



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCRA NO. 7 OF 2019**

**JMM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G E M E N T**

1. **JMM**, the Appellant herein was charged with defilement contrary to **Section 8(1)** as read with **Section 8(2)** of Sexual Offences Act No. 3 of 2006 vide **Marimanti SOA Case No. 7 of 2018.**

The particulars of the charge as per charge sheet presented were that on 6<sup>th</sup> April 2018 at [particulars withheld] village Kamarandi Location, Tharaka South within Tharaka Nithi County the Appellant defiled (name withheld) child aged 6 years. He also faced an alternative charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. He denied committing the offence but after trial he was found guilty of the main charge and convicted upon which he was sentenced to serve life imprisonment. He felt aggrieved and preferred this appeal.

2. A brief summary of the facts presented to the trial court shows that the complainant's mother CKG (PW2) had sent the complainant (PW1), a child aged 6 years, (as per birth certificate tendered by the mother as P.Exhit 1) to fetch some drinking water from her brother in law's house where the Appellant worked as a herds boy. The victim narrated to the trial court how she found the Appellant alone when she went to get the water and how she was pulled into the house and defiled. The child (PW1) later reported to her mother (PW2) what had happened to her and she took her to St. Orsola Hospital, Matiri and later reported the incident at Chiakariga Police Post where a P3 from was issued.

3. The evidence of the complainant and the mother was corroborated by Mary Karigu (PW3), a neighbour who told the court that the complainant's mother and the complainant initially reported her what had happened and on checking at the complainant's private part, found it reddish and swollen. She advised the two to proceed to Hospital, for treatment as the child to her appeared to be in pain.

4. Andrew Kinyua (PW4) the clinical officer attached to Tharaka District Hospital (Marimanti) testified and confirmed that the minor had been defiled. He stated that the victim had been treated at St, Orsola Mission Hospital and that he examined her and noted that her vulva was swollen and hymen broken. He stated that he is the one who filed the P 3 and tended it as P. Exhibit 3. He also tendered treatment chits from St. Orsola Hospital as P. Exhibit 2(a) (b) and (c).

5. When placed on his defence, the Appellant defended himself against the charge stating that he was framed by the complainant mother after he refused/declined to lend her some money. He further stated that he worked for her sister who allegedly had a sour relationship with the complainant's mother. He further stated that the goats he was herding strayed into the complainant's mother's farm and destroyed some crops which reportedly further incensed the mother of the complainant.

6. According to him, his sister accompanied the complainant to Hospital where it was reportedly found that no defilement took place.

7. FK (DW1) testified and corroborated the Appellant's defence. She told the trial court that the complainant did go to her house on the material date and asked for some drinking water which she gave her. She further stated that the child left as the Appellant arrived to water the goats.

8. According to her the complainant's mother had a beef with her over a dispute over a dispute over a he goat she had borrowed her husband in order to sell to get some fare to Mombasa. She added that she reportedly accompanied the complaint and her mother to Hospital where the medical examination allegedly find that the minor had not been defiled though she conceded that the doctor spotted some reddish spot on the minor's thigh.

9. The trial court evaluated the evidence tendered by the prosecution and defence and found that all the elements of the offence had been proved to the required standard. It found that the defence put forward did not cast any doubt to the prosecution's case and convicted the

Appellant and sentenced him to life imprisonment as sanctioned by law.

10. As noted above, the Appellant was dissatisfied with both the conviction and sentence and lodged this Appeal listing the following grounds namely:-

*(i) That the learned trial magistrate erred in law and fact by failing to note that prosecution's witnesses gave inconsistent, conflicting and contradicting testimonies.*

*(ii) That the trial court failed to see the need of DNA test to prove the allegations.*

*(iii) That the trial magistrate failed to note that there was vendetta between the Appellant and relatives of the complainant concerning land.*

*(iv) That the prosecution's case was not proved beyond reasonable doubt.*

*(v) That the sentence meted out was harsh and excessive.*

11. In his written submissions the Appellant contends that the evidence tendered by the prosecution was insufficient to sustain conviction. He points out that the minor gave conflicting evidence regarding the time she was defiled because while she stated it was morning hours, her mother stated it was around 4 pm.

12. He also points out that the minor had stated that she had been given water to take to her mother while her mother denied that the minor went back with the water and instead stated that she was found by the river by her siblings and taken home where should found her lying on a mat outside her home at 7pm.

13. The Appellant submits that the above inconsistencies creates doubt and that he should have benefitted from those doubts citing the decision in the case of **Dankera Ramksham Pandya -vs- Republic (1957) E.A.C.A.**

14. The Appellant has faulted the prosecution for not calling one Kinyua Baraka whom he terms as vital witness. However this is a new ground of appeal which has been raised without leave of this court as provided under **Section 350 Criminal Procedure Code**.

15. The Appellant further submits that the investigating officer failed to investigate the relationship between the Appellant and the complainant's mother and that had she done so she could have established that there was a grudge between him and the complainant's mother.

16. He further claims that he has a medical condition (epilepsy) which should be taken into consideration in this appeal.

17. The Appellant contends that the trial court rejected the Appellant defence which could have aided his acquittal. The Appellant however has again raised this new ground of appeal without seeking the leave of this court pursuant to **Section 350 Criminal Procedure Code**.

18. The Respondent has opposed this appeal through its written submissions dated 13<sup>th</sup> May 2020. The Respondent avers that evidence adduced proved all the elements of the offence of defilement as defined under Section 8(1) and 8(2) of Sexual Offences Act. It has listed the ingredients proven as follows namely:-

*a) That the Appellant had sexual contact with the complainant where his sexual organ penetrated the sexual organ of the complainant.*

*b) That the complainant was aged below 11 years.*

*c) That the appellant was positively identified.*

19. The Respondent contends that the prosecution's case against the Appellant was watertight pointing out that the complainant properly identified him and that the injuries sustained by the minor on her vagina were seen by her mother (PW2) a neighbour (PW3) and confirmed by the clinical officer (PW4).

