**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 45 OF 2019**

**DMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(from the original conviction and sentence in Butere SRMC Sexual Offence Case No. 7 of 2018 by F. Makoyo, SRM dated 19/10/2018)

**JUDGMENT**

1. The appellant was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to life imprisonment. He was aggrieved by the conviction and the sentence and filed the present appeal. The grounds of appeal are that:-

> 1. There was no medical evidence adduced in court to link the appellant with the commission of the offence.
>
> 2. The trial magistrate erred in law in relying on the sole evidence of the complainant without observing that her evidence was not corroborated in material particulars.
>
> 3. The trial magistrate erred in law and fact in not observing that the age of the complainant was not proved beyond reasonable doubt.

2. The grounds of appeal were expounded by the written submissions of the appellant. The state prosecutor did not make a response to the appeal but instead relied on the record of the lower court.

3. The particulars of the charge against the appellant were that on the 24th day of March, 2014 in Butere Sub-County within Kakamega County intentionally caused his penis to penetrate the vagina of TM, a child aged 8 years.

4. The case for the prosecution was that the complainant was a niece to the appellant. The complainant was at the material time aged 8 years. She was staying with her grandmother PW3. The appellant was staying a short distance away from their house. That on the material day the complainant and her friends were playing outside the home of the complainant. Her friends went away. She slept on the grass. The appellant called her to his house. She went to him. He gave her 5/= and sent her to the shops to buy cigarettes and sweets. She went and brought him the cigarettes. She tried to give them to him. The appellant pulled her into the house and placed her on the bed. He removed her skirt and panties. He laid on her and inserted his penis into her vagina. After he finished he gave her 4/= to buy sweets. She went to the house of her grandmother PW3 where she found her playmates. She gave them the sweets. On the following day she was in pain and was unable to walk. Her grandmother PW3 observed it and asked her what had happened. She told her what the appellant had done to her. PW3 took her to her friend Loice PW4. PW4 checked the girl's vagina and saw it swollen. On the following day pW3 took the girl to Butere Police Station and reported. The matter was investigated. The girl was taken to Butere Sub-County Hospital. She was examined by a clinical officer. She was found with bruises and redness, yellowish discharge from the vagina and missing hymen. A P3 form was completed. The appellant was arrested and taken to the police station. He was also taken to hospital for examination. During the hearing the clinical officer PW2 produced the complainant's P3 form and treatment notes as exhibits, P.Ex 1 and 2 respectively. The investigating officer PW5 produced the age assessment report as exhibit, P.Ex 5.

5. When placed to his defence the appellant stated that the complainant is his niece. That he was arrested by policemen on 27/3/2014 and taken to the local AP Camp. He was then taken to Butere Police Station and later to hospital for examination. That he heard about the defilement in court. In cross-examination, he stated that he never met the complainant on 24/3/2014. That he had quarrelled with his grandmother, L PW3. That he had differences with Loice PW4 after he refused to slash her grass. That the complainant was couched by her grandmother although he had no evidence to prove it.

**Submissions –**

6. The appellant submitted that the charge was not proved beyond all reasonable doubt. That Section 124 of the Evidence Act requires evidence of a child to be corroborated by other material evidence which was lacking in this case. That the prosecution witnesses gave contradictory evidence on the amount of money that he was alleged to have given to the complainant. That the complainant said it was Ksh. 4/= while Loice PW4 said it was Ksh. 3/=.

7. The appellant submitted that Section 36 (1) of the Sexual Offences Act requires samples to be taken from an accused person for DNA testing to ascertain whether or not he has committed an offence. That the section was not complied with in his case.

8. The appellant urged the court to quash the conviction and set aside the sentence imposed on him.

**Analysis and Determination –**

9. This being a first appeal, the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See **Okeno –Vs- Republic (1972) E.A 32** and **Kiilu & Another –Vs- Republic (2005) 1KLR 174**.

10. The fourth ground of appeal was that the age of the complainant was not proved. The importance of proving the age of a complainant in a case of defilement was emphasized by the Court of Appeal in the case of **Kaingu Elias Kasomo –Vs- Republic (2010) eKLR** where the court stated that:-

> **"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim."**

11. The age of a person can be proved in various ways. In **Mwolongo Chichoro Mwanyembe –Vs- Republic, Mombasa Criminal Appeal No. 24 of 2015) (UR)** (cited in the case of **Edwin Nyabaso Onsongo –Vs- Republic (2016) eKLR**) the Court of Appeal held that:-

> **"..the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." "... we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."**

12. The officer who testified in the case PW5 stated that the case was taken to them in April, 2018 for re-trial. That the initial investigating officer had by then been transferred. They took the complainant to Butere District Hospital where her age was assessed at 10 years. He produced the age assessment report as exhibit, P.Ex 5.

