REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 16 OF 2018

PATRICK NJUE MUCHEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment and Sentence of Hon M. Opanga- SRM dated 4th July, 2019 in Kangundo SO Case No. 17 of 2016)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

PATRICK NJUE MUCHEKA.....ACCUSED

JUDGEMENT

1. The appellant, **Patrick Njue Mucheka**, was charged in the Kangundo SO Case No. 17 of 2016 with the offence of defilement of a child contrary to 8(1) as read with section 8(4) of the ***Sexual Offences Act, No. 3 of 2006*** the particulars being that on 7th day of August, 2016 in Matungulu Subcounty, Machakos County, he intentionally caused his penis to penetrate the vagina of **NM**, a child aged 13 years.

2. He faced the alternative charge of indecent act with a child contrary to section 11(1) of the same Act the particulars being that on the same day at the same place the appellant intentionally touched the vagina of **NM**, a child aged 13 years. He pleaded not guilty to the offence.

3. In support of its case the prosecution called 7 witnesses. According to the complainant who was by the time of her testimony aged 14 years, on 6th August, 2016, she was on her way to school at 6am when along the way she was called by the appellant who was standing in his *shamba* about 50 metres away. According to the complainant the appellant shouted at her to go and take his phone for charging. The complainant approached where the appellant was and the appellant told her to go to his house where the phone was. However, the appellant followed her and closed the door of the single roomed house from the inside and held her hand. Frightened, the complainant ran, opened the door and went away leaving the appellant with her scarf standing at the door. By that time the complainant had already taken the phone. The appellant then told her to return his phone on Sunday.

4. According to the complainant, on Sunday after church at mid day, she took the phone to the appellant and found him in the *shamba* and handed over the phone to him. However, the appellant told her to go into his house and collect her scarf. The appellant then followed her and once again locked her inside, got hold of her, removed her skirt and pant, lowered his trousers and underwear and touched her vagina by his penis while covering her mouth thereby preventing her from screaming. According to her, the appellant defiled her. After that the appellant got out and she put on her clothes. When the appellant saw the complainant's grandmother, PW2, approach, the appellant told her to hide under his bed and after the grandmother left, the complainant returned to the church. According to her, she did not know how PW2 came to know that she was inside the appellant's house. PW2, however, went for the complainant's mother and both of them went for the complainant. That evening she was taken to the Mama Lucy Kibaki Hospital and the matter was later reported to the police where she was issued with a P3 form. She however did not notice any blood. It was the complainant's evidence that she was not afraid when the appellant called her to go and get his phone. She identified the P3 form, medical report and child health card. According to her, she was born on 26th February, 2003 and the previous year, she was 13 years old. She was later recalled to identify and produce her said scarf as exhibit.

5. In cross-examination, she stated that the day that the appellant called her was the first tie he gave her the phone and denied that the charges were fabricated and that they were against people from Meru.

6. PW2, **AN**, the complainant's grandmother testified that on 7th August, 2016 she was in Church when at 10am she realised that the complainant was missing. She tried tracing her steps which led her to the appellant's house where he found the appellant standing at the door. Upon asking him where the complainant was, he said that he had not seen her. She however insisted that she could see her scarf on the bed. According to PW2, on Saturday, 6th the appellant had gone to where she was herding cattle and asked her about a girl who herded her cattle and she got alarmed because of the rampant cattle theft in the area. She told the appellant that she normally herds her cattle alone. It was her evidence that she had earlier on, on Saturday seen the complainant entering the appellant's house. She then proceeded to call the complainant's mother and they were informed by the appellant that the scarf belonged to a woman who had his mobile phone. Later, the Complainant confided in her mother that the appellant made love to her.

7. PW2 however stated that she did not see the Complainant in the appellant's house and only saw the scarf and that they found the Complainant at home crying. PW2 could however not say if the Complainant's mother had shouted at her but the Complainant disclosed that the appellant had carnal knowledge of her. They then reported the matter to the police and took the Complainant to Mama Lucy Kibaki Hospital.

