REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 49 OF 2018

PETER MAINA WACHIRA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Mukurweini Principal Magistrates' Court Criminal Case No. 3 of 2006 (B.M. Ochoi) delivered on 11th July 2018)

JUDGMENT

The appellant was charged in the magistrates' court with the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. In the particulars of offence, it was alleged that on the 29th day of March 2018 in Mukurweini subcounty within Nyeri County, he intentionally caused his penis to penetrate the vagina of CW, a child aged 13. He faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006, particulars being that on the 29th day of March 2018 in Mukurweini sub-county within Nyeri County, he intentionally touched the vagina of CW a child aged 13.

The appellant pleaded not guilty to both the principal charge and the alternative count. He was, however, convicted on the principal count and sentenced to 20 years' imprisonment.

Being dissatisfied with the decision of the trial court, the appellant lodged the present appeal against both the conviction and sentence. In the grounds set out in his memorandum of appeal, he has stated that the trial magistrate erred in law and in fact by convicting and sentencing him without taking into account the fact that the medical doctor did not examine him; that he erred in disregarding the first prosecution witness's testimony that at the time of the alleged offence, the complainant was at school which evidence was contradictory and inconsistent and; finally, the learned trial magistrate erred in law and in fact by convicting and sentencing him without regard to the evidence that there was an underlying grudge between the appellant and a village elder who testified against him.

As the first appellate court, this court has the task of reconsidering the evidence anew with the object of reaching its own conclusions; these conclusions, may or may not be consistent with the conclusions reached by the trial court. Whichever the case, this court must always be conscious that the trial court would ordinarily have the advantage of seeing and hearing witnesses first-hand; an advantage that this court does not have. **(See Okeno versus Republic (1972) EA 32).**

The first witness to testify was the complainant herself. She stated that she was 13 years old as at the time she testified on 14 May 2018. It was her evidence that on 29 March 2018 she came back home from school at about 5.00 P.M. but soon left to her friend's home to borrow a book. While on her way, the appellant called her and took her to his house. In that house, he undressed her and went ahead to defile her. She described the house as one-roomed and had a bed from which the appellant defiled her. The complainant gave a vivid description of how the appellant defiled her specifically stating that he inserted his penis into her vagina. He left her in the house once he was done.

She left the appellant's house and went back home at about 7.00 P.M. By this time, her mother had returned home; when she sought to know where the complainant had been, she told her that she had been at the appellant's house. It was her evidence that her mother then called a neighbour whom she referred to as Mama Karanja. Just like she told her own mother, the complainant told Mama Karanja that she had been at the appellant's house. The three of them then left and went to the appellant's employer's home. They found the appellant there. The complaint's mother asked him if at all he had had sex with the complainant; he initially denied but later, he admitted that indeed he had defiled the complainant.

On the following day they went to Gakindu police post to report the matter; they were instead referred to Mukurweini police station. At the station they were referred to Mukurweini sub County Hospital where the complainant was treated and had her P3 form filled. The complainant referred to her birth notification form showing that she was born on 18 May 2005. She informed the court that she knew the appellant before as a neighbour and that she had no grudge against him.

The second prosecution witness was the complainant's mother, RWM (PW2). It was her evidence that on 29 March 2018, she came back

from work at around 6 .00 P.M. and found her other child aged 5 alone at home. She enquired from her where the complainant was, but she told her that she did not know. It was her evidence that the complainant was a pupil in class 7 at [Particulars withheld] Primary School.

She retired to bed at about 8.00 P.M. by which time, the complainant had not returned home. At about 8:30 P.M. she heard the complainant knocking. When she asked her where she was coming from, she told her that she had gone for a book, apparently from her friend. She opened the door for the complainant, but she refused to enter house. Instead, she left and returned with one Mama Karanja who was also called Naomi moments later. She asked Naomi to ask the complainant where she had been. It would appear the complainant was hesitant to say where she had been but after some prodding, she opened up and told Naomi that that she had not only been at the appellant's house but that the appellant had defiled her as well.

Together they went to the appellant's employer's home; there she confronted the appellant who admitted that indeed he had defiled the complainant. She reported the matter the following day to a village elder called Thiongo who in turn informed the chief, one Madam Kairu. The chief led them to Mukurweini police station where they were referred to Mukurweini subcounty hospital for treatment.

The third prosecution witness was Moses Thiongo Githinji (PW3) who testified that he was a village elder and that on 30 March 2018 at about 5.00 P.M., the complainant's mother reported to him that her daughter had slept with the appellant. He informed the assistant chief accordingly.

The assistant chief herself testified as the fourth prosecution witness. She identified herself as Martha Nduta Kairo and confirmed that indeed on 30 March 2018 at about 8.00 P.M. she was informed by Thiongo (PW3) that the appellant had defiled the complainant. The following day he called the village elder and asked him to inform the complainant's mother to come to Gakindu administration police post with the complainant.

The assistant chief knew the appellant and it was her evidence that she, together with her colleague called Tabitha arrested him on 20 April 2018. They escorted the appellant to Gakindu police post from where he was taken to Mukurweini police station and subsequently charged.

