REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 33 OF 2017

RMK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(Being an Appeal* from against both the conviction and the sentence of Hon. E. Kelly (Resident Magistrate) delivered on 20th March 2017 in Nakuru Chief Magistrate's Court Criminal Case No. 98 of 2015.)**

J U D G M E N T

1. The Appellant RMK was charged before the Chief Magistrate's Court in Nakuru with two Counts.

a. Defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge as contained in the charge sheet were that:

> On the 26th day of December 2014 in Njoro District within Nakuru County intentionally and unlawfully committed an act by inserting a male genital organ (penis) into the genital organ of JNK, a child aged 12 years which caused penetration.

b. Deliberate transmission of HIV contrary to Section 26 (a) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were:

> On the 26th day of December 2014 in Njoro District within Nakuru County having actual knowledge that you were infected with HIV intentionally knowingly and wilfully had unprotected sexual intercourse with JNK, which infected the said JNK with HIV.

c. In the alternative he was charged with **Indecent Act with a Child Contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.** It was alleged that:

> On the 26th day of December 2014 in Njoro District within Nakuru County intentionally and unlawfully committed an indecent act by touching the private parts namely vagina of JNK, a child aged 12 years.

2. The Appellant pleaded not guilty on the 14th April 2015 and the trial took off on 26th April 2015. After a full trial the trial magistrate, on 20th March 2017, found him guilty of the two main counts sentencing him to two life sentences, but holding the second life sentence in abeyance.

3. To arrive at her decision the trial magistrate heard four (4) prosecution witnesses, the appellant's unsworn statement of defence and his two (2) witnesses.

4. The case for the prosecution was that on 15th January 2015, JKN who testified as PW3, and who is the father to JNK, the complainant, fell sick. He went for treatment at Naishi Dispensary. He was diagnosed with Tuberculosis (TB). He was ordered to bring the rest of his family for testing. He did that and on 6th February 2015 they were all found to be negative of TB, except that JNK was found to be HIV positive.

5. JNK was twelve (12) years then and in class five (5) at the local primary school. On receiving these results her father the PW3 sought to find out from her what had happened. In his testimony he said she told him and her mother that (in his own words);

> "…the accused gave her a mandazi and had sex with her. She gave us details of how it happened and that accused lay on top of her, inserted his penis into her vagina and later warned her that if she revealed to anyone, he would kill her. Jane said it had happened the day her mother sent her to the shop."

6. On learning all these he went to Naishi Police Station, made the report and was issued with a P3 form which he took to the hospital. It was completed, returned to the police station and the accused was arrested in JNK's presence.

7. The medical evidence was given by PW2 Tabitha Ngugi a clinical officer at Lare Dispensary. She testified that the child told her that she was defiled by a person known to her in his house. That she sent the child for laboratory tests for HIV and other Sexually Transmitted Diseases (STDs) on 6th February 2015. That the child was found to be HIV positive. That an examination of the child's genitalia revealed an old torn hymen. That the Post Rape Care (PRC) form was also filled. She testified that the appellant was taken to the same Health Centre on 3rd April 2015, when he was examined and found to be HIV positive. On cross examination she testified that she examined the complaint three (3) months after defilement and found her HIV positive. She further stated that it was difficult to know when JNK had contracted HIV.

8. JNK testified twice, first on 24th June 2015 and on 5th May 2016 when she was recalled at the appellant's request.

9. The first time, after conducting *voire dire* the trial magistrate concluded that:-

> "The witness is not vulnerable. She understands the need to speak the truth but does not understand nature and significance of oath taking. She will give an unsworn statement."

In voire dire this is what she said;

> "My name is JNK. I know why I am in court today. I do go to [particulars withheld] Primary School. I am in class 4. I am 12 years old. I do go to church on Sunday. I do tell the truth. If a person lies, they go to the devil. I will tell the truth. I have seen the pastor speak while holding the bible up. Nowhere else one lifts the bible to confess mistakes. We are 6 children, I am the 3rd born."