8. PW3, **DMC**, the Complainant's mother was, on 7th August, 2016, in her shop at about 2pm when her mother, PW2, went and told her that the appellant had defiled her child. According to her, PW2 informed her that the Complainant was nowhere to be seen and that PW2 had found the Complainant's scarf in the appellant's house. In the company of PW2, PW3 proceeded to the appellant's house where they found the scarf but the Complainant was not there. The appellant denied that the Complainant had been there but after probing admitted that the Complainant had been there and that he did what he did to the Complainant to revenge what his own child had suffered.

9. PW2 found the Complainant in the church. Later in the evening, PW3's father called her and told her that the Complainant had returned and when she went there she found her and upon asking her what happened, the Complainant started crying. They then proceeded to the village elder where the Complainant narrated what had happened to her on 6th and 7th August, 2016. The Complainant was then taken to Mama Lucy Kibaki Hospital and they were issued with a P3 form. It was PW3's evidence that the Complainant was 13 years old at the time of the incident having been born on 26th February, 2003. It was her testimony that the appellant was arrested that very day and that she did not examine the Complainant. She however exhibited the Complainant's Child Health Card.

10. Pw4, **Justus Kyalo Musyoka**, the village elder testified that on 7th August, 2016 after church, she found a woman waiting outside and the woman told her that she was looking for a girl who had gone to church early that morning and that the girl had been seen going to the home where the appellant worked but when they went there they did not find the girl. Later in the day the appeal was taken to PW4's home by other villagers and upon interrogation, the appellant denied having had carnal knowledge of the Complainant. However, upon taking the Complainant aside, she disclosed that the appellant had given her a mobile phone the previous day and she went with it. On Sunday after church she went to the appellant's house and when she heard PW2 approaching she hid under the bed. She disclosed that the appellant had carnal knowledge of her and that the appellant used to give her his mobile phone to call the mother and that whenever she was sent by PW2 she would pass by the appellant's house to drink water.

11. PW5, **John Mutua**, a clinical officer at Kangundo Level Four Hospital testified that the complainant, aged 13 years, was taken to the Hospital with treatment notes from Mama Lucy Kibaki Hospital dated 8th August, 2016 at about 10am. According to PW5, he was informed by the Complainant that the appellant during the time he defiled the Complainant used a condom. It was his evidence that at the time the Complainant was examined, she was in fair general condition but had whitish discharge in her vagina. Her inner lining of the vagina had bruises and the hymen was freshly torn and was at 6.00 O'clock position. The other systems were normal. High vaginal swab showed degenerated spermatozoa. PW5 used the said treatment notes in order to fill in the P3 form.

12. PW6, **Jecinta Gatumbei**, a clinical officer at Mama Lucy Kibaki Hospital confirmed that the Complainant was examined at the Hospital on 8th August, 2016 and had bruises on her vagina with a whitish discharge and the hymen was freshly torn at 6.00 O'clock position. High vaginal swab revealed the presence of spermatozoa. According to her the presence of spermatozoa was proof of defilement. She exhibited the PRC and accompanying certificate

13. PW7, **Cpl Simon Nthenge**, was on 7th August, 2016, at Joska Police Post performing general duties when the Complainant accompanied by her grandmother, PW2, reported that the Complainant had been defiled. PW7 referred them to Mama Lucy Kibaki Hospital for treatment. He also issued then with P3 form which was duly filed in. The accused was later taken to the Post by villagers and village elders and the Complainant identified the appellant. The witness produced the Complainant's Child health Card as exhibit.

14. At the close of the prosecution case, the appellant was put on his defence. In his defence, the appellant testified that on 7 th August, 2016, a Sunday he saw two women who told him to give them the girl he was hiding in his house. They then entered his house but did not get the girl and left to go speak to some boys who were herding cattle and they left together. They proceeded to the Chief where they reported that the appellant had gone to his house and returned at 4pm and demanded that he produces the girl. Later they returned and they arrested him with some people assaulting him. While the Complainant was taken to the Hospital, he was taken to Joska Police Post where he was kept in custody for two days and the third day he was taken to court. He denied that he committed the offence.

