumstances for positive identification were favourable.

31. I therefore have no doubt in my mind that the appellant was positively identified as the perpetrator of the offence by PW1, PW2 and PW3. I find that the evidence was consistent, reliable and corroborative and that the offence was sufficiently proved beyond reasonable doubt. Having established that all the ingredients of defilement were proved to the requisite standard, I find that the conviction of the appellant was safe and deserve no disturbance.

32. On the allegation by the appellant of non-consideration of his alibi defence, I find that no such defence was raised or/and existed. The appellant in his defence stated that he had been charged to cover up the alleged theft of his flour and food by PW1, PW2 and PW3. I note that the trial court keenly evaluated his defence alongside the overwhelming evidence by the prosecution witnesses, and found the same to be implausible.

33. On failure by the prosecution to call PW1's mother and the accused boy to testify, who according to the appellant were crucial witnesses, this issue has been addressed by **section 143 of the Evidence Act** which provides that, no particular number of witnesses shall, in the absence of any provisions of the law to the contrary, be required for proof of any fact. In ***Julius Kalewa Mutungu v Republic (2005) eKLR,*** the court held that as a general principle, **"the prosecution is granted a discretion whether or not to call specific witness and courts would not interfere with that discretion unless it is shown that the prosecution had an ulterior motive in which event it will be presumed that the witness not called would have given adverse evidence."**

34. The prosecution called 5 witnesses in support of its case and I find that the evidence led herein was adequate to sustain the charge. Moreover, it would be an act in vanity for the prosecution to call superfluous witnesses just because they had been mentioned by prosecution witnesses called to testify.

35. The remaining question now is whether the sentence meted out to the appellant was harsh. **Section 8(2)** of the **Sexual Offences Act** provides for a mandatory minimum sentence of life imprisonment, where the victim is aged 11 years or less. Although the appellant was charged under Section 8(1)(3) of the Sexual Offenses Act but convicted under Section 8(1)(2) of the said Act, I find that since the age of the victim was established beyond any shred of doubt, the sentence was within the law.

36. In the end, I find the appeal to be wholly unmerited and the same is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF NOVEMBER, 2021

PATRICK J.O OTIENO

JUDGE

In presence

Mr. Maina for the respondent

Applicant in person

PATRICK J.O OTIENO

JUDGE