REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 51 OF 2018

AMN.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal against the conviction and sentence of Hon. R. Amwayi, RM delivered on 15th May 2018 in Molo Chief Magistrate's Sexual Offence Number 25 of 2017)

J U D G M E N T

1. The appellant AMN was charged with **Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act,** and in the alternative, **Indecent Act with a child Contrary to Section 11(1) of the same Act.** It is alleged that on 24th February 2017 in Molo District within Nakuru County he intentionally caused his penis to penetrate the *anus of SM a child aged nine (9)* years, and in the alternative that he on the same date, time and place unlawfully and intentionally caused his genital organ namely *penis to come into contact with the genital organ namely vagina of SM, a girl aged nine (9) years old.*

2. Plea was taken on 1st March 2017. The appellant pleaded not guilty. The trial commenced on 10th March 2017. After six (6) prosecution witnesses and appellant's unsworn statement of defence, the learned trial magistrate in her judgment of 15th May 2018 found the appellant guilty of **Defilement Contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act.** On the same date she sentenced appellant to life imprisonment.

3. Aggrieved by the conviction and sentence the appellant brought this appeal on 29th May 2018. On 1st October, 2019 he filed his Amended Grounds of Appeal together with his written submissions arguing the grounds.

1. THAT the learned trial magistrate erred in law and fact by failing to find that the prosecution did not discharge the duty of disclosure as per Article 50(2).

2. THAT the learned magistrate erred in law and fact by failing to appreciate that a crucial ingredient of the offence was not proved.

3. THAT the learned magistrate erred in law and fact in failing to find that the prosecution witnesses were not only incredible but also hostile.

4. THAT the learned magistrate erred in law and fact by failing to appreciate the purpose of a voire dire examination.

5. Being a first appeal appellant is entitled to a review, re-assessment of the evidence and for this court to draw its own conclusions, see **Okeno v Republic, 1972 EA 372**

Case for prosecution

The case for prosecution was delivered by six (6) witnesses, the complainant, her minor brother, complainant's mother, a village elder, the clinical officer and the investigating officer. According to the prosecution the appellant was the step father of the complainant having married her mother when she was one (1) year old, and had lived with the appellant for eight (8) years. Her mother and appellant had two (2) other children after her.

5. It was the case for the prosecution that the appellant had three (3) times before this incident defiled the complainant vaginally. She testified that the incident for which the appellant was tried happened on 24th February 2017 at 1.00 p.m. That she was washing dishes. Her

siblings had gone to the river. The appellant found her called he into the house, told her to remove her trouser, told her to bend. She felt pain in her poopoo (anus). He told her he would do it slowly, told her not to make any noise, promised to buy her new clothes, told her not to tell anyone. She stated;

> "*He had inserted his kitu ya kukojoa into my poopoo. After he was done, he told me to dress up and told me to go wash dishes. He stopped defiling me when he saw my brother approaching from the river. But he told them to go back to the river. After they left he came back and proceeded to defile me."*

She testified that on 26th February 2017 she was feeling pain in her poopoo area and that is when she told her mother that "*daddy had defiled me*". She further testified;

> "*…there was a time before this incident he defiled me in my vagina (mahali pangu pa kukojoa). There was also another time he defiled me while I was in Kisii."*

On cross examination she told the court that appellant was not her real father that her mother had given birth to her before she got married to him. On re-examination she said she told her brother that appellant had defiled her.

6. Her brother **PW2** ten (10) year old **SA** gave unsworn testimony that on 24th February 2017, he came from the river about 1.00 p.m. He found PW1 washing dishes and crying. He asked but she did not tell him why she was crying. He testified;

> "*The following day she told me that she had been defiled by daddy. She told me she was feeling pain in her private parts*"

He testified further that the appellant told her not to tell anyone or she would be killed. That he promised her a new dress. That he informed their mother who took her to hospital. On cross examination he said he was the one who told their mother about the incident because when it happened she was out of town.

