



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 5 OF 2017

LM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Hon. J. N. Nthuku (SRM) in Nakuru Chief Magistrate's Court Adult Criminal Case Number 110 of 2015 in a judgment dated 16th January 2017)

J U D G M E N T

1. The appellant LM was on 26th January 2017 convicted for the offence of **Defilement Contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act** and sentenced to life imprisonment.

2. It was alleged that on 2nd May 2015 within Nakuru County he intentionally and unlawfully committed an act of inserting his penis into the vagina of JA a child aged ten (10) years which caused penetration. In the alternative he was charged that on the same date, time and place he committed an **Indecent Act with a child Contrary to Section 11 (1) of the same Act** by touching the vagina and buttocks of JA a child aged ten (10) years.

3. Aggrieved by the conviction and sentence he filed petition of appeal on 23rd January 2017 with grounds which he amended and filed with his written submissions. The Amended Grounds of Appeal were;

1. THAT the trial magistrate erred in law and in fact by failing to appreciate that the medical evidence adduced by the prosecution was not sufficient to allow a conviction.

2. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that section 8(1) of the Sexual Offences Act number 3 of 2006 on sentencing.

3. THAT the learned trial magistrate erred in law and in fact by failing to consider my plausible defence and mitigation thereof.

4. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that crucial witness was not called upon by the prosecution to testify.

5. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that crucial evidence in terms of exhibits were not produced.

4. He argued that the trial court had miscalculated the age of the minor in arriving at his sentence, as the minor was above eleven (11) years old, and by **Section 8(2) of the Sexual Offences Act** life imprisonment should not have been meted against him. That the body of evidence did not prove the charge beyond a reasonable doubt, for instance it appeared that the offence was reported before it was committed. That the medical evidence did not prove penetration by a penis, that the lack of P3 was evidence of lack of medical evidence, and in any event the Post Rape Care (PRC) was in violation of **Section 80(1) of the Evidence Act**. That crucial witnesses were not called, and that the trial court ignored his defence.

5. In opposing the appeal Ms Nyakira for the state submitted that the age of the child was established at eleven (11) years old by a certificate of birth. That the sentence was properly meted in accordance with the law. That the child narrated how the defilement had occurred.

6. In rejoinder the appellant argued that he ought to have been examined for forensic evidence as per **Section 36 of the Sexual Offences Act**,

and that according to **Mwacharo v Republic [2016] eKLR** the prosecution to have produced a baptism card and age assessment report.

7. After conducting *voire dire* the trial magistrate formed the opinion that the child understood the importance of telling the truth but not that of an oath. The child was affirmed. The case for the prosecution was that the appellant was living with the complainant's sister one, C, apparently, as husband and wife. That the appellant used to sell mandazi.

8. On 2nd May 2015 at 5 p.m. complainant's sister (she does not name her) gave Ksh. 20/= to buy mandazi from the appellant. When she went to his house, she gave him the money then he ushered her into the house and put her on the bed where he removed his trousers and hers. He lay on top of her and put his urinating thing into hers. She felt pain, when he finished and opened the door, C was there. He asked her where she had been but she asked him what he had done to her (the complainant). The complainant told her sister what had been done to her so she could tell their mother but the appellant prevented her from doing so, so she went herself and reported to their mother.

9. The complainant testified that said she bled from her private parts and both her panty and trouser were blood stained. That her when she reported to her mother, they both went back to appellant's place where her mother ordered C to get her things and go home.

10. On cross examination she testified that one Chege saw her go into appellant's place, that Chege saw her and even saw her blood stained panty and trouser. She said her clothes were blood stained and she took them to the hospital. On further cross examination she said that she saw a little blood from her private parts but she did not tell the police. That she also saw a little substance from her private parts. She reiterated the fact of going with the panty to hospital. She said that her uncle is the one who arrested the appellant as he tried to escape.

11. **PW2 HD** told the court that her daughter C was married to the appellant. On that 2nd May 2012 at 6.30 p.m. C was at home (HD's place) as she had given her a task to perform. While there C gave the PW1 Ksh. 20/= to take to the appellant and to tell him that she would be going home later. PW1 went to appellant's house. She took too long to return home and HD sent her brother D to check on JA's class friend if JA had gone there. D came back and reported that she not there.

