REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL 153 OF 2015

VNW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the conviction and sentence in original Bungoma CM Cri. Case 1678/2013 delivered on 14.06.2015 by Hon. M. AGUTU – RM]

JUDGMENT

The appellant VNW was charged with the offence of defilement of a child(girl) contrary to section 8(1) as read with sub-section 2 of Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 12th August 2013 at Kibabii Location within Bungoma County he intentionally and unlawfully caused his penis to penetrate the vagina of CGT a child aged 4½ months.

He also faced an alternative charge of committing indecent act with a child contrary to section 11 of the sexual offences Act No. 3 of 2006 based the same facts. The particulars of the alternative charge were that on the on the 12th August 2013 at Kibabii Location within Bungoma County the appellant intentionally and unlawfully touched the vagina of CGT a child aged 4½ months.

The evidence on record is that Pw1 mother of the complainant, EAA testified that on 12th August 2013 at around 6.00am she had left the complainant with the accused. She stated that they were sleeping on a mattress on the floor. She testified that she came back after twenty minutes and the child was crying and the door was shut but not bolted and when she got into the house the baby stopped crying after sometime but she did not check on her she assumed it was usual cry of a baby. At around 8.00am she woke up the accused and he dressed up and left for work. She testified that when the baby woke up she picked her and placed her on her legs and that is when she saw mucous like fluid on the left buttock of the child. She confirmed and the fluids were coming from the vagina of the child. She took the child to Kibabii Health Center then later on Bungoma District Hospital. She testified that the clinical officer Pw2 at Kibabii examined that child and observed that labia minora and majora were torn and white discharge from her private parts and was referred to Bungoma District Hospital and later reported to police.

Pw2 John Wekesa Clinical Officer at Kibabii Health Centre testified that on 12/8/13 complainants mother came carrying the child stating the child had difficulty passing urine and saw fluid discharge from the private part of the child. He testified that he examined the child and found genital parts labia minora and labia majora were foda and she was discharging fluid from private parts. He referred her to Bungoma District Hospital.

Pw3 Barasa Sitati the area chief testified that on 12/8/13 at 4pm he received call from John Wekesa who works at Kibabii Health Centre. He testified that he was asked to go to the hospital and when he arrived at the hospital he was informed that a man had defiled the child.He testified that accused had defiled the baby and he took initiative of arresting the accused.

On Pw4 testimony Alex Wanyonyi a clinical officer at Bungoma District Hospital testified produced a P3 Form prepared by Dr. Damba who examined the complainant. He produced P3 Form filled on 13/8/2013. He testified that it stated that the child had been defiled by a person known to them and vagina of the child was swollen. He produced P3 Form and treatment notes.

Pw5 Cpl Yusuf Ibrahim testified that on 13.8.2013 at 9 am while at work Bungoma Police Station. A woman came carrying a child at around 6am and stated she had left the baby with the husband to fetch milk and when she came back the child was crying and she checked the baby had been defiled. He commenced Investigations and accused was arrested by area chief and charged with present offence. When the accused Appellant was found to have a case to answer he was put on his defence and gave sworn evidence calling no witness.

The Accused VNW testified that when he met Pw1 she informed him that her child was suffering from Gonorrhea and he gave her money for treatment. He testified that on a certain day he came back from work and found PW1 smoking bhang and she stated that she will teach him

a lesson for not providing food. He stated that later on he was arrested by the Chief.

After full hearing it is upon the above evidence that the trial court found the accused guilty and sentenced him to life imprisonment. Having been dissatisfied with the judgment the Appellant has appealed to this court on the following grounds:

i. That the learned magistrate erred in law and facts to convict him by failing to find that he was not accorded fair hearing.

ii. That he pleaded not guilty.

iii. That the trial magistrate erroneously convicted him without observing that section 200(3) of the CPC.

iv. That the learned magistrate erred in law and fact to convict him without considering that the prosecution case was not proved beyond reasonable doubt.

v. That the learned magistrate erred in convicting him without considering his defence.