The doctor who filled the P3 form in respect of the complainant was Dr Kimathi Paul (PW5) and it was his evidence that upon examination of the complainant, no injuries or lacerations were noted on her labia majora or minora but that the hymen was broken. The HIV test was negative. A vaginal swab was done but no spermatozoa was noted; however, there were pus cells confirming that there was an infection. The test for syphilis produced negative results and so was the test for pregnancy.

Nonetheless, the complainant was given emergency contraceptives. He assessed the degree of injury to be 'grievous harm'. He signed the P3 form on 5 April 2018. He acknowledged that his findings were based on treatment notes from the same hospital.

In answer to questions put to him by the appellant, the doctor testified that he could not tell whether the hymen had been recently broken or had been broken much earlier. He also confirmed that the appellant was not brought to hospital for examination. As far as the age of the complainant is concerned, he relied on the complainant's mother's information that the complainant was 12 years old at the time of examination.

The last prosecution witness was the investigation officer, who identified himself as Mwamwero Bongo (PW6). It was his evidence that at the material time, he was attached to Gakindu police post and that on 31st March 2018 at around 11.00 A.M., the area assistant chief came with a lady and a child. They reported that the child had been defiled on 29 March 2018 by the appellant. He booked the report and advised them to proceed to Mukurweni sub county hospital for the complainant to be examined and treated. They later came back, when he issued them with the P3 form which was subsequently filled by the doctor. He recorded their statements and statements of other witnesses.

On 20 April 2018, the area assistant chief called and informed him that she had managed to arrest the appellant at Githunguri. He went there and rearrested the appellant whom he escorted to Gakindu police post and later to Mukurweini police station.

In the course of his investigations, he obtained a notification of birth for the complainant indicating that she was born on 18 May 2005.

Upon cross-examination, he admitted that he recalled the appellant going to the police post and inquiring about a rumour spreading in the village that he had defiled a child. It was his evidence that at that time the investigations were still underway, and, by then, he did not have any particulars concerning the appellant, apparently as the person who might have defiled the complainant.

When the appellant was put to his defence, he opted to give sworn testimony. It was his evidence that he lived at Gakindu in Mukurweini and that on 29 March 2018 at about 3.00 P.M., he went to Kanunga shopping centre. He returned home at about 9.00 P.M.

While he was in his house, he heard a lady calling him from outside. He went out and found the lady with her daughter; they turned out to be the complainant and her mother. They then entered his house; the complainant was asked where she had been, and she said that she had gone to her friend's place to borrow a book. The complainant's mother told him that the complainant was claiming that she was at the appellant's place from 5.00 P.M. when she came back from school. He denied that he had been at home at that time. The complainant's mother then left and told him that she would investigate the matter further and talk to her daughter.

On 31 March 2018, the complainant's mother came back to his house and told him that she wanted to apologize because she had established that her daughter had been lying. He told her that he thought they were out to soil his name, but he opted not to pursue the matter any further.

However, rumours continued circulating in the village that he had defiled the complainant. He reported the matter to the chief, but the chief told him that he had not been informed of such a matter and that he would find out from the complainant's mother. He later went to Gakindu police post to make his complaint. The complainant's mother was summoned but she denied that she had said anything malicious about the

appellant.

The appellant later learnt that the complainant's mother had a grudge against him because the two of them were disputing over some work which the appellant's employer had given him and it is the same work that the complainant's mother had apparently wanted to do. Because of this dispute, the complainant's mother had vowed that she would do everything possible for him to leave the village. She even threatened the appellant that he either leaves or she would report him to the police. It was his evidence that the complainant's mother wanted to extort money from him demanding, in particular, the sum of Kshs. 15000/=. It is when he declined to pay that she went and reported the matter to the police station.

The appellant testified that he was later arrested and even after his arrest, the complainant's mother came to the police station and demanded that she be paid so that she could drop the case against him. Although he told the police of his grudge with the complainant, they still charged him. It was also his evidence that the complainant told him that she had been forced to testify against him. According to him, the complainant's mother used to complainant to extort money from people.

Subsections (1) and (3) of section 8 under which the appellant was charged read as follows:

> ***8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(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.***

Thus, two critical elements that must be proved to sustain a conviction for the offence of defilement under these provisions of the law are the act of penetration and the age of the victim.

> "Penetration" is a term of art and is defined **Section 2** of the Act to mean *"the partial or complete insertion of the genital organs of a person into the genital organs of another person"*.

Dr. Kimathi's (PW5) evidence left no doubt that there was penetration of the complainant's genital organs; as noted, he established that although there was no injury of any sort on the complainant's labia majora or manora, her hymen was, nonetheless broken. In fact, the perforation appears to have been so obvious that the injury was rated as 'grievous harm'.

The perforation of the hymen is always proof of the fact of penetration as understood in law and the case against the appellant could not have been an exception. I am satisfied, as the learned magistrate was, that the element of penetration was proved beyond doubt.

As far as the element of age is concerned, documentary evidence in the form of an acknowledgement of birth notification was produced showing that the complainant was born on 18 May 2005. This means that as at 29 March 2018, when the offence is alleged to have been committed, the complainant was about 13 years old. Her age placed her in the category of children contemplated in Section 8(3) of the Act. Like penetration, there was no evidence to controvert this piece of evidence.