20. It opines that the prosecution's witness were firm and remained unshakable during cross-examination. It further adds that the complainant's testimony on its own was even sufficient to prove sustain a conviction going by the provisions of **Section 124** of the **Evidence Act**.

21. On sentence, the Respondents supports the trial court for meting out a sentence as provided under **Section 8(2)** of **Sexual Offences Act** stating that the same was proper in the circumstances. It points out that the Appellant aged 37 years old preyed on an innocent minor aged 6 years and defiled her causing her permanent physical and emotional scars. It further contends that Parliament enacted Sexual Act and prescribed harsh punishment to the culprits in order to protect the young and vulnerable from sexual predators.

22. This court has considered this appeal and the grounds upon which it has been urged. I have also considered the opposition by the State. The Appellant was as observed above charged and convicted of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of **Sexual Offences Act**.

23. The offence of defilement is committed if 3 essential ingredients are established and proved by the prosecution. These are;

***i) Penetration whether complete or partial***

***ii) Age of the minor positive.***

***iii) Identification of the culprit***

24. In this appeal the Appellant has not attacked the prosecution's case in so far as proof of the above crucial elements are concerned. Instead the Appellant's main thrust of his appeal revolves around what he terms as inconsistencies and contradictions of the evidence tendered by the prosecution. What he has pointed out however are some insignificant details of what transpired after the incident. The Appellant claims that there was inconsistency on the narrative given by the complainant because according to the Appellant the minor testified that she was given water to take to her mother while the mother testified that the minor did not go back with the water. I have looked at the evidence tendered by both the minor and the mother and find that what the Appellant has pointed out as an inconsistency is so insignificant that it really does not alter the two narratives of both the complainant and her mother on the chain of events at the material time.

25. I also find no basis on the Appellant's contention that there was inconsistency on when the act of defilement took place. All the witnesses were candid that the incident took place during the day in the afternoon.

26. PW2 stated that it was about 3pm while the minor stated that it was during the day. I therefore do not find any inconsistency at all regarding the time of the incident.

26. The Appellant's contention that he was framed by the complainant's mother due to her personal differences with her employer in my view could not aid the Appellant's defence despite calling her employer (DW2) to testify regarding the alleged feud between the complainant's mother and her. The reason is fairly simple if it is true that there was a grudge between the complainant's mother and the Appellant's employer, the complainant could have framed the Appellant's employer or her husband in order to get back at them. I am also not persuaded that a 6 year old child could be used to give false testimony if the complainant was really intent at settling old scores if at all. The Appellant has faulted the investigating officer for not investigating the existence of a grudge between him and the complainant's mother but the investigating officer was not obligated to investigate on facts to aid the Appellant. Her work was to establish that an offence had been committed and adduce evidence in court to prove that the offence was indeed committed against the minor. She was certainly not obligated to aid the Appellant in any way.

27. I have re-evaluated the evidence tendered at the trial against the Appellant herein and contrary to his contention the evidence tendered against him was overwhelming and left no doubt that he really committed the offence of defilement against a 6 year old girl. The evidence of the minor was candid and the description of all events as they unfolded shows that the child vividly remembered the ordeal she underwent. This is what she told the trial court in part.

***" He held my neck and leg. He then pulled me into a house. He then removed my clothes. He closed the door. He made me lie on a bed. He then undressed himself. He then came to bed. He removed the thing he uses to urinate. He inserted into my thing for urinating....."***

28. When the mother (PW2) found her lying on a mat at home she told the trial court,

***" I noted that she could not stand as her legs were shaking. When I went to clean her private part I noted that she had pain. I checked and noted that her vagina was swollen and reddish....."***

29. A neighbour named Mary Karigu (PW3) also stated that when she heard about the ordeal she inspected the complainant's vagina and found it ***"all red and swollen."*** She also noted some watery discharge.

30. This court further notes from the medical check up or examination done on the minor as per the P3 tendered by medical officer (PW4), the evidence of PW1, PW2 and PW3 is corroborated. The medical officer made the following observations:

***" there was evidence of penetration- broken hymen and blood stained pant."***

31. The Appellant in this appeal states that he was framed by the complainant's mother owing to a grudge but the evidence of independent witnesses PW3 and PW4 overrules any such possibility. That is why I find that the evidence tendered by the prosecution on the overall was really overwhelming and the Respondent is correct to state that the evidence tendered proved beyond doubt that the Appellant committed the offence. This court finds that the trial court evaluated the evidence well and came to the right conclusion. The Appellant was guilty as charged.

32. On sentence though the Appellant contends that the sentence was harsh, I really do not find any other sentence that could be meted out in the circumstances. The minor was aged 6 years old which is really a tender age. The law (**Section 8(2) of Sexual Offences Act**) provides for life sentence for that sort of offence looking at the seriousness of the offence and the manner in which it was done I find that the Appellant really did not deserve any other sentence because children of tender years need protection particularly from sexual predators like him notwithstanding his claim that mercy should be extended to him because of sickness (epileptic.)

In the end I find no merit in this appeal. The same is disallowed. Both the conviction and sentence for the aforesaid reasons are upheld.

**Dated, signed and delivered at Chuka this 29<sup>h</sup> day of June 2020.**

**R.K. LIMO**

**JUDGE**

**29/6/2020**

Judgment signed, dated and delivered in the open court in presence of Momanyi for Respondent and Appellant in person via zoom.

**R.K. LIMO**

**JUDGE**

**29/6/2020**