REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 38 OF 2019

JOHN MWAURA KARAU……...…………………….…..APPELLANT

VERSUS

REPUBLIC…………………………………………….RESPONDENT

(An appeal against conviction and sentence (Hon Okuche, SRM) delivered on 21st January 2019 in criminal SO NO 6 of 2018 at Loitokitok)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. Particulars were that on the 9th day of June, 2018 at 6 p.m. in Loitokitok Sub-County within Kajiado County he intentionally caused his private organ to penetrate the private organ of MNN, a child aged 5 years.

2. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act. Particulars being that on the same day 9th day of June 2018 in the same place, he intentionally touched the private parts of MNN, a child aged 5 years.

3. The appellant pleaded not guilty to both the main count and the alternative charge. After a trial in which the prosecution called 6 witnesses, and the appellant's defence, he was convicted on the main charge and sentenced to life imprisonment. He was aggrieved with both conviction and sentence and filed this appeal raising the following grounds, namely;

> ***1. That the trial magistrate erred in law and fact by convicting him in violation of Article 35 of the constitution.***
>
> ***2. That the trial magistrate erred in law and fact in failing to find that prove/investigations were not done in the case.***
>
> ***3. That the trial magistrate erred in law and fact by convicting him while relying on evidence of hostile witnesses.***
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> ***4. That the trial magistrate erred in law and fact in convicting him, but failed to find that some of the witnesses disowned their statements.***
>
> ***5. That the trial Magistrate erred in law and fact by dismissing his defence.***

4. The appellant filed additional grounds of appeal which he called amended grounds of appeal on 4th March, 2020 stating that:

> ***1. The trial magistrate erred in law and fact by failing to find that the prosecution did not prove penetration and identification beyond reasonable doubt.***
>
> ***2. The trial magistrate erred in fact and law by relying on the prosecution witnesses when it was clear that the witnesses were not credible.***
>
> ***3. That the prosecution did not prove its case beyond reasonable doubt.***

5. During the hearing, the appellant who was unrepresented relied on his written submissions and urged the court to allow the appeal, quash the conviction and set aside the sentence.

6. In the written submissions filed on 4th March, 2020, the appellant argued that the ingredients of the offence were not proved. Regarding penetration, the appellant submitted that the prosecution has a duty to prove all the elements of the offence beyond reasonable doubt. He

relied on ***Sekitoleko v Uganda*** [1967] EA 53.

7. He also relied on ***Daniel Kiplimo Cherono v Republic*** [2014] eKLR for the submission that where a complainant was emphatic that the penetration took the form of complete sexual intercourse, the prosecution bears the burden of proving beyond reasonable doubt that indeed the victim had engaged in sexual intercourse on the date alleged.

8. The appellant argued that in a defilement charge the prosecution must prove the three elements of age, penetration and identification of the offender. He contended that the prosecution did not prove the element of penetration and relied on ***Jacob Odhiambo Omumbo v Republic*** (CR. A. No. 80 of 2008 Kisumu) for the submission that penetration is a key ingredient of the offence of defilement and must be satisfactorily proved.

9. The appellant submitted that the evidence of PW1, PW2 and PW3 was contradictory; that PW4 stated that he examined PW1 after 5 days but the trial court stated that it was on the same day. He also faulted the evidence of PW4 that there was defilement yet found no spermatozoa in the urine. He argued that broken hymen is not necessarily evidence of penetration.

10. He relied on ***PKW v Republic*** [2012] eKLR for the submission that the court cannot place high premium on the finding that the hymen had been broken as evidence of penetration since some girls may be born without hymen. (See also the Canadian case of ***Queen v Manuel Vincent Quintanila*** [1999] AB QB 769)**.**

11. As to whether white discharge may be due to sexual intercourse, the appellant argued in the negative and relied on ***Peter Mwangi Muthonya v Republic,*** (Criminal Appeal NO. 154 of 2005).

