REPUBLIC OF KENYA

IIN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 102 OF 2018

KAFUNDI MASHA BAYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. D. Odhiambo, Resident

Magistrate, delivered in Shanzu Senior Principal Magistrate's Court Sexual Offence Case No. 9 of 2017).

JUDGMENT

1. On 24th August, 2018 the appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on diverse dates between 3rd September, 2016 to (sic) 20th September, 2016 at [Particulars withheld] area in Kisauni Sub-County within Mombasa county intentionally caused his penis to penetrate the vagina of ZY [name withheld] a child aged 6 years. He was sentenced to life imprisonment.

2. The appellant was dissatisfied by the decision of the Trial Court and filed a petition and grounds of appeal. With leave of the Court, on 5th November, 2019 he amended his grounds of appeal. These are to the effect that the charge was fatally defective, that he was not positively identified and the medical evidence was unreliable. He also claimed that there was a grudge between him and the victim's mother who was his lover before the incident and that the Hon. Magistrate did not consider his defence. His ground of appeal on the sentence meted out to him was that it was the mandatory minimum sentence, which was harsh, excessive, unjust and unfair, based on the circumstances of the case.

3. In his written submissions the appellant stated that the charge sheet neither disclosed the time the offence was committed nor was the word "*unlawfully"* reflected thereon. He also indicated that the victim's age given on the charge sheet was at variance with that on the P3 and PRC forms and the age assessment report. He submitted that the foregoing was contrary to the provisions of Section 214(1) of the Criminal Procedure Code.

4. The appellant contended that his identification as PW1's assailant was doubtful for the reasons that the size of the alleged tin lamp, its distance from the scene of the incident and intensity of the light were not explained. He further contended that since the offence happened at night and the victim was under attack, it was more difficult for her to properly observe and make a positive identification. He argued that an identification parade should have been held for PW1 to identify her assailant.

5. The appellant challenged the medical evidence adduced by PW3 in the form of P3 and PRC forms for PW1. He stated that PW3 did not introduce himself to the Trial Court to confirm that he was indeed a Doctor. Further, that he never revealed that he had worked with all the authors of the medical documents and that he was conversant with their handwritings and signatures as required under the provisions of Section 77(2) of the Evidence Act.

6. On the issue of the finding that PW1's hymen was broken, the appellant argued that the breakage could have been caused by anything else but not by him. He also contended that PW1 could not have been defiled as no blood was noted on her private parts.

7. The appellant submitted that the incident in issue was reported to the police on 5th September, 2016 but PW1's P3 form was filled a month later on 3rd October, 2016. In the appellant's view, it was difficult for the Doctor to establish the proper results of the incident.

8. The appellant stated that it was not clear who the author of the PRC form was as the clinical officer who examined PW1 was not called to give evidence. He also said that no comments were written down on the sketch of the image on the PRC form or on the said document.

9. The appellant claimed that the age of PW1 was not established as the charge sheet indicated that she was 6 years old but in her evidence

she said that she was 7 years old.

10. The appellant submitted that there was a grudge between him and PW1's mother, as such the charge against him was fabricated. He alleged that he caught PW1's mother who was his fiancée having sex with another man and he told her that their relationship was over.

11. The appellant submitted that his defence was not considered, yet it cast doubt on the case by the prosecution. He asserted that he should have been given the benefit of the doubt. He prayed for his appeal to be allowed.

12. Ms Mwangeka, Prosecution Counsel, filed her written submissions on 3rd December, 2019. On the issue of PW1's age, she submitted that PW1 said that she was 7 years old and that the age assessment form indicated that she was 6 years old. It was stated that the Trial Magistrate relied on the age assessment form when determining the age of PW1. Ms Mwangeka cited the case of **Joseph Kieti Seet v Republic** [2014] eKLR to propound the fact that an age assessment report can be relied on to determine the age of a victim of defilement.

13. On the issue of penetration, the Prosecution Counsel submitted that PW1 adduced evidence that while in the appellant's house, he put his urinating thing in hers. It was stated that the Doctor (PW3) testified that on examination of PW1's genital organ, he found PW1's hymen absent. He also noted scratches on her vagina. She submitted that the Doctor stated that the possible cause of injury was a blunt object and that penetration was proved.

14. With regard to identification, Ms Mwangeka submitted that PW1's evidence was that the appellant was their neighbour and he defiled her in his house which was lit by a tin lamp. She indicated that PW1 was able to see the appellant well. That he was not a stranger to PW1 as he used to take her and her siblings to his house to sleep there, as their mother was a drunkard.