Appellant filed his hand written submissions in which he submitted that the finding that he defiled daughter of Pw1 cannot be proved.

He submitted that Pw2 filled a P3 form and the medical report did not state the weapon that made the child's labia swollen and inflamed. He submitted that the prosecution failed to establish that the discharge belonged to the appellant. He submitted that no investigation was carried out in the matter and that is defence was rejected by the trial court.

The prosecution opposed the appeal through state counsel Nyakibia who submitted that on age that age assessment form was produced and showed that the complainant was 4 months old. He submitted on identification that complainant mother testified on behalf of the complainant and that she testified that the complainant had left child with the accused but when she came back the child was crying and that he had defiled the minor.

He submitted on penetration the complainant mother examined the child and found whitish discharge and that the clinical officer confirmed penetration. He submitted that the evidence of pw1 was corroborated and that the trial court considered the evidence of the appellant and dismissed it. He submitted the sentence of life imprisonment should be upheld as the crime was against a helpless person.

This being the Appellant's first appeal, the role of the first appellate Court is well settled. It was held in the case of **Okeno Vs Rep 1972 EA** and further in the Court of Appeal case of **Mark Oiruri Mose Vs. R (2013)eKLR** that this Court is duty bound to review the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt.

The key ingredients of the offence of defilement include **proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence.**

On the age of the complainant, the prosecution produced age assessment form as exhibit 4 that confirmed the minor was 4 months old.

The Sexual Offences Act promulgated some rules towards the achievement of its objectives. Those rules came to be known as **"The Sexual Offence Act (Rules of Court) 2014** which came into force on 11/07/2014 under Legal Notice No. 101.Under **Rule 4 thereof**, the age of the complainant may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or any other similar document. It is therefore the finding of this Court that from the evidence, the complainant was a minor at the alleged time of commission of the offence.

On the issue of penetration of the Complainant's private parts, Section 2 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 Vs 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 mine).*

In demonstrating this particular ingredient of the offence, PW4 a clinical officer at Bungoma District Hospital produced a P3 form which indicated that the Labia of the child were torn and the hymen perforated. It also revealed that there was white discharge from the vagina from treatment notes from both Kibabii Health Centre and Bungoma District Hospital and this documents were produced in court. Going by the foregoing evidence it is clear that the act of penetration was effectively proved.

On whether the Appellant was the perpetrator, as the Appellant has denied committing the alleged offence, that calls for an in-depth examination of the circumstances so as to settle the issue as to whether the Appellant was rightly identified as the perpetrator of the offence.

Pw1 testified on material date he left the accused with the child and went to fetch milk and when she came back the baby was crying. She testified that when the baby woke up and she placed her on her lap she saw white discharge from her vagina. This witness had left the accused with child sleeping on the floor and when she came back he found him still with the child.

The appellant on the other hand in his defence he stated that there was a time Pw1 took the child to the hospital and he was called and to the child had gonorrhea. Also pw1 informed the clinical officer that her child was defiled by a person well known to them and that is the accused who they lived together as husband and wife. I am of the considered view that the appellant was effectively identified because the complainant stated they lived together at home. The identification was free from error.

The appellant has prayed for leniency on the sentence. Sentencing is discretion of the court and the high court can only interfere if the sentence is illegal or was arrived at by applying wrong principles of law. From the evidence on record it emerged that the complainant was a minor aged 4½ months old.

On sentence, the child was of tender age, of 4½ months. The appellant was sentenced to serve life imprisonment. Though the offence is serious, I set aside the sentence of life imprisonment imposed. The appellant is hereby sentenced to serve Twenty five (25) years imprisonment from date of conviction on 20.6.2015.

Dated and **Delivered** at **BUNGOMA** this 11th **day of** March, **2020.**

S.N.RIECHI

JUDGE