REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 42 OF 2018

YAKUBU ISMAIL DOKOTA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Resident Magistrate Court at Hola Criminal Case No. 194 of 2016 by Hon. M.D. Kiprono (SRM) dated 16th December 2016)

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 were that on 30th May 2016 at [particulars withheld] Township, in Tana River Sub-County within Tana River County, the Appellant intentionally caused his penis to penetrate the vagina of ZS a child of 7 years old.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that on 30th May 2016 at [particulars withheld] Township, in Tana River Sub-County within Tana River County, the Appellant intentionally touched the vagina of ZS a child of 7 years old with his penis.

3. The Appellant denied the charges and the matter proceeded to full trial. The prosecution called seven witnesses in support of its case.

4. PW1 (ZS) the victim, after voire dire examination gave her sworn statement. She told the court that she was 6 years old and she lived at Mwanagaza and attended [particulars withheld] nursery. That on the day of the offence she was alone heading home from school, using the hospital route, when the Appellant who worked at the hotel in the hospital called her. That the Appellant gave her tea and mandazi and when she had finished eating, the Appellant asked her to pay but she did not have any money. That the Appellant pulled her into the kitchen, removed her pants and he removed his trousers and did "tabia mbaya" (bad manners) by putting his penis in her vagina. The Appellant threatened to cut her if she screamed. Afterwards he told her to leave and not to tell anyone. She went home while she was crying and bleeding and that her clothes had blood on the front.

5. The victim further told the court that she met with a neighbour Gutayo (PW6) who informed her mother and she was taken to hospital. She said that at the time of the incident there was no one in the hotel and that the Appellant had locked the front doors. She described the hotel as having two rooms and a cement floor. She said that she could see the person who defiled her in court but she did not know his name. She stated that it was not the first time and that the Appellant had defiled Z (PW2) before.

6. ZS PW2, gave a sworn statement after voire dire was conducted. She told the court that she lived at [particulars withheld] and that she was in nursery and she went to school with PW1 at [particulars withheld] Primary. She said that some days they used the [particulars withheld] route when going to and from school while on other days they used the hospital route. She told the court that there was a hotel and shops at the hospital. She said that on the 30th May 2015 she was not with PW1. That one day she was in the hotel together with PW1 when he the Appellant told PW1 to go out. That the Appellant took her to a room defiled her and then gave her money which she shared with PW1. She said that she never told anyone about it. She told the court she never saw PW1 being defiled but she saw her blood stained clothes.

7. PW3 NHS, was the victim's sister. She told the court that she was working at Chewani on 31st May 2016 and came back the following day when she found PW1 crying. That PW1 told her that she had been defiled. She took her to hospital where she was admitted for one week. They reported the matter to the police and were issued with a P3 form. She said that the victim told her she would show her the person who defiled her. She took her and PC Mwanaharusi Ali (PW7) to the hotel where the Appellant operated but he was not there. That when they inquired they were informed that the Appellant had left employment.

8. PW6 Dr. Ashako Wario was the doctor from Hola County Referral hospital who examined the victim. He told the court that the victim was brought on 13th June 2016 for examination for alleged defilement. He said he was unable to conduct an examination as the victim was restless and crying. He said that even though he was with a female clinical officer the victim refused to he down as she resisted all attempts

and screamed and kicked around. That he recorded that the victim had post traumatic disorder. He also saw the victim's treatment notes from an earlier exam and noted that her virginity had been broken and it was concluded that she had been defiled. He produced the P3 form (Pexh 1) which he filled. He also stated that Madube, the clinical officer in-charge, conducted an age assessment and that the victim was 7 years old. He produced the age assessment report (P.Exh 2).

9. PW5, was Dr. John Mwangi from Hola County Referral Hospital. He produced another P3 form (P.Exh 4) which had been filled by Dr. Nassir on the 11th August 2016. He informed the court that Dr. Nassir was away on training in Malindi and that he had worked with her and he knew her handwriting. He stated that the victim had been treated earlier and the doctor filled the P3 based on the treatment notes (P.Exh 3) which he produced. He stated that the victim had a swollen abscess on her private parts with pus and bartholimitis was noted. That the victim's hymen was broken and there was active vaginal bleeding. He stated that he knew the clinical officer who did the treatment as he had worked with him for more than six months.

10. PW6, Florence Gutayo, told the court that on 30th May 2016 she was visiting a friend at Mwangaza when she came across PW1 who was injured and was walking with difficulty and was crying. That they took PW1 to hospital. That PW1 told the doctor that a man who worked at the hotel had defiled her.

11. PW7 PC Mwanaharusi from Hola police station was the investigating officer. She told the court that on 31st May 2016 she received a report that a girl had been defiled. She went to the hospital where she found the girl had been hospitalized. That PW1 could not walk and her parts were swollen and bleeding and she was admitted. That when she returned to hospital on the 1st June 2016, PW1 told him she was defiled at a hotel within the hospital. Together with sergeant Kwendo the found a doctor who was the chairman in-charge of the canteen who informed them that the person who worked there had left work. That she called the Appellant who said he was at umoja. She further told the court that she followed up with the P3 and that the girl was not examined as she was traumatised.