12. HD She sent D to appellant's place. D came back to report that he found appellant and C fighting. It was then that JA came carrying C's baby and told HD that JA had done *tabia mbaya* to her. This was at 7.00 p.m. HD went to appellant's house and found him arguing with C. Neighbours advised her to take JA to hospital. She called her brother **JO** who came and arrested the appellant. She then took JA to hospital where she was treated and the PRC forms filled. She said JA was born on 27th February 2004.

13. On cross examination she said appellant's house was about ten (10) walk minutes from her place. That C had gone home about 5.00 p.m. and returned to her house about 6.30 p.m. That JA had come home about one (1) hour after she had been sent by her sister. She said JA told her that the appellant had defiled her. That she examined JA's private parts and confirmed that the child had been defiled.

14. **PW3 JO** testified that he received a call from HD that her daughter had been defiled by the appellant. He rang his brother one **S** and told him what had happened. He then proceeded to HD's place and was told she had taken the child to hospital. On his way home he met **S** having already arrested the appellant. They took him to Kiamunyi Police Post and they recorded their statements the next day.

On cross examination he said they arrested the appellant while he was trying to escape. He denied that they reported assault.

15. **PW4 Dr. Njoroge Kanyotu** testified that the PRC form was filled on 2nd June 2015 by a Dr. Murage. He said on examination Dr. Murage had found that the outer vagina was red, and the hymen was torn and lacerated. That Dr. Murage had concluded there was penetration and filled the PRC and signed it. Dr. Kanyotu declined to testify on the P3 because according to the prosecutor, he was not aware who had completed it. On cross examination by the appellant, he said that the complainant was examined two (2) days after the alleged defilement, on 4th May 2015. According to the examination JA was not bleeding, there was no spermatozoa. His evidence was that there was nothing in the PRC to connect the appellant with the offence. He also testified that the PRC was not stamped because it belonged to Ministry of Health (MOH), he denied that PRC is completed from treatment notes, stating that it is completed directly by the Doctor on examination of a **Sexual Offences** victim. He said sperms could survive up to seventy two (72) hours but their absence in the vagina did not mean there was no defilement. He also said that physical exercises could in rare occasions cause breakage of the hymen. He said JA was not issued with a treatment card because that would have attracted a fee, but for **Sexual Offence** victims, the PRC is filled for free.

16. **PW5 No. 2009037193 APC Robert Mambo** told the court that on 2nd May 2015, he was on patrol within London Estate in Nakuru about 10.00 p.m. when he met two (2) people who had arrested a person. They told him that that person had defiled a child. These were JO and another and the arrested person was the appellant. He and his colleagues re-arrested him and took him to Kiamunyi Police Post. They advised the men to take the child to hospital. On cross examination he said he never saw the child victim, but on interrogation the appellant admitted defiling the child and apologized.

17. **PW6 No. 5371 PC Samuel Rono** testified that on 2nd May 2015 at 11.00 p.m. the appellant was brought to Kiamunyi Police Station by PW5. That the following day he recorded statements and received the PRC form. He investigated the case. He did not visit the scene. The child's clothes were not availed to him. He said appellant was arrested on Saturday was taken to Central Police Station on Monday 4th May 2015 and taken to court on Tuesday 5th May 2015.

18. On 20th July 2016 the prosecution closed its case without calling the doctor who filled the P3.

19. In his defence the appellant gave unsworn statement. He denied committing the offence saying that the whole issue was because of his failure to pay dowry of Ksh, 70,000/= as demanded by his in-laws.

20. He testified that on the material date he came from work and found his house was empty. He went to his in-law's and found his wife and

son there, and she told him he was being taught a lesson. His brothers-in-law came, took him out and beat him up. An Administration Police (AP) officer rescued him and took him to Kiamunyi Police Post where he was locked up for long before being taken to court, on allegations that he had defiled JA. He said his mother told his in-laws he would pay the dowry but they said he would pay it in prison.