7. PW3 was the mother to PW1 and PW2. She said PW1 was born on 14th July 2008 and produced a copy of a clinic card. Her testimony was that on 26th February 2017, she sent the children to the river while she was washing clothes. PW2 came and told her that the PW1 had told him that she was defiled by the appellant. She examined the complainant, she could *"not see her private part"* but the complainant was in pain. She took her to hospital where she was told that the complainant had a raptured hymen and bruised anus. A P3 was completed and the appellant was later charged. On cross examination she said that the appellant had been defiling the minor for a long time, and this was the third time. That even the week before this incident he had attempted to defile her.

8. On 22nd December 2017 the trial magistrate changed and upon the application of **Section 200 (3) of the Criminal Procedure Code** the appellant opted to proceed from where the case had stopped before the new trial magistrate.

9. PW5 Ngetich Stanley from Molo Sub County testified that the P3 was completed by one *"Saide who is my colleague"*. Reading from the P3 he testified that the complainant alleged to have been defiled three (3) times and this was the third incident, twice vaginally, now analy. He examined the anal region and found that it was tender, painful and inflamed. That injury was three (3) days old and caused by a penis. P3 was filled on 28th February 2017.

10. PW6 the investigating officer **No. xxxxx PC Joel Kipngetich Kosgei.** He testified that on 24th February 2017 he was in crime office when the complainant and her mother came in and reported that on the same date the complainant had been defiled by her father. He booked the report, took the complainant to hospital, issued P3. That at the time of reporting the appellant had been arrested by members of the public he re-arrested him from members of the public, placed him in cells. He said that when the complainant reported she had difficulty walking and was in pain. She told the police she had been defiled three (3) times.

Defence

11. In his defence, the appellant gave unsworn statement and did not call any witness. He said that the basis of the charges were matrimonial issues he had with PW3. That on the material date he went home at 2.00 p.m. The PW3 was not home. The other children were playing outside. He rang her. She said the complainant had diarrhoea and she had taken her to hospital and the complainant had been treated. They came back home. He denied defiling the child. That she was indeed his child.

The Appeal

12. The appellant relied on his written submissions and also highlighted the same. He submitted that his right to fair trial was violated because he was not issued with witness statements to enable him prepare his defence. To this he added the fact that no Post Rape Care Form was filled for the complainant. He relied on **Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR**. He also argued that the prosecution had not proved penetration. He faulted the medical evidence of clinical officer which the trial court relied on in its judgment. Quoting from the judgment he pointed out the specific area of concern;

> "*The clinical officer in his testimony stated that at time of examination of anal region revealed that it was tender inflamed and swollen. He stated that the probable weapon used was penis. He produced the P3 form as an exhibit. PW2 stated that on 24th February 2017 when he got home he found the complainant crying. From the testimony and evidence on record, there was penetration of the complainant's genitalia (anus) by male genital organ as evidenced by tender swollen and inflamed anus."*

13. He urged the court to find that the trial court had misdirected itself on the medical evidence as there was no proof that the alleged injuries were caused by penile penetration. That the clinical officer's statement that there was penetration was not supported by any evidence. He submitted that the complainant's abdominal pains and pain in the anal region could have been caused by other factors including constipation.

14. Regarding the *voire dire* examination he submitted that the trial magistrate misled herself on the purpose of a *voire dire* examination. That after conducting *voire dire* on PW1 she drew the conclusion that;

> "*The minor is fluent and outgoing and very confident. She is however too young to give a sworn statement."*

15. That this view demonstrated that the trial court had conducted *voire dire* to determine the age of PW1, yet she was supposed to determine whether the witness understood the nature and meaning of an oath. He relied on **Peter Kariga Karume v Republic Criminal Appeal Number 77 of 1982** where the court said;

> "*Where in any proceedings before a court, a child of tender years is called as a witness, the court is required to form an opinion on voire dire examination whether the child understands the nature of an oath in which case his sworn may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is collaborated by material evidence in support thereof implicating him."*

16. He argued that the trial magistrate relied on the uncorroborated unsworn testimony of two (2) minors to convict him.

17. The appellant also attacked the testimony of prosecution witnesses. He urged the court to pay attention to the contradictions and inconsistencies in the case for prosecution.