10. I was disconcerted by the jumbled up manner in which her testimony was recorded. Reading the record I gathered that she told the court that she knew the appellant as RMK. That she was born on 28th January 2003. That her father had TB but she was HIV positive. Her father asked her who had defiled her. That is when she decided to tell him the truth. That accused had had sex with her three (3) times, and last time was on 26th December 2014. She stated;

> "There was a time I had gone to the poshomill on his plot. Accused called me asked me to enter his house put me on his bed... the third time was in shamba. I had come from buying vegetables. He called me. I went to his garden. He inserted his penis in my vagina, his things for peeing, in my peeling thing (sic)."

11. For the incident of 26th December 2014 she testified;

> "I was sent by my mother to the accused's shop. Accused told me to enter his house he lie on top of me, inserted his penis in my vagina, warned me if I tell anyone he would beat me. Then he told me to leave and go away. He told me to wear my clothes. He had locked the door behind him. I felt pain."

12. On cross examination she told the court that when she went to the shop the appellant was seated outside and there were other houses. There were also people outside there, that she entered accused's shop through the back door and no one saw her. From there she went and bought sugar from W M's shop. By then she was not walking well. She did not tell WM what had happened to her. When she got home her mother had left and her father had not arrived from work. By the time her father came back she had washed her clothes. She did not tell her siblings.

13. When she was recalled she said she had been sent to the shop at 9.00 a.m. She said appellant's home was very far from her home.

14. The investigating officer was PW4 No. 37102 PC Joseph Masese. His testimony was that on 12th April 2015 the complainant came with her father to the police station. He reported that the child was sent to buy sugar and when she got to accused's shop, he asked her to go into the shop by the back door, defiled her, and then sent her to buy sugar elsewhere. That it is when the child was found to be HIV positive that she was asked to say who had defiled her. That she had told who had defiled her and she took them to his home. He was absent so they were looking for him but found him taking chang'aa. He was arrested, taken to Naishi Police Station, statements were recorded. He was taken to Lare Health Centre, where he later tested HIV positive. This investigating officer said he met the child's mother at the police station but did not recorded a statement from her. He also said that the appellant never told him there were any grudges between him and the family of the victim.

15. The prosecution closed its case.

16. The appellant was found to have a case to answer. He made an unsworn statement of defence. He had three (3) children; two (2) boys and a girl and his wife was deceased. His mother DW2 lived with his daughter. On 23rd December 2014 he was rang that his daughter was missing. He went to his mother's place that same day. He stayed there till 2nd January 2015.

17. DW2 his mother corroborated his evidence. DW3, his neighbour also confirmed that the appellant left her with his two (2) sons when he

was called home because his daughter was missing. This was on 23rd December 2014. He came back on 2nd January 2015.

18. The appellant then described how he was arrested on 13th April 2015, taken to the police station and later to the health centre. He was aware of his HIV positive status. He denied having defiled the child or deliberately infecting her with HIV.

The Appeal

19. The Appellant aggrieved by the conviction and sentence filed the present Appeal on 29th March 2017 with grounds. When he filed his written submissions on 1st July 2019. He also filed his amended grounds of appeal which he argued. That;

a. The Trial Magistrate erred in law and fact when she convicted the Appellant in the present case without conclusive proof of his penetration of the Complainant

b. The Learned Trial Magistrate erred in law and in fact by convicting the Appellant in this case and yet failed to note that the evidence adduced by the prosecution was not credible, it was not reliable

c. The Learned Trial Magistrate erred in law and fact when she convicted the Appellant in this case on unproved age of the Complainant, in this instance (life imprisonment) where as she was in the age bracket of 20 years imprisonment and that there was no evidence to prove transmission of HIV /AIDS to the Complainant by the Appellant

d. The Learned Trial Magistrate erred in law and in fact when she convicted me in this present case yet failed to consider the Appellant's plausible defence which was not rebutted by the Prosecution and also that there was a grudge from the money issue between the Complainants family and the Appellant. and that the HIV/ AIDS status of the Complainant was discovered before and earlier than what the Court was told

20. The appellant relied on his written submissions and responded orally to the submissions by Ms Nyakira for the state. The appellant urged the court to find that;

i. There was inconclusive proof of penetration.

ii. The evidence presented before court was neither credible nor reliable.

iii. That age of the complainant was not proved, neither the appellant's HIV status.