21. This is a first appeal. My duty is well demonstrated in **Okeno v R (1972) EA 372** where it was stated

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTILAL M RUWALA V R, [1957] EA 57). 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 courts’ findings and conclusions; it must make its own findings and draw its own conclusion 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 witness.”

22. I have carefully considered all the submissions and evidence before me. Looking at the totality of the appellant’s grounds the issue is whether the case for the prosecution was proved beyond a reasonable doubt to warrant the conviction; and two, what sentence would be applicable where the victim is above 11 years old.

23. The ingredients for defilement have now acquired notoriety: age of the victim, penetration, and the identity of the perpetrator. I dare say this is not a mathematical equation and that a scrutiny of the evidence of the circumstances surrounding the alleged commission of the offence must accompany these ingredients.

24. With regard to penetration, it is critical to note that PW1 told the court that she bled after the alleged defilement. That both her trouser and pants were blood stained. That one by the name Chege saw her enter the appellant’s house and again when she was leaving his house with a blood stained panty and trouser. Who is this Chege? Why was this Chege not called to testify yet he was the eye witness of very crucial evidence?

25. Secondly it is curious that C, who met the complainant at her doorstep as the appellant was opening the door, did not witness this blood stained trouser? Yet, according to the complainant when C came she demanded to know from the appellant what he had done to her. There is no mention of blood stained trouser or panty. If it was there C, would have seen the blood stained trouser.

26. From here the complainant testified that she went home and told her mother PW2 that she had been defiled by the appellant. PW2 did not mention seeing any blood stains on the complainant’s clothes. The mother’s testimony is that the complainant came home carrying C’s child. The complainant never testified to this. PW2 said she even examined the complainant’s private parts. She made no mention of any blood stains. It was the complainant’s testimony that her mother accompanied her back to the appellant’s house. Again, no mention of blood stained trousers even as they went back to the appellant’s house. In fact it appears to me that the sole purpose of going back to the appellant’s house had nothing to do with alleged defilement but to get C to leave the appellant’s house. If the appellant had defiled the complainant as alleged and C had found them as alleged, the neighbours would have arrested the appellant long before the PW2 went back to confront him.

27. That is why these testimonies do not add up. According to PW2 after C finished her task and left for her house, she sent D to check whether JA was at C’s. D came back to report that C and the appellant were fighting. What were they fighting about? Nothing is said about the cause of their fight. PW2 testifies that it is soon after this that JA arrived while crying and carrying C’s baby and reported that appellant had done *tabia mbaya* to her. Did D find the complainant there at C’s place? If so, what happened?

28. PW2 said she went to appellant’s house and found the two (2) arguing. There is nothing in her testimony as to whether she confronted the appellant with the information the child had told her. She says before she went to hospital about 7.00 p.m. she called her brother who came and arrested the accused. Her brother *“had already reported at the police post where they took the accused.”* That is curious. What had her brother reported (about 7.00 p.m.) at the police post yet the events were just unfolding?

29. Secondly, if he had already reported at the police post, why would they have to arrest the appellant and take him to the post? Her testimony that they had already reported at the police post where they later took him is contradicted by the evidence of her own brother, PW3 and the AP officer PW5 and Police Constable (PC) Rono PW6 How?