18. Regarding the date of the alleged offence, the investigating officer testified that the report was made on 24th February 2017 by the complainant and mother, that the appellant was arrested the same day by members of the public and he took the child to hospital the same day. That PW2 said he told the mother about the alleged defilement on 25th February 2017, the **PW4** the village elder said the PW3 reported to him on 25th February 2017 that the child had been defiled by her husband yet she in her testimony said that it was on 26th February 2017 when she had sent the children to the river that PW2 told her that PW1 had told him that she had been defiled by appellant. His question was, how could all this be true? He urged the court to find that these were all marks of a made up case. He cited **Section 163 (1) (c) of the Evidence Act**.

19. The appeal was opposed by the state through Ms. Nyakira. She submitted that the ingredients of defilement were proved. The age of the complainant, at nine (9) years. Date of Birth 14th July 2008 via clinic card. That the appellant was known to the minor. That she testified that he inserted his penis into her anus, and the clinical officer confirmed this as he found tenderness, inflamed swollen anus.

20. In rejoinder the appellant submitted that defilement could not have resulted in just swelling.

Analysis and Determination

21. The issues for determination are;

1. **Whether the trial magistrate conducted proper voire dire.**
2. **Whether the evidence is contradictory or inconsistent.**
3. **Whether the appellant's rights to fair trial were violated.**

22. Starting with the third (3rd) issue, appellant argued that there is nothing in the proceedings to show that he had been supplied with witness statements. Hence prosecution had failed to discharge its duty of disclosure as per **Article 50 of the Constitution.**

23. I have perused the record. Indeed it does not state anywhere that the appellant requested for and was granted or denied the witness statements, or that the court directed the same be supplied. However the record is clear. Every time the matter came for trial on 10th March 2017, prosecution said he had two (2) witnesses. The accused said "*I am ready*". The matter proceeded, three (3) witnesses testified, and were cross examined by appellant. On 16th June 2017, PW4 testified, appellant is recorded saying, *"I am ready"*. Similarly on 15th March 2018 when PW5 and PW6 testified, there is no indication that appellant was suffering from failure of prosecution to supply witness statements.

24. In his submissions he says this case had no Post Rape Care form, and that he was told it was not necessary, when? It would appear he was supplied with all these, and that is how he realized the Post Rape Care was not there. Hence, it is my finding that the appellant's right to disclosure was not violated.

25. Regarding ***voire dire*** for PW1, **Section 19 of Cap 15 Oaths and Statutory Declarations Act at Sub Section (1)** states:-

> ***"Where in any proceedings before any court…. any child of tender years called as a witness does not, in the opinion of the***

court… understand the nature of the oath, his evidence may be received though not given on oath, if, in the opinion of the court… he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth, and his evidence… though not given on oath… shall be deemed to be a deposition."

26. It is evident from the record that the trial magistrate in conducting the *voire dire* did not establish, either whether PW1 was possessed of sufficient intelligence to testify or understood the duty of speaking the truth. So from the record the basis for taking the minor's unsworn testimony was because she was *"too young".* Whether she was possessed of sufficient intelligence or understood the duty of telling the truth, the trial magistrate did not make any finding rendering PW1's testimony almost worthless. Similarly regarding PW2 the trial magistrate opinion was;

"he can give unsworn statement due to his tender age."

She did not form the required opinion with regard to the PW2's intelligence or understanding of the duty to tell the truth.

