



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO. 51 OF 2019**

**NMK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal from the Judgment of Honourable J. Irura PM in the Principal Magistrate's Court at Nkubu S.O No.35 of 2018, delivered on 12<sup>th</sup> March 2019)**

**JUDGEMENT**

1. The appellant was charged with the offence of defilement contrary to **Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that the appellant on the 13<sup>th</sup> day of September 2018 at about 1400 Hrs in Meru County did an act which caused penetration with his genital organ (penis) into the genital organ (vagina) of MN a child aged 9 years.
2. The trial court convicted and sentenced the accused to serve a life sentence. The accused was aggrieved by his conviction and sentence which led to this appeal. The Appellant appealed based on seven (7) grounds as follows:-
  - i. That the learned Magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent contradictory and conflicting testimonies.
  - ii. That the Learned Magistrate erred in law and fact by failing to note that the prosecution case was not proved beyond reasonable doubt.
  - iii. The Learned Magistrate erred in law and fact by failing to note that the doctor who examined the complainant testified that no injuries were seen in the private parts of the complainant.
  - iv. That the Learned Trial Magistrate erred in law and fact by sentencing the Appellant to life imprisonment on the wrong section of Sexual Offences Act.
  - v. That the Learned Trial Magistrate erred in law and fact by rejecting the Appellant's defense without giving cogent reasons
  - vi. And vii the Appellant required to be furnished with court proceedings and judgment to draft more cogent grounds for the appeal and also to be present during the hearing of the Appeal.
3. The prosecution called six (6) witnesses to support their case. **PW1 MN** stated that she was born in 2009 and is in class four. She stated that she lives with in her grandparents while her father and uncle live in the same compound. That on 13/9/2018 at about 2.00PM she went home as she had been sent home due to school fees. When she got home she found her father alone. He later called her from her grandmother's house with the intention of sending her to the shop. When she got there he told her to enter into the bedroom and go up to the bed.
4. He then came to the bedroom and covered her mouth with a blanket. He then proceeded to remove all her clothes and his clothes and then began doing bad manners to her. He used his part for urinating and placed it on her part for urinating. He tried to insert it for some minutes but he could not go in. She felt a lot of pain and she started bleeding. He dressed her and he also put on his clothes. She started crying and he told her that he loved her. He chased her away and she went to Agnes whom she told her what had happened. She accommodated her in her home.
5. On 14/9/2018 she went back home at about 7.00AM where she found her grandparents whom she informed of the incident. Her father then came and chased her away while her grandparents were there. She went to Nancy Kaari whom she informed what had happened. She stayed with her from 14/9/2018 to 19/9/2018. Nancy called the sub area who took her to the police station. She was accompanied by Nancy,

her grandfather and the sub area. She was then taken to Huruma Centre. Since she refused to go home she was taken to hospital by the Children Officer on 20/9/2018 where she was treated and given medication.

6. **PW2 Nancy Kaari Euphrasio** neighbor to the complainant testified that on 17/9/2018 at 4.00PM she was at home when the complainant came and told her that she had been chased away by her father. She explained to her how on a Thursday her father defiled her. She let her stay at her home as she was getting help for her. She called the sub Area Muriungi who came the following morning. They then went and reported the matter at the police station.

7. **PW3 Robert Muriuki Murungi** area manager of the village testified that on 17/9/2018 he received a call from one Charles Gitonga, who is the husband of **PW2**, and **PW2** as well. They informed him that there was a child who had been defiled by her father and was at their home. After work he proceeded to their home where she found child. **PW1** told him what had happened and she said that she would not go back home as it was her father who defiled her. She told her grandparents what had happened but they did not take action. They even told her not to tell anyone. He then called the Children's officer who advised that the child be taken the following day to Igoji Police Station of which he told Charles and **PW2** to take **PW1** to do so.

8. **PW4 MM** grandfather to **PW1** and father to the accused told the court that on 13/9/2018 he came back home at 6.00PM and did not find anyone. By the time he was sleeping she had not returned. When his wife came back he informed her that their granddaughter had not spent the night at home. They looked for her but they could not find her. At about 6.00AM **PW1** returned home and found him alone. When he asked **PW1** where she had been she kept quiet. He does not know why his granddaughter left home.

9. **PW5 Seberina Kaimatheri** clinical officer at Kanyakine Sub County Hospital produced the P3 form which had been filled by Moses Baiyane. On examination the child who was aged 9 years old had no physical injuries her body. She was treated after five days of the incident happening. Her private parts were lacerated and were reddish and her hymen broken. There was no discharge noted. It was opined that the bruises on the genitalia and it being reddish and the hymen broken was suggestive of penetrative sexual intercourse.

10. **PW6 No. 91469 PC Oscar Lwango** the investigating officer recalled that on 18/9/2018 he received a Voluntary Children Officer based at Igoji by the name Charles Kiago accompanied by MN. He explained that he had received a report that MN had been defiled by the father. He interrogated the child who explained that she was 9 years old. That on 13/9/2018 when she got home she found her grandparents were not there but her father was there in his house. She went to her grandmother's house and went to her room to sleep. While inside the house she heard her father call her to his house. The two homes are about 10 meters apart. She went and he ordered him to enter the house and called her to the bedroom. He then ordered her to remove her clothes and climb over the bed. The accused then removed his clothes and lay on her. He covered her mouth had sexual intercourse with her by inserting his penis into her vagina. After that the accused told her not to tell anyone what had happened as he would kill her. After that the child run out and found that her grandparents had not returned, thus she fled the homestead. She went to the home of Nancy Kaari who noticed that the child was injured and accommodated her in her home. The informed the Sub Area informed Charles Kiragu who brought the complainant to the station. He recorded their statements and issued them with a P3 form. After investigations he arrested the accused.