12. The appellant also faulted the trial court for relying on the discredited evidence of PW1, PW3 and PW5 all minors. He argued that they contradicted themselves in their testimonies and therefore the trial court was in error in relying on their testimonies. He relied on ***Ndungu Kimani v Republic*** [1979] KLR 282 for the submission that a witness in a criminal trial whose evidence is proposed to be relied on, should not create an impression in the mind of the court that he is not a straight forward person and raise suspicion about his trustworthiness.

13. He again relied on ***Philip Naka Matu v Republic*** [2016] eKLR for the submission that evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent version of the same event, differing fundamentally from one purported eyewitnesses to another, cannot give the assurance that court needs to be satisfied beyond reasonable doubt.

14. The appellant then argued that the prosecution did not prove its case beyond reasonable doubt. He relied on ***Gabriel Kamau Njoroge v Repbulic*** *(*1982 – 85) KLR, and ***Ouma v Republic,*** (Cr A. No. 91 of 1995) for the submission that at the time of evaluation of prosecution evidence, the court must have in mind the accused person's defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. He further relied on ***Salim Juma Dimiro v Republic*** (Criminal Appeal No. 114 of 2004) for the submission that reevaluation of evidence is a matter of law.

15. Mr. Njeru, learned Assistant Deputy Prosecution Counsel, opposed the appeal, supported the conviction and sentence. He submitted that the prosecution proved its case beyond reasonable doubt. According to counsel, the prosecution proved age, penetration and identification of the perpetrator who was known to the victim. He therefore argued that all ingredients of the offence were proved.

16. On sentence, Mr. Njeru argued that the sentence of life imprisonment is lawful and urged the court to dismiss that appeal, uphold conviction and affirm the sentence.

17. I have considered this appeal; submissions and the authorities relied on. I have also perused the trial court's record and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reanalyze, revaluate and reconsider the evidence afresh and come to its own conclusion on it. The court must however bear in mind that it did not see the witnesses testify and give due allowance for it. (See **Okeno v Republic** [1972] EA 32)**.**

18. In ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal again held that:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

19. PW 1 MNN a minor aged 5 years gave unsworn testimony and told the court that she was playing with friends when the appellant who was their neighbour called and asked her to go to his house. When she got to the appellant's house, he asked her to lie down on a mattress; undressed; asked her to remove her pants and defile her. Thereafter, he gave her Kshs.10, which she used to buy a sweet. He warned her not to disclose what had appended to anyone. He used a tablecloth to wipe her private parts. She then put on her cloths and left. After buying the sweet, she went to play with her friends. She later went home with her friends who told her mother what the appellant had done to her. She told the court that the appellant had defiled her on several occasions after which he would give her Kshs.10. She was later taken to hospital and then to the police station.

20. PW2 GG, PW1's mother, testified that the PW1 was born on 28th July, 2012 and had her birth certificate which confirmed those details. She told the court that on 9th June, 2018 she went to school after which she went home to prepare lunch. She sent PW1 to the Posho mill and after she came back, she then went to play with her friends. Later S. told her that the appellant had defiled PW1. She asked PW1 what had

happened and PW1 narrated to her about the incident and that after defiling her, the appellant gave her Kshs. 10 to buy a sweet.

21. She reported the matter to the police and took PW1 to hospital where a P3 form was filled. She told the court that the appellant was their neighbour and that she also informed the village elder who called the police. They went to the appellant's house but he was not in. He was later arrested. In cross-examination, the witness told the court that it was PW1's friends who informed her about the incident but that they did not find blood in her private parts.

22. PW3 RC, also a minor aged 11 years, testified on oath that on 9th June, 2018 she was with PW1 and M. They went to cut grass with J and S and left PW1 and M. When they came back, they found M alone. She asked M where PW1 was and she told her that PW1 left with a certain man. They went to check for her at the appellant's home where she heard the appellant and PW1 talking. She ran and told M that PW1 was at the appellant's house. When PW1 joined them, she had a sweet. When she asked PW1 where she got the sweet from, PW1 told her that it was the appellant who had given her after lying with her on the bed. They went and informed PW2. The police later recorded her statement. In cross-examination, she told the court that she never saw the appellant call PW1 but PW1 told them that the appellant had been defiling her and that she saw the appellant and PW1 heading to the house.