15. The Prosecution Counsel made reference to the appellant's defence where he admitted that he knew PW1 and that he used to have a clandestine relationship with her mother. It was thus submitted that PW1's identification was by way of recognition. Ms Mwangeka relied on the case of **Anjononi v Republic** [1980] KLR at 59 to emphasize the fact that identification by recognition is more reassuring than identification of a stranger.

16. It was submitted that the appellant's defence was considered and that the Trial Court addressed the claim that there was a grudge between the appellant and PW1's mother. She prayed for the conviction to be upheld.

17. On the issue of the sentence imposed on the appellant, Ms Mwangeka was not opposed to a determinate sentence of 30 years. She relied on the case of **Jared Koita Injiri v Republic** [2019] eKLR to support her position.

18. On 17th February, 2020 the appellant filed submissions in response to those filed by the respondent's Counsel. He stated that penetration which is an essential ingredient for the offence of defilement was not proved beyond reasonable doubt. He contended that if PW1 had been defiled, at 6 years of age, she would not have been able to walk normally the following day. He further contended that the lack of a hymen in her genital organ was not conclusive evidence of defilement. He relied on the case of **Odhiambo v Republic** [2005] eKLR, to support his submission.

19. He argued that the issue of identification was not proved beyond reasonable doubt and stated that PW1's siblings should have testified to confirm if he was the perpetrator of the offence. He relied on the decision in **Abdallah Bin Wendo v Republic** (1953) 20 EACA at 166 and **R v Turnbull** [1973] 3 ALL ER 549, on mistaken identity.

20. On the issue of the sentence, the appellant cited the case of **Francis Karioko Muruatetu v Republic** [2017] eKLR, where the Supreme Court substituted the sentence of life imprisonment with 15 years imprisonment.

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT

21. PW1 was ZY [name withheld], a minor aged 6 years as per the age assessment form. She was taken through *voir dire* examination and gave sworn evidence. She stated that the appellant was their neighbour at Mishomoroni, where she used to live with her siblings and their mother. It was her evidence that there was a day when the appellant went to her mother's kibanda (shed) where she used to sell tomatoes. That the time was 8:00p.m., and the appellant whom she knew as Masha told her mother that he had gone to pick them (children) to go to sleep. That the appellant took her and her younger sister to his house. She then fell asleep.

22. She testified that when she woke up she was startled to see the appellant removing her inner pants and she started screaming. PW1 further testified that when she woke up, the appellant was on top of her. She stated that he was using his fingers and his *thing used to urinate* which he put in her *thing for urinating* (vagina). PW1 also stated that the appellant told her that if she told her mother about it, he would kill her with a knife. She indicated that her mother had gone to *get drunk* and when she returned, she told her.

23. It was PW1's evidence that there was a tin lamp which was burning, which produced light and she could see the appellant. PW1 stated that she ran to their house which was next to the appellant's. She stated that when her mother followed up on the issue with the appellant, he threatened her with a panga. She was taken to hospital and the Doctor found nail marks and said that her complaint was true.

24. PW2 was ZAH [name withheld]. She stated that she was the guardian of PW1, who was her sister's daughter. She indicated that she was told by her sister that PW1 had been defiled by the appellant. PW2 also indicated that the court granted her custody of PW1 because her mother was a drunkard.

25. PW3 was Dr. Salim Said of Coast Province General Hospital (CPGH). He produced the P3 and PRC forms for PW1. He stated that on examination, as per the P3 form, PW1's hymen was found to be absent and she had scratches on her vagina. The cause of the injury was a

blunt object. In regard to the PRC form which was filled on 5th June, 2011 at CPGH, the Doctor said that on examination PW1's hymen was found to be absent and she had abrasions on the fourchette (counterchecked from the original PRC form). The Doctor also produced PW1's age assessment report which showed that she was approximately 6 years old.

26. The Investigating Officer was No. 868552 PC Wilfred Nyange who was attached to Nyali Police Station. It was his evidence that on 24th January, 2017 a report was made that a child had ben defiled by the appellant. PW4 stated that he went to the appellant's home and arrested him. He indicated that the child who was 6 years old was taken to hospital and the appellant was charged.