11. At the close of the prosecution's case the accused gave a sworn testimony. **DW1 NKM** testified that he did not commit the offence for which he has been charged with. His daughter was left by her mother whom she continued taking care of her. That a group of people came and said they wanted to sponsor his daughter. Then he was arrested and charged.

12. This matter was canvassed by way of written of submissions. The respondent submitted they proved all the ingredients of the offence of defilement beyond reasonable doubt. Thus, the trial magistrate did not err in conviction and sentence as the evidence adduced was solid. The Appellant was in court when directions were taken that appeal was to be disposed by way of written submissions and the DR was directed to supply him with the records of appeal and when the date for judgment was taken on 31<sup>st</sup> October 2019 he was present but he appears not to have filed any submissions. This court has therefore perused the records trial court to determine the appeal inconsideration of the submissions by the Respondent counsel.

13. This being a first appeal this courts duty if to revisit and re-evaluate the evidence before the trial court a fresh, assess it and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Okemo vs. R [1977] EALR 32**

14. The issues for determination are ***whether the ingredients for the offence of defilement under Section 8 (1) of the Sexual Offences Act*** were proved by the prosecution namely :

1. Age of the complainant
2. Proof of penetration
3. Positive identification of the assailant.

15. On age of the complainant, **PW1** stated she was born on 2/1/2009. **PW5** who produced the P3 form which stated that she was nine years old. The child's health card showed that she was born on 29/1/2009. The exhibit was not challenged. Therefore, I am satisfied that the trial magistrate did not error when she found that the complainant is a child aged eleven (11) years or less.

16. On the issue of penetration, ***Section 2(1) of the Sexual Offences Act*** defines penetration as:

***“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”***

This position was fortified in the case of Mark Oiruri Mose v R [2013] eKLR when the Court of Appeal stated thus:

***“Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ.”*** (Emphasis added).

17. **PW5** stated that when the child was examined five days after the incident, it was noted that there were lacerations on the vagina with reddening of the wall, hymen broken but there was no discharge. This was suggestive of penetrative sexual intercourse. Consequently, I am satisfied that the prosecution proved the ingredient of penetration.

18. Lastly, positive identification of the assailant. It should be noted that before **PW1** gave her testimony she was subjected to *voire dire* examination. The court noted that she appeared intelligent but was apprehensive to give evidence on oath. She went ahead and gave unsworn evidence under cross-examination by the appellant.

19. **PW1** stated that when her father called her with the intention of sending her to the shop he told her to enter his house and go to the bedroom. He came removed her clothes as well as his and lay on her. He used his part for urinating and placed it on her part for urinating. He tried to insert it but it could not go in. She was in a lot of pain and she was bleeding. When he was unable to take it in he dressed her and then left the house. He followed her and then chased her away. There was no one at home when the incident happened. She went to one Agnes where she spent the night. On 14/9/2018 she went back home at 7.00AM and informed her grandparents who did not do anything. He father chased her away again and this time she went to **PW2**. There was no one at home when the incident happened.

20. According to **Section 124 of the Evidence Act** it stipulates that :

***“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

***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.”***

21. In spite of the above, **PW1’s** testimony is corroborated by the evidence of **PW4**. **PW4** told the court that he does not know why his granddaughter ran away. But he confirmed to the court that he told the police that **PW1** fled for fear of her father. He added that when his wife went to look for the child she traced her at Kaari’s house which is where **PW1** stayed for some time. The Appellant complained that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies. I have looked at the evidence of the complainant and she says she was defiled on 13<sup>th</sup> September 2018 at 2.00 pm. The Grandfather (**PW4**) corroborates her evidence that on 13<sup>th</sup> September 2018 he came home at 6.00 pm and he did not find her grand-daughter as she had sought refuge at a neighbours home after the accused defiled her and subsequently chased her away from home. The only contradiction is the date when complainant went to **PW2’s** home because she says it was on 14<sup>th</sup> of September 2018 whereas **PW2** says that the complainant went to her on 17<sup>th</sup> September 2018. The inconsistencies as to the date when **PW1** went to **PW2’s** home is not a material contradictions that is fatal to the case. This was so stated by the Court of Appeal in the case of Richard Munene v Republic [2018] eKLR where it stated as follows:

***“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”***

22. The appellant did not provide an explanation as to where he was when the offence occurred. He was the only parent of the child as his wife had left and he had a duty of care for the child but the child had been away for several days but did not bother to look for her. He does not deny that he chased away the child on 13<sup>th</sup> and 14<sup>th</sup> of September 2018 and his father **PW4** confirms that the child ran away from home from fear of the Appellant. The Appellants defence was a mere denial and the trial court noted that he was not able to rebutt the prosecution case. It was also noted that the Appellant did show that there existed any grudge between him and the witnesses who testified to warrant them framing him up. just states that he did not commit the offence. Moreover, when a group of people came alleging to sponsor his daughter he was arrested and charged. Therefore, I am of the view that the prosecution proved that the accused was identified as the assailant.

23. Accordingly, I find that the appeal is unmeritorious and the same is dismissed.

**HON A. ONG’INJO**

**JUDGE**

**JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 23<sup>RD</sup> DAY OF JANUARY 2020.**

**In the presence of :**

C/A: Kinoti

Appellant: Present in person

Respondent: Ms Mbithe for the state.

**HON A. ONG'INJO**

**JUDGE**