REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 150 OF 2019

(CORAM: F. GIKONYO J.)

(Against the original conviction and sentence by Hon. S. M. Mungai, CM in Isiolo CMCRC (SO) No. 18 of 2018 delivered on 30.8.2019)

DAVID MURERWA KIRIGA....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to **Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2016**. The particulars of the offence were that on diverse dates between 6th August and 7th August 2018 at [particulars withheld] Area of Nyanyuki Township of Laikipia County within the Republic of Kenya intentionally and unlawfully caused his penis to penetrate the vagina of **BBW** a girl aged 7 years.

2. He was also charges with alternative charge of Committing an indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars are on the same dates and place the appellant committed an indecent Act with a child by touching the vagina of **BBW** aged 7 years.

3. The trial court found him culpable of the main charge of defilement and sentenced him to life imprisonment. Aggrieved by the aforesaid determination the appellant filed its petition of appeal on 3/9/2019 raising six grounds of appeal that can be summarised as follows;

a. That the learned Magistrate failed to note that the complainant did not identify him in court.

b. That the learned Magistrate failed to note that he was not ready to proceed with the case at Isiolo because the complainant influenced the case.

c. That the trial magistrate erred in law and in fact by not observing that the evidence adduced by the prosecution witnesses was uncorroborated and inconsistent.

d. That the trial magistrate failed to not the disagreement between the complainant's mother and the appellant.

e. That the trial Magistrate failed to note that no independent witness was called upon to clear the doubts.

f. That the trial magistrate failed to consider his defence.

g. That the trial magistrate erred in meting out a mandatory sentence of Life imprisonment.

ANALYSIS AND DETERMINATION

Duty of court

4. First appellate Court should re-evaluate the evidence adduced and make own findings. But, it must give allowance to the fact that it did not have the advantage of observing the demeanour of witnesses. See **Okeno vs. R (1977) EALR 32.**

Issues

5. The grounds of appeal herein raise three broad issues for consideration, i.e.;

a) Whether the prosecution proved its case beyond reasonable doubt; and

b) Whether the trial magistrate considered the appellants defence; and

c) Whether the sentence imposed was harsh.

6. The first issue is covered in **grounds a, b, c and f** of the appeal. The major arguments in the appellant's submissions are; that the trial magistrate failed to note that he was not positively identified by the complainant; that the evidence of the prosecution witness was inconsistent and that the case in Isiolo was influenced.

Alleged influence of proceedings

7. I feel I should first consider the submission made by the appellant that the case at Isiolo was influenced. This is a serious allegation which should be substantiated for it imputes influence of the process of justice. I note that the case instituted at Nanyuki court where the charges were read out to the appellant. But, the matter was transferred to Isiolo at the request of the prosecution for the case touched on a staff working at Nanyuki court. The court ordered transfer of the case to Isiolo Law courts for the sake of fairness on the part of the defence. I do note that Pw1 testified that she was a process server serving at Nanyuki Law courts.

8. The decision taken by the magistrate at Nanyuki was perfectly in line with the old age adage that; justice should not only be done but should also be seen to be done. The magistrate acted pursuant to **Section 79 of the Criminal Procedure Code**. And, by this judicial act, possibility of influence of proceedings was removed. I do not also find any shred of evidence that the trial at Isiolo was influenced in any manner. Accordingly, the allegation of influence of proceedings in so far as it is a ground of appeal fails and is hereby rejected.

Elements of crime

9. I now move to consider the substantive arguments. In defilement cases, the prosecution must proof;

i. The victim was a child

ii. There was penetration; and

iii. The penetration was by the Appellant

Victim was a child

10. Defilement relates to a victim who is a child. A child is a person of below the age of 18 years. See the Children's Act. Age must therefore be proved. **Pw1 CK** testified that PW2 was her child. She learnt of her sexual molestation from Pw3. She produced the birth certificate as Pexh1. According to the certificate of Birth the victim was born on 10.5.2011 at Nanyuki. PW1 also stated that she was 7 years old. Therefore, at the time of the offence i.e. August 2018 she was 7 years old. The prosecution therefore proved the victim was a child aged 7 years at the time of the commission of the offence.

Penetration

11. Penetration is a requirement in defilement. According to section 2 of the Sexual Offences Act: -

"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

12. The appellant submitted that the complainant's hymen would have been broken in any other instances i.e. through the bobaboda ride and or through his playful nature. Intrusive or vigorous activities may break the hymen. But, what is the evidence saying?