15. In her judgement, the learned trial magistrate found that based on the Child health card/clinic immunization card which showed that the Complainant was born on 26th February, 2003, she was 13 years. She found that based on the evidence of the Complainant coupled with the medical examination evidence, PW5 and PW6, both clinical officers found that there was evidence of defilement. She therefore found that the appellant had committed the offence as charged in the main count while finding that the appellant's defence was a mere denial as he failed to explain how the Complainant's Scarf was spread on his bed. She then proceeded to sentence the appellant to serve 20 years imprisonment.

Determination

16. I have considered the grounds of appeal, the submissions made by the parties and evidence on record as I am duty bound to do. The submissions made on behalf of the appellant seems to have been made in respect of a totally different case since they were addressing evidence other than that adduced before the trial court.

17. Nevertheless, this being a first appeal, I am enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.**

18. In this case the prosecution's case was that on 6th August, 2016 at 6am she was on her way to school when she met the accused who invited her to collect his phone and charge it for him. She acceded to that request but the appellant followed into his house but she managed to slip away with the phone leaving her scarf behind. The appellant however told her to return the phone on Sunday which she did upon leaving the church. Once against the appellant followed her inside the house and this time round she was unable to extricate herself from the grip of the appellant who, according to her, locked her inside, got hold of her, removed her skirt and pant, lowered his trousers and underwear and touched her vagina by his penis while covering her mouth thereby preventing her from screaming. According to her, the appellant defiled her. After that the appellant got out and she put on her clothes.

19. However, according to the Complainant's grandmother, PW2, the previous day, she had seen the Complainant entering the appellant's house and that day the appellant had inquired from her where the girl who normally took care of her cattle was. Therefore, when PW2 did not see where the Complainant was she decided to follow the footsteps of the Complainant which led her to the Appellant's house where though she was unable to trace the Complainant who was hiding under the bed, she saw the Complainant's scarf on the bed. Upon asking the Appellant about the scarf, the appellant stated that it was left by a woman who had gone to charge his phone. After PW2 left, the Complaint returned back to church. Later when confronted by PW2 and her mother, PW3, the Complainant disclosed that she had been defiled by the appellant. She however disclosed to PW4, the village elder that she used to pass by the appellant's house to drink water whenever she was sent by PW2. According to PW5, during the incident, the appellant was wearing a condom. The evidence of PW6 was however that upon examination, spermatozoa was seen in the Complainant's genitalia.

20. Section 8 of the ***Sexual Offences Act*** provides as follows:

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***
>
> ***(5) It is a defence to a charge under this section if -***
>
> > ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
> >
> > ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***
>
> ***(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.***
>
> ***(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.***

21. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** where it was stated that:

> **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

22. Regarding the age of the Complainant it was clear from the Child Health Card that the Complainant was born on 26th February, 2003. Therefore, as at 6th August, 2016, the Complainant was 13 years old and therefore a child.

23. Regarding the identity of the Appellant there is no doubt that the Complainant and the Appellant knew each other very well. It is

unbelievable that the Complainant would find the Appellant on her way to school at 6am and immediately acceded to his request to pick his mobile phone for charging. It is more likely as testified by PW4 that the appellant and the Complainant were acquaintances and were it not for the fact that PW2 became suspicious of their activities, the relationship between them may not have come to light. Accordingly, I have no doubt in mind that the Appellant's identity could not have been mistaken.

24. Regarding penetration, it was the Complainant's evidence that after the appellant followed her into the house, locked her inside, got hold of her, removed her skirt and pant, lowered his trousers and underwear and touched her vagina by his penis while covering her mouth thereby preventing her from screaming. According to her, the appellant defiled her. From the above evidence of the Complainant nothing was said as to what happened after the appellant touched her vagina by his penis. The evidence of PW6 was however to the effect that upon examination, the Complainant had bruises on her vagina with a whitish discharge and the hymen was freshly torn at 6.00 O'clock position. High vaginal swab revealed the presence of spermatozoa. According to her the presence of spermatozoa was proof of defilement. What is however intriguing is that according to the information given by the Complainant to PW5 was that the appellant used a condom. If the appellant used a condom then from where did the spermatozoa come from. Clearly the evidence of the Complainant was inconsistent with the evidence of PW6 regarding penetration. First, the Complainant only stated that the appellant touched her vagina by his penis. Then she narrated to PW5, a clinical officer that the appellant was wearing a condom. In this regard the appellants relied on **Onubugu vs. State 119741 9 S.C.1 Kem vs. State (1985)1 NWLR** where the court was of the opinion that**:-**