30. PW3 received the phone call from PW2 at 9.30 p.m. on 2nd May 2017. He met his other brother JO who had already arrested the appellant. This JO did not testify. If PW2 called JO and went and arrested the appellant why did this JO not testify so that he could tell the court why and when he arrested the appellant? If he arrested the appellant around 7.00 p.m. what was he still doing with him after 9.30 p.m. when PW3 received the call from PW2 and found him having already arrested the appellant? Is it not curious that no other neighbour of the appellant, the people who were at the scene and who allegedly advised PW2 to take the child to hospital did not take action and arrest the appellant on the spot? Is it not curious, because the way things are in this country, a suspect of sexual violence against a child will be arrested by the nearest person or persons. The moment members of the public hear that a person is suspected of a sexual offence against a child, people do not wait, so why would PW2 need to call her brothers, yet there were neighbours there, who even advised her to take the child to hospital and who could have called the police or arrested the appellant? What is more puzzling is that no report had been made to the police post before the appellant allegedly was taken there by the PW3 and his brother. According to PW5, he was on patrol when he met *“2 people who had arrested a man at 10.00 p.m. at London Estate”*. If PW2 is to be believed the appellant was arrested just after 7.00 p.m. and a report had already been made at the police post. If they had arrested him at 10.00 p.m., then this must have been after 11.00 p.m. PW5 re-arrested appellant and took him to Kiamunyi Police Post where he was received at 11.00 p.m. According to PW6 who was at the Police Post no report had been made earlier, so all this evidence, creates a doubt as to what exactly happened and why the appellant was “arrested”.

31. The other curious thing is the medical evidence. PW2 said she took the child to hospital the same night of 2nd May 2017 and she was treated on the same night. The PRC that was produced by PW4 was completed on 4th May 2017. No treatment documents were produced. PW4’s explanation was that a victim of sexual violence is never issued with treatment document and card. That patient is “treated” with the PRC form which is completed when a patient who is a victim of sexual violence is treated at the hospital. This position does not hold against

the usual practice or flow of events in these cases. The court will take judicial notice of the fact that victims of sexual offences get treatment and treatment cards and records usually accompany the PRC form and the P3. In addition in this case the PRC form was completed on 4th May 2017 which is indicated as the date of examination. If this doctor is to be believed then the complainant was not taken to hospital on 2nd of May but on 4th of May. Hence the PW1, PW2 and PW3 either did not tell the truth or the doctor was misleading the court. Either way this created a doubt as to the credibility of the medical evidence.

32. The child first testified that she went with her blood stained pants to hospital, was examined and treated, then retracted this evidence.

33. As if that is not enough the prosecution withdrew the P3 form for evidence. Why? No good explanation was given save that PW4 the doctor could not tell who had filled it out but he was comfortable producing the PRC. The PRC form itself announces at the top left corner;

“... To be used as clinical notes alongside P3 form for purposes...”

It bears no outpatient number (OP/No.) hence no evidence that the child was treated before the PRC was filled. It claims that a report was made at the Kiamunyi Police Post on 2nd May 2017 at 7.00 p.m. There is no evidence that such a report was ever made. It also states that the child's clothes were left at home. PW4 stated further that there was nothing in the PRC to connect the appellant with the alleged offence. Does this kind of evidence support the charge of defilement? It is noted in the PRC that the hymen was lacerated. At another part of the form it says “hymen torn and lacerated” there are also comments “hyperemic vestibule.” There was no bleeding or blood. PW4 did not examine the complainant. There was no P3 for him to produce. He could not tell how old the injuries were and no opinion as to what could have caused the injuries. PW1's testimony is inconsistent, creating doubt, at some point she says she bled, took the blood stained clothes with her to hospital. At another point, no, she did not take the clothes with her to hospital. At some point she saw some substance and a little blood, but neither her mother, her sister or Chege the people who saw her so soon after the alleged defilement testified to support this.

34. This matter resonates with the one where *Meoli J*, in the case of **T N M v Republic [2017] eKLR** stated as follows:

“The learned trial magistrate also failed to note that the victim was not physically examined by the doctor who completed the P3 form and that the corresponding PRC forms were never produced at the trial. In this case the PRC forms could have been used as primary medical evidence, if produced.

This is an unfortunate case. The victim's teachers rose to the occasion in the protection of the minor and her welfare but were let down by the police who seemingly conducted routine investigations in the matter. The most unfortunate and heart breaking fact is the uncooperative stance by PW2, considering the age of the victim and her health condition.

In the clear absence of proper medical or other evidence in proof of the offence, however, the court ought not to have anchored a conviction on mere suspicion. For these reasons, I do find that the conviction in this case cannot stand and agree with the decision of the Director of Public Prosecutions to concede the appeal the conviction is quashed and the Appellant is set at liberty unless otherwise lawfully held.”