27. The appellant gave sworn defence to the effect that PW1's mother was his lover. He claimed that he found her with another man in December (sic) and decided to leave her. That she threatened to teach him a lesson and that is when she framed him up for this case of defilement. He further stated that on 10th September, 2016 at 11:15 p.m., PW1's mother went home drunk and started abusing his parents. He indicated that when he refused to respond to her, she told PW1 to say that her panties had been removed and she had been defiled by him. That he slept and in the morning he reported what had happened to the police.

28. The appellant indicated that on another day, PW1's mother abused his parents and spit on him. That he reported to Nyali Police Station. He stated that nobody saw him taking the child to his house and that as an adult, he could not sleep with PW1 and her mother at the same time.

ANALYSIS AND DETERMINATION

29. The duty of the 1st appellate court is to consider the evidence adduced before the lower court and reach its own independent decision. It must however bear in mind that it neither saw nor heard the witnesses testify and make an allowance for the said fact. The said duty was espoused by the Court of Appeal in the case of ***Njoroge v Republic*** *[1987] KLR 19 at page 22 in the following words:-*

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that a court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya Vs Republic [1957] EA 336, Ruwalla Vs Republic [1957] EA 570."***

30. The issues for determination are:-

> **(i) If the charge was fatally defective;**
>
> **(ii) If the appellant was positively identified;**
>
> **(iii) If the medical evidence adduced was credible;**
>
> **(iv) If the prosecution proved its case beyond reasonable doubt; and**
>
> **(v) If the sentence imposed on the appellant can be regarded as either harsh or excessive.**

If the charge was fatally defective

31. The appellant claimed that the charge against him was fatally defective because the time of the incident and the word *"unlawfully"* were not included in the particulars of the charge. As per the evidence of PW1, the appellant went for her and her younger sister from their mother's shed where she was selling tomatoes at 8:00p.m. He took them to his house. PW1 fell asleep and when she woke up, she found the appellant removing her inner wear. He was on top of her. There was a tin lamp which was burning in the said house. It is therefore clear that the offence occurred at night and failure to include the time when the offence was committed did not render the charge to be fatally defective.

32. The other contention with regard to the charge was that the particulars thereof excluded the word *"unlawfully"*. According to the appellant, the said omission rendered the charge defective. Section 137(a) of the Criminal Procedure Code states as follows on the issue of framing of charges-

> ***"(i) ……..***
>
> ***(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the Section of the enactment creating the offence."***

33. From the wording of the above provisions, a charge sheet need not necessarily contain all the essential elements of the offence, but must contain adequate information for an accused person to understand the charge facing him. As such, it is this court's finding that omission of the word *"unlawfully"* from the particulars of the charge did not render the charge fatally defective. In any event, the offence of defilement cannot be committed lawfully as a child is incapable of giving consent for sexual intercourse to take place.

34. In **John Irungu v Republic** [2016] eKLR, the Court of Appeal stated as follows on the failure by the prosecution to strictly comply with the rules on drafting of charges-

> ***"The code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein Section 382 of the Code focuses, not on formal compliance with the rules of framing of the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice."***

35. This court's finding is that there was no failure of justice that was occasioned by the issues pointed out by the appellant due to the manner in which the particulars of the charge were drafted. The said ground is therefore lacking in merit.

If the appellant was positively identified.

36. The appellant claimed that PW1 in her evidence did not state the size of the tin lamp, its distance to the scene of the incident and its intensity. In this case, identification of the appellant was by way of recognition. He was known to PW1 and on the material day, he picked her and her sister from their mother's shed and took them to his house where they slept. PW1 gave a vivid account that when she awoke she found the appellant on top of her and she screamed. He threatened to kill her with a knife if she told her mother about the incident. PW1 was clear that there was a tin lamp which was burning in the appellant's house.

37. In **Wamunga v Republic** [1989] KLR 426 the Court of Appeal stated as follows on the issue of identification by recognition-

> ***"It is trite that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

38. The Trial Court addressed its mind to the issue of identification of the perpetrator of the offence and found that PW1 knew the appellant as their neighbor and from her evidence it was clear that he was well known to her. This court finds no justifiable reason to depart from the finding of the Trial Court. I therefore hold the same position on the issue of identification of the appellant and that there was no mistaken identity.

39. Furthermore, the appellant was a friend to PW1's mother and he stated so in his defence. The offence occurred at such close proximity that PW1 could not have been mistaken about the appellant's identity. It is the finding of this court that due to the light in the appellant's house, the circumstances were favourable for positive identification. The issue of mistaken identity does not arise and an identification parade would have served no useful purpose.