> **"Where prosecution witnesses have given conflicting version of material facts in issue, the trial judge by whom such evidence is led must make specific findings on the point and in so doing must give reasons for rejecting one version and accepting the other. Unless this is done, it will be unsafe for the court to rely on any of the evidence before it."**

25. In light of these inconsistencies and contradictions, the benefit of doubt must go to the appellant. In **Dominic Kibet Mwareng vs. Republic [2013] eKLR** it was held that:

> **"The other ingredient in a charge of defilement is penetration by a particular assailant at a particular time…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence."**

26. Having considered the evidence presented before the trial court it is my view and finding that the issue of penetration was not proved to the required standards. In this case however, the appellant faced the alternative charge of indecent act. Section 2 of the ***Sexual Offences Act*** provides *inter alia* as follows:

> ***"indecent act" means an unlawful intentional act which causes-***
>
> ***(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.***
>
> ***(b) exposure or display of any pornographic material to any person against his or her will;***

27. Section 11(1) of the ***Sexual Offences Act*** provides that:

> ***Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.***

28. Therefore, for the purposes of that alternative charge, it does not matter whether in doing so, the appellant used his male genital organ or any part of his body as long as he touched the genital organs of the Complainant which was the testimony of the Complainant.

29. Having considered the evidence presented before the trial court it is my view that the appellant was improperly convicted on the offence of defilement. From the evidence adduced it is my view that the evidence disclosed the commission of the offence of indecent act. Though that was not the main offence with which the appellant was charged, indecent act is a cognate offence to the offence of defilement. Section 179 of the ***Criminal Procedure Code*** provides that:

> ***(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.***

30. As regards the power of the Court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, the Court of Appeal in **Robert Mutungi Muumbi vs. Republic [2015] eKLR** expressed itself as hereunder:

> **"The third issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda's response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged…As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court**

contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171* and *WACHIRA S/O NJENGA V. REGINA (1954) EA 398*). *Spry, J*. explained the essence of the first consideration as follows in *ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294*, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

> **"*Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.*"**

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial." [Underlining mine].

31. The Court proceeded:

> **"The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See *REPUBLIC V. CHEYA & ANOTHER [1973] EA 500).* In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied."**

32. Accordingly, I hereby set aside the appellant's conviction of the offence of defilement and substitute therefor the conviction of the offence of indecent act.

33. As regards the sentence, though the appellant and the Complainant seemed to have been close even before the date of the incident, that is no excuse since the Appellant did not contend that he was misled as regards the age of the Complainant. In this case, the appellant took advantage of the tender age of the complainant for his own selfish gratification. In **D W M vs. Republic [2016] eKLR** where the Court held that:

> **"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."**

34. However, as was appreciated in **Tito Kariuki Ngugi vs. Republic [2008] eKLR**:

> **"The Appellant…caused her trauma which she will have to live with for the rest of her life."**

35. This Court does not condone offences against minors and vulnerable persons. As was appreciated by **Madan, J** (as he then was) in **Yasmin vs. Mohamed [1973] EA 370**:

> **"The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved."**

See also **Omari vs. Ali [1987] KLR 616.**

36. In the premises I allow the appeal in so far as the conviction and sentence imposed on the appellant in respect of the offence of defilement is concerned, substitute therefor a conviction of the offence of indecent act and sentence the appellant to serve 10 years' imprisonment to run from 10th August, 2016.

37. Judgement accordingly.

38. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic, the Appellant having consented to that mode of delivery.

Read, signed and delivered in open Court at Machakos this 30th day of April, 2020.

G V ODUNGA

JUDGE

In the presence of:

Ms Njeru for the Respondent

Appellant in attendance through skype

CA Geoffrey