13. The trial magistrate considered the age indicated in the assessment report and held that the complainant was at the time of defilement aged 6-7 years. Therefore that the charge under Section 8 (2) of the Sexual Offences Act was proper.

14. The grandmother to the complainant PW3 stated that at the time of defilement the complainant was aged 8 years. PW3 was the guardian of the complainant. She must have been aware of her age. The clinical officer who completed the P3 form estimated her age at 8 years. There is then no doubt that the complainant was at the material time aged below the age of 11 years. The age of the complainant was therefore proved to have been below the age of 11 years. The charge under Section 8 (2) of the Sexual Offences Act was proper.

14. The appellant contended that the prosecution did not adduce medical evidence to link him with the commission of the offence. However defilement can be proved in other ways other than medical evidence linking an accused person to the commission of the offence. It can be proved by both oral and circumstantial evidence – See **AML –Vs- Republic (2012) eKLR** and **Kassim Ali –Vs- Republic, Msa Court of Appeal Criminal Appeal No. 84 of 2005.**

15. Section 36 (1) of the Sexual offences Act empowers a court trying an accused person of an offence of defilement to issue orders for an accused person to undergo a DNA test to ascertain whether or not he has committed the offence. However a reading of the Section shows that it is not couched in mandatory terms. The same was held by the Court of Appeal in **Hadson Ali Mwachongo –Vs- Republic (2016) eKLR**. In this case there was no spermatozoa found in the vagina of the complainant. There was then no basis of conducting a DNA test. The fact that there was no medical evidence taken from the appellant to link him with the offence was not fatal to the prosecution case as he could still be convicted on the basis of oral or circumstantial evidence.

16. There was a contradiction as to whether the appellant gave the complainant Sh. 4/= or Sh. 3/=. In my view this was a minor contradiction that did not affect the substance of the prosecution case. The court can ignore minor contradictions in a case – See **Jackson Mwanzia Musembi –Vs- Republic (2017) eKLR**.

17. The proviso to Section 124 of the Evidence Act allows a court trying an accused person over a sexual offence to convict singly on the evidence of a child if the court is satisfied that the child is telling the truth. In the premises corroboration of the evidence of the child is not necessary. The submission by the appellant that corroboration was necessary is not tenable in law.

18. The trial magistrate considered the evidence of the complainant and stated that he was convinced that the child was truthful. He stated that the complainant did not have reason to give false evidence against the appellant. That the appellant's defence was a mere denial that did not shake the prosecution evidence.

19. The trial magistrate considered the findings by the clinical officer that the complainant's vagina was bruised and came to the conclusion that the appellant had penetrated the complainant. Further that this was corroborated by PW3 who observed that the complainant had difficulty in walking.

20. On my own analysis of the evidence there was no doubt that the appellant defiled the complainant. Penetration was confirmed by the findings of the clinical officer that there were bruises on the vagina. The appellant was an uncle to the complainant. The incident occurred in broad daylight. There was no truth in the appellant's defence that he did not meet the complainant on the material day. There was no truth that the complainant's grandmother PW3 had fabricated the case due to a grudge. The prosecution witnesses had no reason to lie against the appellant. The appellant was convicted on cogent and credible evidence. The conviction is thereby upheld.

**Sentence –**

21. The appellant was given the mandatory minimum sentence of life imprisonment for defilement of a girl aged 8 years. In **Evans Wanjala Wanyonyi –Vs- Republic (2019) eKLR** the Court of Appeal while considering the constitutionality of the mandatory minimum sentence under Section 8 (3) of the Sexual Offences Act held the mandatory sentence to be unconstitutional as it deprives the court of its inherent jurisdiction not to impose the minimum sentence in an appropriate case. The net effect is therefore that courts have discretion to impose a sentence other than the mandatory sentence in a case of defilement where minimum sentence is prescribed. As the sentence of life imprisonment is no longer a mandatory sentence I have power to interfere with the sentence imposed by the lower court.

22. In the above referred to Court of Appeal case the court cited the case of **Christopher Ochieng –Vs- Republic (2018) eKLR** where the said court reduced a sentence of life imprisonment for defilement to 30 years imprisonment.

23. In mitigation at the lower court, the appellant pleaded for leniency. I am of the view that the sentence of life imprisonment is not appropriate in this case. The sentence of life imprisonment is thereby set aside. Considering that the complainant was aged only 8 years, I sentence the appellant to serve thirty years imprisonment commencing from the date of arrest, i.e. on 27/3/2014.

**Delivered, dated and signed in open court at Kakamega this 5th day of March, 2020.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Miss Omondi for State/Respondent

Appellant - present

Court Assistant - Polycap

14 days right of appeal.