If the medical evidence was credible.

40. The appellant challenged the production of the P3 form by PW3 and claimed that the provisions of Section 77 of the Evidence Act were not complied with. The lower court proceedings indicate that on 5th December, 2017 the prosecution informed the Trial Court that the Doctor who was before the court was not the one who filled the P3 form.

41. The Prosecution Counsel applied for PW3 to produce the P3 form on behalf of Dr. Bukdesi who was away on further studies. It was further stated that PW3 had worked with Dr. Bukdesi. The appellant responded by saying it was okay. The application by the prosecution was allowed. The appellant can therefore not backtrack now and claim that the provisions of Section 77(2) of the Evidence Act were not complied with.

42. PW3 also produced the PRC form and age assessment report for PW1. The appellant never objected to the production of the same by the said witness. It is too late in the day now for him to challenge their production during this appeal as he failed to do so at the earliest opportunity. This court holds that the medical documents in the nature of the PRC form and age assessment report were properly produced in court and were admissible in evidence.

43. The writings on the photocopy of the PRC form contained in the Record of Appeal are very faint. This court has referred to the original PRC form which was produced in the lower court. It indicates that PW1's vagina had abrasions at the fourchete and her hymen was broken. These were the same findings which were captured on the P3 form. The foregoing medical findings leave no doubt that PW1 was defiled.

If the prosecution proved its case beyond reasonable doubt.

44. The age assessment report dated 14th September, 2016 shows that the approximate age of PW1 was 6 years. She was of tender age. The age of PW1 was therefore established by the said report. The medical evidence adduced indicated that she was defiled. On identification, the appellant was positively identified by PW1 as he was not a stranger to her. The defence raised by the appellant was unbelievable as from the evidence of PW2, PW1's mother was a drunkard who did not care much about her children. PW2 was appointed a guardian to PW1 and her sister by one of the courts, after their mother disappeared for 3 months.

45. If PW1's mother was in a sexual relationship with the appellant, there is nothing on record to indicate that she injured PW1's private parts so that she could frame a charge of defilement against him. The appellant had the right to apply to have her summoned by the court for him to cross-examine her on the said allegations, but he did not. This court finds that the appellant's defence was far-fetched and it was rightly rejected by the Trial Court, which correctly found that there was no malice on the part of PW1's mother.

46. It is the finding of this court that the appellant was convicted on cogent evidence adduced by PW1 that she was defiled by him. Although there were no eyewitnesses to the commission of the said offence, the evidence of a victim of a sexual offence can form the basis of conviction under the provisions of Section 124 of the Evidence Act, if the Trial Court believes that the victim was telling the truth. According to PW1, her sister was younger than her and she was asleep when the appellant defiled her. The prosecution did not err by failing

to call her to testify. In this case, the Trial Court's analysis indicates that he believed the evidence adduced by PW1 and convicted the appellant on the same. This court is of a similar view and finds that the fact of defilement as stated by PW1 was supported by the evidence of PW3 through medical evidence. This court upholds the conviction against the appellant.

If the sentence imposed on the appellant can be regarded as harsh or excessive.

47. The appellant urged this court to set aside the sentence meted out to him. Having found that he was properly convicted, this court has considered the circumstances of the case and the fact that the Prosecution Counsel was not averse to the sentence of life imprisonment being substituted by this court with a sentence of 30 years imprisonment. This court notes that sentencing is at the discretion of the court and when considering an appropriate sentence all the evidence adduced must be taken into account. The victim herein (PW1) was only 6 years old. In her evidence, PW1 stated that the appellant went to her mother's shed and told her that he had gone to pick them (her and her sister) to go and sleep. They slept in the appellant's house because their mother had gone to *get drunk*. It is therefore apparent that the appellant was supposed to protect such vulnerable children from abuse but he took advantage of PW1's mother's irresponsibility and turned against PW1 whom he sexually abused.

48. The above factors militate against the appellant's sentence of life imprisonment being reviewed. I therefore uphold the sentence of life imprisonment imposed on the appellant. The appeal is dismissed in its entirety. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **30th** day of **June, 2020. Judgment delivered through microsoft Teams online platform due to the covid-19 pandemic.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Mr. Muthomi, Prosecution Counsel, for the DPP

Mr. Oliver Musundi- Court Assistant.