23. PW4 Abdi Hussein Sheikh, a clinical officer attached to Loitokitok hospital, testified that on 14th June, 2018 he examined PW1, who was taken to the facility with an allegation of defilement. On examination, there were no bruises on PW1's external gentalia. The hymen was however broken. There was infection in the urine with pus cells but there were no spermatozoa in the urine. He formed the opinion that she had been defiled. He filled and signed a P3 form which he produced as PEX 2. He also produced treatment notes as PEX 4. In cross-examination, the witness told the court that he did not know who broke the hymen and that defilement was over a period of time.

24. PW5 SN, a minor aged 12 years testified on oath that on 9th June, 2018, she was at PW1's home playing with PW1 and H. PW1 left to the appellant's home after the appellant called her. M also followed them. PW1 and appellant entered his house. She later came back after she was given money to buy a sweet. They reported the matter to PW1's mother.

25. PW6 No. 81810 CPL Esther Munyalo, a police officer attached to Loitokitok police station, testified that on 9th June, 2018, she was called by a colleague and informed about the case. They went to the scene where they found PW1 and her mother and members of the public. They went to the appellant's house but he was not in. She took PW1 to the station and later to hospital. Later the appellant was taken to the station by his brother. He was booked and escorted to hospital. PW1 was treated and discharge. PW1 was issued with a P3 form which was filled and returned to the station. The witness told the court that according to the birth certificate PW1 was 5 years old. She produced the Birth Certificate as PEX 1. In cross-examination, the witness told the court that it was PW1 who informed her about the incident.

26. In his defence, the appellant gave a sworn testimony and told the court that on 9th June, 2018, he woke up and went to work leaving his son at home. He worked up to 5 o'clock in the evening then went to the market for shopping. When he returned home at 7 p.m., his son informed him that police officers were looking for him. He called his brother who took him to the police station to find out what the problem was. At the police station, he was arrested and placed in custody. He was later taken to hospital and returned to the station and later charged in court. He told the court that PW2 the complainant's mother was his wife but he had married a second wife and that was why she had a grudge with her. In cross-examination, the appellant told the court that he had a wife and children. He also stated that he did not know whether PW2 was another person's wife.

27. After considering the evidence of both the prosecution and the defence, the trial court was satisfied that the prosecution had proved its case, stating at page 21:

> "***The accused person has denied having had sexual intercourse with the minor. However, the minor stated that it was the accused who has had sexual intercourse with her…The accused person is well placed at the scene. I find that there is overwhelming evidence that he committed that offence. In a nutshell, I found that the prosecution has proved their case beyond reasonable doubt…"***

28. The appellant has raised a number of grounds in challenging his conviction and sentence. He has argued that the prosecution did not prove the ingredients of the offence of defilement. The respondent on his part argued that they proved the ingredients of the offence as required by law and proved the case beyond reasonable doubt.

29. The appellant faced a charge of defilement. The prosecution was therefore bound to prove beyond reasonable doubt, the age of the victim, penetration and identity of the perpetrator. On age, the prosecution was to prove that the victim (PW1) was a minor.

30. PW1 told the court that she was 5 years old. PW2 told the court that PW1 was born on 28th July, 2012 and had her birth certificate to show that. The Birth certificate was produced by PW 6 as PEX 1 and indeed showed that PW1 was born on 28th July, 2012. That evidence was not controverted. For that reason, I am satisfied that the prosecution proved that PW1 was a minor and, therefore, proved the first ingredient.

31. Second, the prosecution was required to prove penetration. The trial court believed the testimony of PW1 and the evidence of the clinical officer (PW4) and concluded that there was evidence of penetration.

32. The evidence on penetration was basically that of PW1 and PW4. PW1, a minor aged 5 years, told the court that the appellant called her into his house and defiled her after removing his cloths and asked her to remove hers; that he applied saliva on her private organ and his and then defiled her. She did not cry or make noise; he then gave her Kshs. 10/- which she used to buy a sweet. PW1 did not report the incident to PW2, her mother. It was instead PW3 who reported to PW2 what had happened. PW2 told the court that PW1 did not have blood in her private parts.