12. At the end of the prosecution's case, the trial court found a *prima facie* case against the Appellant and placed him on his defence. The Appellant elected to give an unsworn statement.

13. He told the court that while working at the hotel he disagreed with the supervisor who was a nurse over money. That he would give the money collected to the nurse but she failed to submit it. That the medical officers were unhappy and blamed him for the shortage so he left employment on the 20th February 2016. That on 31st May 2016 the supervisor called him and asked his whereabouts. After he told her he was in umoja, the supervisor hung up. That on 11th June 2016, he had left a supermarket in town when he met a police officer who asked his name and whether he was from the hotel. That the police officer informed him that a girl had been defiled and alleged that he had failed to honour police summons. He was arrested and charged with the offence. The Appellant further told the court that PW3 used to supply vegetables to the hotel and that when he stopped buying them from her, she threatened him and urged him to buy from his people of somali origin. That he was sacked immediately thereafter.

14. At the end of the trial, the learned magistrate found the Appellant guilty. He convicted and sentenced him to life imprisonment.

15. The Appellant being aggrieved by the conviction and sentence lodged his homemade amended petition of appeal on 30th September 2019. His three grounds of appeal were that the court erred in relying on the evidence of a witness which was insufficient to warrant a conviction; that the trail magistrate erred in admitting the evidence of PW4 and PW5 which had gaps and inconsistencies, and; that the sentence was manifestly harsh and excessive and in breach of Article 50 (2) (p).

16. At the hearing of the appeal on 5th November, 2019, the Appellant relied on his written submissions filed on 30th September 2019. A summary of his submissions were to that the trial magistrate relied on the evidence PW1 which was questionable. He argued that it was not possible that the victim, being a minor of 7 years old, did not cry or scream when being defiled by an adult for the first time and that it was not possible for her to walk without difficulty if indeed she had been defiled. He relied on the case of **Ogeto vs Rep Cr. App 1 of 2014** which held that the court had to believe that the victim was telling the truth before it relied on the evidence of a single witness. He submitted that the victim was coerced to fabricate the case against him.

17. It was the Appellant's further submission that the medical evidence produced by PW4 and PW5 was inconsistent and did not prove that the victim was defiled. He submitted that PW4 was unable to examine the victim to ascertain if she was defiled and that the analysis by PW5 was wrong. He argued that bathlimitis abscess was caused by a bacterial infection due to poor hygiene and not as result of defilement. He contended that the medical evidence was not satisfactory and that the conviction was unsafe. He relied on the case of **Rose Ouma Otawa vs Rep (2011) eKLR** and **Boniface Chitsango Ngoba vs Rep (2018) eKLR.**

18. Lastly, the Appellant submitted that the sentence was manifestly harsh and excessive as the phrase "shall be liable upon conviction" was the maximum sentence and not the mandatory sentence as held in **Daniel Kyalo Muema vs Republic (2009) eKLR.** He contended that he was a first offender and he should have benefited from the least severe punishment as prescribed in Article 50(2) (p) of the Constitution. He further submitted that the life sentence denied him his right to mitigation in contravention of section 216 of the Criminal Procedure Code.

19. The Respondent opposed the appeal in its entirety through its submissions dated 5th November 2019 which it also relied on during the hearing. The submissions were to the effect that all the elements of defilement had been proved to the required standard during trial. That penetration was proved by medical evidence as contained in of the P3 form. On the sentence, the Respondent submitted that the wording of the SOA was mandatory and that the court was bound by the law and it left no room for discretion.

20. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

21. I have considered the grounds of appeal, the record and the respective submissions. The primary issue for determination is whether the prosecution proved its case against the Appellant beyond reasonable doubt. The second issue is whether the sentence was lawful and appropriate in the circumstances of this case.

22. On whether the prosecution proved the case beyond reasonable doubt, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

23. It is also trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement, and; secondly it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic Criminal Appeal No. 169 OF 2014 [2015] eKLR**.

24. It is a well established principle that the age of a complainant can be determined by medical evidence in absence of any documentary evidence age as was held in **Thomas Mwambu Wenyi v Republic Criminal Appeal NO. 21 OF 2015 [2017] eKLR,** where the Court of Appeal cited with approval **Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2 of 2000** which held that:-

> ***"In defilement cases, medical evidence 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."***

25. PW4 Dr. Ashakok Wario from Hola County Referral Hospital told the court that the victim was taken for age assessment which was conducted by Madube, the clinical officer in charge. He produced the age assessment (P.Exh2) which found that the victim was 7 years old. Besides the age assessment report, the victim told the court that she was 6 years old and in nursery school. I find that the age of the victim was proved by way of the age assessment report. Her tender age was also observed by the court when it administered a *voir dire* examination.