21. The appeal was opposed on the ground that the key ingredients of defilement, age, penetration and identity of the culprit were proved, and that the state had proved beyond a reasonable doubt that the appellant had infected the complainant with HIV.

22. By such arguments the appellant put in question the whole of the case for prosecution, and the only thing left for this court, as the 1st appellate court is re-look at, re-assess, re-evaluate the evidence and draw its own conclusions as guided by **Okeno v Republic (1972) EA 32 Kimeu vs Republic (2003) KLR 7562,** always keeping in mind that it neither saw or heard the witnesses.

23. On age of appellant he referred to **Kibale vs Uganda (1999) 1 EA 148.** The age of the victim has been the centre of the sentence which is meted to an accused person found guilty of a defilement. However since the **Muruatetu** case and **Dismas Wafula Kilwake**, and other cases, the mandatory nature of the minimum sentences was done away with returning to the trial court the discretion to give the appropriate sentence in each case.

In this case the sentence was given before **Muruatetu** hence the trial court did not have that discretion. So, what was the age of the complainant herein?

Apparently it was not certain. The charge sheet said twelve (12) years, as on 26th December, 2014. The matter was reported to the police in April 2015, the child was said to be still twelve (12) years. An age assessment was done, and at the same time a clinic card produced. The card said she was born on 23rd January 2003 by 26th December 2014 she was twelve (12) years and ten (10) months and therefore when she testified in May 2015, she could not have been twelve (12) years. She was over thirteen (13) years. There appears to be this narrative to keep her at twelve (12) years for as long as was necessary. There was nothing wrong for her to say she was 13 when she testified since there was proof of age. However, it appears that the prosecution was not certain with the same .That seems to have misled the trial court as to the sentence that was available to her to mete out to the appellant.

24. Section 8(1) as read with **8(3) of the Sexual Offences Act** provides for a sentence not less than twenty (20) years. To increase it to life it was necessary for the trial court to give an explanation for the same.

25. Regarding the charge on transmission for HIV, the provision is for a minimum sentence was fifteen (15) years to life.

26. The appellant was entitled to an explanation for the life sentences. And the trial court was obligated to give reasons for the sentences.

27. Was there penetration? What was the evidence? The trial magistrate believed that the appellant had sexual intercourse with the complainant on 26th December 2014 and other occasions mentioned by the complainant. The appellant had serious gripe with this. What is the evidence?

28. To begin with the trial magistrate misdirected herself in making the finding that there were several instances of sexual intercourse between the appellant and the complainant. The appellant is facing one count of defilement on a specific date, **26th December 2014**. The charge did not say diverse dates? It specified one incident. The father of the complainant spoke of one incident. The investigating officer was not aware that there were other incidents. So where did the rest come from? If indeed the prosecution was aware of their existence, why was the appellant not charged with the same? For as long as the appellant was not charged with those other alleged incidents, the trial magistrate was not called upon to make a finding, on them, and that evidence was prejudicial to the appellant as the prosecution chose to charge him with one count then led evidence on two other occasions . These were not even investigated. The trial court ought not to have relied on that evidence.

29. Now the charge. On 26th December 2014, the complainant said she was sent to the appellant's shop at 9.00 a.m. to buy sugar. According to her testimony, he defiled her, then she went and bought sugar from another shop. The investigating officer's version was that after the defilement the appellant *sent* her to buy sugar elsewhere.

30. The complainant also testified that one aunt Grace had told her mother she had seen her going into the appellant's shop. This aunt Grace who would have corroborated this evidence was never called. Neither was the mother to the child who is the one who is said to have sent her to the shop. Except for the word of the complainant, no one else testified that she was actually at the appellant's shop on the material date. This despite the fact that her testimony was that she came from the appellant's house and went to mama Muthoni's shop, and there were other persons outside the shop. The case of **Bukenya Vs Uganda [1972] 549, at 550 to 551** speaks to this situation.