27. In **Michael Muriithi Kinyua v Republic [2002] eKLR** the Court of Appeal (*Chunga CJ, Tunoi and Lakha JJA*) discussed this **Section 19.** The court made reference to decisions of the former Court of Appeal of East Africa in outstanding cases.

v. Nyasani S/o Gichana v Republic [1958] EA 190,

v. Kibageny Arap Kolil v Republic [1959] EA 92,

v. Oloo s/o Gai v Republic [1960] EA 86.

The court then proceeded to summarise the holdings in those cases in **Nyasani & Kibageny** thus;

"…. The procedures which a trial court should follow when receiving evidence of a child of tender years… there are two steps to be borne in mind. The first step is for the court to ascertain whether the child understands the nature of an oath. An investigation of this nature must be done by the court immediately the child appears in court. The investigation need not be long but it has to be done and has to be directed to the particular question whether the child understands the nature of an oath. If the answer to this is in the affirmative then, the court proceeds to swear or affirm the child and to take his or her evidence on oath. On the other hand if the child witness does not understand the nature of oath he or she is not necessarily disqualified from giving evidence. The second step then follows. The court may still receive evidence if the court is satisfied that upon investigation that he is possessed of sufficient intelligence and understands the duty of speaking the truth…. investigations need not be long but it must be done and when done, it must appear on record…" (emphasis mine)

These guidelines set down many years ago and have interpretation and application in a plethora of authorities still hold true. While I have expressed the view that it is time that this assessment was "handed over" to the experts on child development so that the court would be guided by an expert's report especially on "sufficient intelligence", for as long as that remains the position of **Section 19(1) of Cap 15**, then the trial court is obligated to demonstrate its investigation and its opinion. In this case the record falls short of this demonstration and even the trial magistrate's opinion on each of the two (2) children does not comply with the requirements.

28. The Court of Appeal in **Michael Muriithi Kinyua** above went on to state;

"We would like to call the attention of trial judges and magistrates to this procedure and to emphasise that there is need for strict compliance, failure of which may very well, in appropriate circumstances, vitiate conviction and result in allowing the appeal."

29. The Court of Appeal further held that, where a child of tender years is allowed to give evidence under **Section 19(1) of Cap 15**;

"…the removal of the proviso also removed the requirement that the unsworn evidence of a child of tender years required corroboration as a matter of law. Despite this, we think that the practice is a sound one and should still be followed by courts as a rule of practice. …. where a child of tender years is allowed by the court, upon proper investigations under section 19(1) of the Oaths and Statutory Declarations Act, to give sworn evidence, there is a requirement, as a rule of practice, that such evidence should be corroborated. It is a sound rule of practice which has stood the test of time and it ought not be disregarded for the sake of fair trial and justice to the offender. That corroboration should be in material evidence implicating the accused … "

30. I am well alive to the provisions of **Section 124** and the proviso thereto with regard to sexual offences. However the record here is clear. The trial magistrate did not rely on that proviso. Is it applicable at this point?

It states:

Corroboration required in criminal cases

Notwithstanding the provisions of section 19 of the **Oaths and Statutory Declarations Act (Cap. 15)**, *where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

31. Clearly it is the trial court that is bequeathed that privilege and duty to apply Section124 and its proviso.

32. What is this evidence?

33. It all begins with the charge sheet. One will notice that the main charge speaks of the genital organ of the victim involved to be the anus. When it comes to the alternative charge the genital organ involved is said to be the vagina.

34. While it is possible that during an anal defilement the vagina could get involved, the complainant did not mention anything in her testimony regarding any contact between her vagina and the appellant's male organ. I did not see where this charge could arise from without any mention by the complainant. Was a case of "*pata potea*" that if we don't catch him with this, we can catch him with that!