35. It is similar to what transpired in the case of **David Waweru Githii v Republic [2019] eKLR**, *Kemei J*, observed as follows:

“PW 5 had a PRC form that was filled in by Dr.Kinyanjui on 30.11.2014 and he sought to produce the same. He testified that the findings were a torn hymen but not fresh and that the child told him that a neighbor had inserted his finger inside her vagina. On cross-examination, he testified that the PRC form was not stamped and it had no security mark but however maintained that it came from his clinic because it had a reference number that could be traced to the hospital. He testified that the hymen could be broken by many things/objects and that he last saw the child in 2015. On re-examination, he testified that the PRC form says that a finger broke the vagina but admitted that the PRC form was not stamped...The only independent evidence is that of the doctor who proved penetration while the investigating officer relied on the P3 form and a PRC form that is not before the court...PW4 testified that the victim was treated at Nairobi Women's Hospital and no treatment notes were produced thus creating doubt as to whether there was any such incident...I make a finding that doubt was created in the case of the prosecution and that the prosecution did not establish that the offence was committed.”

36. *Githinji J*, in the case of **Langat Dinyo Domokonyang v Republic [2017] KLR** states as follows:

“Indicates presence of laceration on the genital region, hymen not intact, discharge noted and state this as confirmed defilement, it can't be correct. It simply shows penetration, a word of which constitutes one of the ingredients in the offence of defilement and of Sexual Assault. The prosecution was therefore obliged beyond the evidence offered to show that the penetration was by male sexual organ. Showing that a male was involved is not enough. Nothing should be left for the court to assume. The court must be certain that the evidence discloses the offence the suspect is charged with.

I also wish to add here that the age of the injuries noted must be brought within the time the offence was allegedly committed.”

37. For the evidence to be reliable, and credible, it needed to add up. See *Ngenye-Macharia J*, in the case of **Isaac Obongo Onyinkwa v Republic [2019] eKLR** stated as follows:

“PW1 testified that the Appellant inserted his penis inside her private parts which caused her to feel a lot of pain. PW1's evidence was corroborated by the Post Rape Care Report produced in evidence by PW4 in which it was concluded that PW1 had been defiled. This evidence was further corroborated by PW7 who opined, upon examining the complainant, that she had been

defiled since her vaginal wall was hyperaemic and/or inflamed. She had bruises on the fore cheeks of her private parts, a small tear on the vagina and her hymen was broken. In the premises, this court concurs with the learned State Counsel's submission that the prosecution sufficiently established that the complainant had been defiled."

38. In this case the evidence relating to penetration was unreliable.

39. On the age of the record does show that she was above 11 years old and not yet 12 years. **Section 8(2)** is very specific to '11 years or less'. It is true that the Act is silent on the in between 11 to 12 years, as the next provision is for where the victim is between 12 and 15 years old. However the spirit of the Constitution and the Sentencing Policy Guidelines is to mete the least severe sentence available having taken into consideration all the evidence with regard to sentencing. Whatever the offence is, an accused person is entitled to a consideration of the aggravating and the mitigating circumstances especially in a case like there where there appears to be lacuna. In this case, there is no indication on the record that the trial magistrate applied her mind to the age of the complainant while meting out the life sentence. The complainant is said to have been born on 27th February 2007. Offence is alleged to have happened on 2nd May 2015. As far as **Section 8(2)** was concerned the complainant was not 11 years old and was not below 11 years old. She was above 11 years and not yet 12 years old. The sentence of life imprisonment was clearly not available to mete against him. If the trial magistrate had looked at the sections and attempted to address the lacuna the court would have at least noted that between the two provisions a sentence could be anything between **Section 8(2)** life and **Section 8(3)**, 20 years imprisonment.

40. While there is no doubt that the complainant knew the appellant, hence the identity of the perpetrator would not be an issue, it is evident from the foregoing analysis of the evidence that this case presents with numerous doubts. These must be resolved in favour of the appellant. In the upshot the appeal succeeds, the conviction is quashed and the sentence is set aside. Appellant 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

Edna Court Assistant

Appellant present