26. On the issue of penetration, it is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. Republic Criminal Appeal No 155 OF 2011 [2013] eKLR** where the court stated that:-

> ***"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."***

27. In this case, the victim (PW1) gave told the court how the Appellant pulled her into the kitchen, removed her pants and then he removed his trousers before proceeding to defile her. In her words, she said that he did "tabia mbaya" to her. This court takes judicial notice that Kenyan children often use the words "tabia mbaya" to refer to sexual intercourse. He threatened to cut her if she screamed and told her not to tell anyone. She said that when she left the hotel she was bleeding. This was corroborated by PW6 who told the court that she found the victim crying and she was walking with difficulty.

28. Dr. Ashako Wario (PW4) told the court that when the victim was brought on the 13th June 2016 he was unable to examine her as she refused to lie down as she kicked and screamed. He produced the P3 form (P.Exh 1) filled on 13th June 2016 which indicated that the victim was fearful, emotionally unstable and terrified when she was told to lie down. He noted that the victim was suffering from post-traumatic stress disorder secondary to sexual assault and concluded that it was a defilement case.

29. Dr. John Mwangi (PW5) produced another P3 form (P.Exh 4) filed on 11th August 2016, on behalf of Dr. Nassir who was away on training. He informed the court that the P3 was filled based on treatment notes (P.Exh3) for the victim when she was treated earlier. The P3 indicated that the victim had bartholinitis and had abscess on labia minora, majora and right of perineum. It also indicated that the hymen was broken and that there was active vaginal bleeding and urinalysis test revealed she had bacterial infection. In light of the above, I find that the medical evidence corroborated the evidence the victim and find that penetration was conclusively proved.

30. On the issue of identification, the victim told the court that she did not know the Appellant's name but she positively identified him in court. This amounted to dock identification.

31. The law on dock identification was succinctly laid out by the Court of Appeal in ***Muiruri & 2 Others versus R (2002)1 KLR 274*** where it stated that:-

> ***"…we do not think it can be said that all dock identification is wrong. If that were to be the case then decisions like Abdulla bin Wendo versus Republic (1953)20 E.A.CA 166, Roria versus Republic (1967) E.A. 583 and Charles Maitonyi versus R(1986)2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases Courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The Court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the Court duly warns itself of the danger of mistaken identity." (Emphasis mine.)***

32. In **Wamunga Vs Republic (1989) KLR 426** the Court of Appeal sounded a caution on analysis of evidence of identification in the following words:-

"It is trite Law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to

examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis for conviction."

33. In the present case, the victim frequently passed by the hotel when going to and from school. She said that she had tea with her sister (PW2) at the said hotel the day before she was defiled. She was defiled at around 4:00pm in the afternoon and they were all alone. She knew the Appellant as the "person of the hotel." She had taken tea in the hotel and he only dragged her into the next room after she said she did not have money. He was therefore not a total stranger who pounced on her. There was sufficient time for interaction of her to identify him. In the circumstances, I find that the victim physically knew the Appellant and the conditions for identification were good.

34. In addition, the trial magistrate invoked section 124 of the Evidence Act and in his judgment found that the victim was candid on what happened and how it happened. I am in agreement with the trial magistrate's finding. The victim told both PW4 and PW7 that she was defiled in a hotel at the hospital. Her evidence was not shaken during cross-examination by the Appellant and it was very clear and concise. The victim had no reason to frame the Appellant.

35. Furthermore, PW7 stated that during her investigations she interrogated the doctor in charge of the hotel who informed her that the Appellant was the one working there at the time. Besides the Appellant disappeared from his place of work (the hotel) soon after the incident and was arrested two weeks later. I find the facts and the circumstances of the case to be true and there was no possibility of mistaken identity. From the evidence, I have no doubt that the Appellant was positively identified.

36. On sentence, the Appellant contended that the sentence meted out was harsh and excessive and that the mandatory nature of the sentence contravened his right to mitigation in section 216 of the CPC.

37. Tackling the issue of mandatory sentences, the Court of Appeal in **Jared Koita Injiri vs. Republic [2019] eKLR** where it held that:-

> ***"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy..."***

38. I am guided by the above case. In the present case, and I note that the Appellant is a first offender. However, the defilement of a 7 year old child, is a heinous act. The Appellant lured the victim with food and thereafter threatened to cut her with a knife if she screamed. The victim was physically injured to the point she had to be admitted to hospital for a whole week. To add to the victim's misery, she was psychologically scarred and so traumatised as evidenced by the fact that she could not lie down for the doctor to examine her. She had to undergo counselling. There is no telling how deep her scars go and the permanent effect it may have on her life.

39. I find that this is a suitable case which deserves the maximum sentence. I uphold the conviction and confirm the sentence of life imprisonment.

40. Orders accordingly.

Judgment delivered, dated and signed at Garsen this 26th day of February, 2020.

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R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

The Appellant in person

Mr. Onderi for the Respondent