> "…It is well established that the Director [of Public Prosecution] has a discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three was. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case… Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that these were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses if called, would have been or would have tended to be adverse to the prosecution's case. If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them without success…"

31. The complainant was found to be HIV positive on 6th February 2015 and the clinical officer said it was difficult to tell when indeed she contracted the virus. The appellant was tested positive on 13th April 2015. So, if the appellant defiled the complainant on 26th December 2014, is it possible that by 6th February 2015 the HIV test on the complainant would have been viable? According to the clinical officer, the HIV test would have been viable three (3) months after the first contact. Between 26th December 2014 and 6th February 2015 was one (1) month and eleven (11) days. If indeed the only corroborating evidence that indeed the appellant had sexual intercourse with the child and infected her with HIV, is the child's HIV status, then, clearly that evidence is questionable and inconclusive to say the least.

32. The other evidence is that of the torn hymen, old torn hymen.

The appellant cited several authorities for the proposition that a torn or broken hymen per se is not proof of defilement or conclusive proof of defilement. See;

> 1. **Michael Odhiambo vs Republic (2005) eKLR** where the court noting that the Complainant was examined by Dr. K'Ogutu Vitalis, held that the rapture of the hymen was not conclusive proof of defilement.
>
> **2. Daniel Mwingirwa vs Republic [2017] eKLR**

The Court of Appeal made reference to **P.K.W vs R** and made the following observations;

> "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."

There was no evidence that the JNK's torn hymen was proof of ongoing defilement.

> **Was the body evidence credible/reliable to support a safe conviction?**

33. The first issue is with when the complainant's HIV status was discovered. The evidence on record is that it was on 6th February 2015 but it is on 12th April 2015 that a report was made at the police station. This delay was not explained, yet according to the complainant's father, she told them of the defilement by the appellant on **6th February 2015.**

34. According to the appellant's defence the complainant's mother had obtained some goods and cash from his shop. She asked for school stationary and cash of Ksh. 5,000/= for hospital which she would refund. When he demanded for a refund PW3 the complainant's father told him they would pay when they wanted to, he threatened legal action, he threatened the same in equal measure. The next time he saw himself

being arrested only to be charged with this offence.

35. The appellant further argued that the investigating officer did not conduct sufficient investigations to establish whether the complainant and the appellant's strain of HIV were the same. This is clearly was a line of investigation that was available to the prosecution. One would expect that in a case like this where forensic evidence would likely nail the culprit or exculpate him the prosecution would pursue it to its logical end. The appellant is saying that there was better evidence available but the prosecution chose to proceed without it.

36. It has been held by the Court of Appeal that defilement is not proved by medical evidence or DNA but by evidence of the victim or circumstantial evidence. See **AML v Republic [2012] eKLR, Kassim Ali v Republic Mombasa Criminal Appeal Number 84 of 2005**. But herein was a very peculiar case, where the only supporting evidence was that of an infection with HIV. It was only prudent for the medical officer to carry out further tests to confirm that position as that evidence was available and would have established whether or not the two (2) had the same strain of HIV. That besides, it is evident that the trial court relied on the unreliable testimony of the complainant. Her case developed as the matter went along creating three other incidents before the alleged last one to create the impression of continuous defilement. The dates as to when the HIV status was discovered, the date of the report to police, the lack of investigations, the failure to call the crucial witnesses all contributed to the doubt over the case for the prosecution.

37. The appellant gave a plausible defence of where he was at the material time. This read with the fact that there was nothing place before the court to demonstrate that the alleged defilement happened on the 26th December as alleged. The prosecution position was that on that date the complainant was sent to the shop by the mother. Considering, one, the mother never testified, and that this came up almost two months later, what was it that fixed this incident on the 26th December 2015? There was nothing hence the appellant's defence that on that specific day he was not at home and corroborated by two witnesses bore some weight. It sure did throw some shadow of doubt on the case for the prosecution.

38. Regarding the sentence, it is prudent for trial court to give reasons for any sentence given. With the *Sentencing Policy Guidelines* now in place, and ***Muruatetu*** et al providing the space for re sentencing in cases where mandatory sentences were meted out, there is no excuse not to and it is only proper to do so.

39. In the upshot I find that the conviction on each count was unsafe. Each conviction is quashed. Each of the sentences is 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