It follows that, unless the perforation of the complainant's hymen was a self-inflicted injury, it was proved beyond doubt that the offence of defilement as contemplated under Section 8 (1)(3) of the Act was proved to have been committed.

The lingering question, which is now the only question of concern is whether there was sufficient evidence to support the learned magistrate's finding that the appellant was the perpetrator of the alleged offence. In order to get the appropriate answer, it is necessary to consider the learned magistrate's findings of fact on this question.

While holding the appellant culpable, the learned magistrate seems to have heavily relied on the evidence of the complainant which he accepted as having not only been consistent but was also corroborated by the evidence of her own mother, at least to the extent that she testified as having not found her at home when she returned from work. He, on the other hand, discounted the appellant's defence that he was implicated by the complainant mother's because, so he reasoned, although he alleged that the complainant's mother threatened him, he never took any action on the threats.

With due respect to the learned magistrate, he misdirected himself on the facts and on the law in both respects.

To start with, the finding that the complainant was consistent in her evidence is debatable; but even if she was, her evidence ought to have been considered in the context of the entire evidence on record and not in isolation. When her testimony is considered from that perspective, particularly when its considered alongside her mother's evidence, what the earned magistrate considers as consistent evidence becomes blurred.

Sample this. According to the complainant, her mother called her neighbour, Mama Karanja, when she arrived home late. But the complainant's mother testified that the complainant left on her own only to come back with the said neighbour. In fact, she testified that it is her neighbour who then pleaded with her to open the door for her daughter. Only then did the complainant's mother ask Mama Karanja to ask her daughter where she had been.

It is thus apparent that either the complainant or her mother was not consistent in their evidence. Mama Karanja who is alleged to have been with them never testified. Had she done so, she probably would have shed more light on who between the complainant and her mother was consistent in their evidence and to that extent she would have been a central witness in the prosecution case. In the face of the apparent conflict between the complainant's evidence and that of her mother; and, in the absence of the evidence of Mama Karanja, it could not be concluded with any certainty that the complainant was consistent in her testimony and, on that note, convict the appellant. In my view, the

inconsistency in the evidence of the two crucial witnesses created a reasonable doubt which ought to have been resolved in the appellant's favour.

There is another source of doubt that the learned magistrate was alive to but which he resolved in the prosecution's favour and, effectively placed the burden of proof on the appellant rather than on the prosecution. This was with regard to the question of penetration on which the learned magistrate acquitted himself as follows:

> ***"As to whether penetration took place, the evidence by pw1 the complainant was that the appellant took her into his house removed her clothes and his clothes and inserted his penis into her vagina. The medical evidence presented did little to corroborate the evidence of the complainant, according to the post rape care form, the outer genitalia was intact, there was (sic) no lacerations and though the hymen was broken there was an indication that the complainant appeared to have had intercourse previously and therefore the hymen was already broken. I am cognisant of the fact that the hymen was already broken does not rule out the possibility of defilement having taken place and to me it boils down to the credibility of the complainant."***

The medical evidence, no doubt, proved the fact of penetration; however, the doctor could not tie the penetration to a particular date. As a matter of fact, he testified that he could not state whether the penetration was a recent occurrence. The learned magistrate rightly accepted his evidence in this regard and found as a fact that penetration could probably have occurred at any time other than on the alleged date; having so held, the learned magistrate misdirected himself on the law when he proceeded as if it was upon the appellant to prove that the complainant had been defiled on a particular date rather than the other.

Of course, the burden was always on the prosecution, and not on the appellant, to prove to the satisfaction of the court, that the penetration took place on 29 March 2018, the date on which the appellant is alleged to have defiled the complainant. It was not for the appellant to prove that the penetration was not perpetrated on the material date, or on any other date for that matter.

At the very least, the evidence that penetration may not necessarily have occurred on 29 March 2018 should have created a reasonable doubt, not whether the complainant had been defiled (for that question has already been answered in the affirmative), but whether she had been defiled by the appellant on 29 April 2018 as alleged in the particulars of the offence.

Finally, it would appear that the learned magistrate disregarded the appellant's defence. It may be recalled that the appellant testified as having reported the complainant's mother's conduct to the area chief and, later, to the police. None other than the investigation officer himself confirmed that indeed the appellant had been at Gakindu police post to lodge his complaint against the conduct of the complainant's mother. Yet in his judgment, the learned magistrate faulted the appellant for failing to take any action on the complainant's mother's threats. In fact, as a result of what he thought was inaction on the part of the appellant, he described his defence as an 'after thought.' Had the learned magistrate given the appellant's defence due attention, he probably might have reached a different conclusion.

In the ultimate, I am persuaded that the appellant has made out a case that his conviction is unsafe. There was simply no proof beyond doubt that he is the person who defiled the complainant. Accordingly, I allow his appeal; his conviction is quashed, and sentence set aside. He is therefore set at liberty unless he is lawfully held. It is so ordered.

Signed, dated and delivered this 22nd day of May 2020
Ngaah Jairus

JUDGE