35. The PW1 said she had been defiled vaginally twice before the anal defilement. Her mother said she had been defiled many times by the appellant. It is noteworthy despite this, not a single investigation was launched into this, and if it was that evidence was not laid before court. A simple medical examination would have at least clarified the issue whether the complainant had vaginal sexual intercourse before the alleged anal defilement? The P3 simply takes history thus;

"*Defiled by her father, this is the third time, and in two (2) previous ones were vaginal and this one is anal. Patient has back ache pain while passing stool."*

On general examination the P3 says *"swollen tender, inflamed anal region"* then *"abdominal pains"*.

An examination of the labia majora, labia minora vagina and cervix, "no injury detected". If the complainant was defiled vaginally twice before this, there would have been evidence of previous sexual activity. Its absence makes her testimony and that of her mother doubtful, regarding the whole story. In particular the mother also alleged that appellant had attempted to defile the complainant the week before this incident. What did she do about that incident? I noted that the complainant said nothing about this attempted defilement, a week just before this alleged anal defilement. Did it really happen or was that supposed to embellish the case for the prosecution? This is and the whole mix up on the dates, as to when it happened, when it was reported to the police; the P3 says OB 20/26/2/2017, the investigating officer said it was reported on 24th February 2017. Which is which? In addition P3 indicates that the complainant was not given any treatment prior to the P3 examination on 28th February 2017. So was she taken to hospital on 26th as alleged?

It is evident that the trial magistrate did not apply her mind to the evidence on record she would have noted these inconsistencies and gaps in the same, rendering any conviction unsafe. The clinical officer whose testimony the trial magistrate relied on to prove penetration is not the one who examined the complainant. He testified from the P3. Nowhere in the P3 does the officer who examined the complainant arrive at the conclusion that the injuries he noted were caused by a penile penetration.

36. The complainant stated that she was told to bend and when she did the appellant put his penis into her anus. The complainant did not say she saw what was put in her anus but she said it was the appellant's urinating thing. She added that this went on until her brother came back from the river, the appellant stopped, send them back to the river and continued to defile her. Is this testimony true? Read together with her brother's testimony, it is contradictory. Her brother's testimony is that when he came from the river, the complainant was washing dishes and crying. There is nothing about his coming home, being sent back by the father. This would have been very significant evidence. He did not say it because it did not happen.

37. It is also PW2's testimony that he told the mother about the defilement on 25th, while hers is that he told her on 26th, and the complainant says she told her mother on 26th. PW4 the village elder says that the report was made to him on it was on 25th.

38. I come to the conclusion that the trial magistrate failed to conduct proper *voire dire* and hence did not comply with provisions of **Section 19 Cap 15** or the proviso to **Section 124 of the Evidence Act.**

39. The prosecution presented evidence on the age of the complainant. The appellant was known to the complainant. Did the prosecution prove penetration? The case for the prosecution was that this incident was one of three, including an attempt. The evidence placed before the trial court did not support any of those others and the question was what that made of this one. Looked at wholesomely the same was not conclusive with regard to penetration. The role of the police is to receive the reports and investigate every possible angle and to tie up the loose ends to ensure no gaps. The prosecution ought not to present any case to court with loose ends or obvious gaps such as this. Sexual offences are not mathematical equations. The surrounding circumstances are the ones that carry the case because they set the scene. It is the investigators paradise to speak to, to pick out the key issues, and prepare the same for prosecution, and from which the prosecution choose the angle to present to court. Here the prosecution chose to present the appellant as the abusive stepfather but that did not hold. The body of evidence was in tatters and could not stick the conviction. It also gives the impression of a set up gone bad. Overall the corpus of evidence before the trial magistrate was contradictory, inconsistent and not worthy of credit to warrant a conviction.

40. The appeal succeeds. The conviction is quashed. The sentence set aside. The appellant is to be set at liberty unless otherwise legally held.

Delivered, Dated and Signed at Nakuru this 23rd day of April, 2020.

Mumbua T. Matheka

Judge

In the presence of:- Via Zoom

Ms Odero for state

Court Assistant Edna

Appellant present