33. PW4, the clinical officer who examined PW1, told the court that PW1 had no bruises on her private parts but the hymen was missing. He also told the court that there were no spermatozoa but there was presence of pus cells in her urine.

34. I have perused the P3 form. It confirmed that there were no bruises on external genetalia, no vaginal lacerations and no cervical laceration. It also confirmed that there was no vaginal bleeding and no spermatozoa. I have also perused the PRC which is consistent with the P3 form. However the PRC clearly states that there was **"no penetration"**.

35. With this evidence, I am unable to agree with the trial court that the prosecution proved the ingredient of penetration beyond reasonable doubt. If the medical evidence did not confirm penetration, there was no basis for the trial court to conclude that this ingredient had been I must also state that absence of hymen per se cannot be conclusive evidence of penetration and therefore defilement, nor can be the presence of Pus.

36. In ***PKW v Republic*** *(*supra*)*,***Maraga and Rawal JJ***(as they then were) stated with regard to absence of hymen*:*

> ***"[15]. In their analysis of the evidence on record, the two courts below…appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?***
>
> ***[16].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 riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769."***

37. The above view found favour with the Court of Appeal in ***David Mwingirwa v Republic*** [2017] eKLR. In that appeal, the trial court convicted the appellant for incest finding that the appellant had defiled the complainant on the basis that her hymen had been broken. On appeal to the high court, the High court dismissed the appeal. On further appeal to the Court of Appeal, the Court of Appeal observed:

> ***"From that reasoning of the learned judge, it would seem that the certainty or confidence with which the asserted that there was overwhelming evidence of L K having engaged in sexual activity came in no small measure from what she considers the corroboration afforded by the evidence of PW4 on the broken hymen. According to the learned judge, PW4 was of the view that "there was continuous process of defilement." With respect, we do not think that this was entirely correct. The Clinical Officer PW4 noticed that the hymen was broken but there were no other injuries to L K's genitalia. Nor was there spermatozoa or any male emission in her vaginal carnal. He merely stated that the broken hymen was suggestive of an ongoing process of defilement. He did not suggest that his said conclusion was based on any other observation beyond the broken hymen. Then this brings to the fore the issue raised by the appellant whether, in the absence of any other medical or physical evidence, a broken hymen is conclusive proof of penetrative sexual intercourse as PW4 seemed to suggest (his remarks in the P3 and his testimony in Court do not go beyond a suggestion) and as the learned judge seemed to have concluded, we think it was an error for the learned judge to form a firm conclusion of defilement from the fact alone of the broken hymen."***

38. The Prosecution was also to prove the identity of the attacker. However, having determined that here was no evidence of penetration, discussion on this ingredient becomes moot. Suffice only to say that the evidence of PW1, PW2 and PW3 was that the appellant was a neighbour and lived in the neighborhood, a fact the appellant himself did not dispute. In fact, he stated that he lived at Maji estate which was the estate PW1, PW2 and PW3 stayed. That means the appellant was known in the area and therefore he was not a stranger.

39. According to PW3, she went to the appellant's house and heard the appellant and PW1 talking. That if it be true, did not mean the appellant was defiling PW1. PW3 did not see the appellant committing the offence. She told the court that it was PW1 who told them what had happened. That was at best hearsay. It was also the appellant's defence that PW2 was his wife and that he had married another wife hence the grudge.

40. As the Court of Appeal stated in ***Stephen Nguli Mulili v Republic*** [2014] eKLR:

> ***"[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR."***

41. I have considered the appeal submissions and the authorities. I have also reevaluated the evidence and analysed it myself. The conclusion I come to is that the prosecution did not prove the case against the appellant beyond reasonable doubt. Consequently, the appeal is allowed, conviction quashed and sentence set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Kajiado this 30th day of April,2020.

E.C. MWITA

JUDGE