13. The complainant gave credible and tangible evidence of how the appellant removed her clothes and inserted his penis into her vagina. This was quite specific and clear evidence of penetration. More evidence abounds. **Pw4 Nancy Muthoni Maina** a registered nurse at Nyanyuki Teaching and Referral Hospital testified that the minor was brought to the hospital on 10/8/2010 on allegation of being defiled. That on examination of the minor she found that her hymen was broken and missing. The genitalia had pieces of tissue. That the appellant was also examined at their facility by her colleague who established that he was normal as per the treatment notes. Stephen Mbogo, her colleague filled the P3 form. In cross-examination she stated that the minor had informed them that the appellant had defiled her. She stated that there was evidence of penetration on the genitalia of the child. She produced the **Post rape care form as Pexh 2, the P3 form of the minor as Pexh 3. Treatment notes of the appellant as Pexh 4 and P3 from as Pexh 5.**

14. The evidence adduced show that hymen was broken and missing, and the genitalia had pieces of tissue. It also shows that there was penetration of the genitalia of PW2. Accordingly, the medical evidence corroborated the evidence of PW2. I find that there was penetration of the genitalia of PW2. The million-dollar question in law is: Was is by the appellant?

Identification of perpetrator

15. The appellant argued that he was not identified to be the perpetrator of this heinous crime. The prosecution must prove that the appellant caused penetration of the child. In **Wamunga v. Republic (1989) KLR 424 at 426** the court had this to say:

> **"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 a conviction."**

16. What evidence was adduced on identification? **Pw2 BB,** aged 7 years and upon conduct of *voire dire* testified that she was at her aunt's place when on 6/8/2018 she found the appellant cleaning the chairs. That the appellant called her to the shamba and removed her trouser. That on the next day the appellant was also cleaning the chairs when he called her to the shamba and removed her trouser. He also removed his trouser and inserted his penis in her private parts. She told the trial court that he warned her not to tell anybody about what had happened. That she did not tell anybody about it until on Thursday when she informed N, Pw3. Her mother, Pw1 was informed of what had happened by Pw3 and they took her to the hospital where she was treated. That they later on went to the police station and reported the incident.

17. In cross-examination she reiterated that she knew the appellant prior to the incident and also stated that on the two occasions she found him cleaning the seats. This is identification by recognition and I do not find anything that suggests she was mistaken or was under any delusion in identifying the appellant as the person who inserted his penis into her vagina.

18. The evidence by **Pw1 CK** augments that of PW2. She testified that she had taken her child, the complainant to her cousin's house. That on 9/08/2018 she was called by Pw3 and informed that the complainant had been defiled by the accused person. That she interrogated the complainant in the presence of Pw3 who confirmed that she had been defiled. She later on took her to Nanyuki Cottage Hospital where she was examined and treated. They later on reported the matter at Nanyuki and recorded their respective statements. It was her testimony that she later on learnt that when they left her cousin's home the accused person asked of their whereabouts and upon being informed that they had left for town he took off immediately leaving behind his food and clothes. In cross-examination she confirmed knowing the accused person prior to the incident. Pw1 produced the birth certificate as Pexh1.

19. Pw3, WNN corroborated the evidence by **PW1** and **PW2.** She confirmed that Pw1 is her aunt whereas Pw2 is her cousin. She testified that she was present when Pw2 was brought to their aunt's place on 6/8/2018. That she did not notice anything abnormal with the minor till on 9/8/2018 when the minor informed her that she had been defiled by the appellant. That when she asked her why she never revealed the sexual assault, PW2 told her that the appellant had threatened to harm her. That she immediately called pw1 who came and together with a colleague took the minor to hospital. She stated that the appellant was in the compound but when the police came he had left. She confirmed being familiar with and knew the appellant as a person who used to clean the seats and tend to the garden.

20. Pw5 PC David Kibet was the arresting officer. He testified that on 13/8/2018 he was informed by the CIP Murithii the DCIO that there was a suspect of defilement who had disappeared to Kamangura. That together with Pc Ndabo and Pc Oboso they were directed to the home of the appellant's brother where they found the appellant in a house near their shamba.

21. Pw6 Sergent Anna Kitoo testified that together with a colleague, they proceeded to the scene on 9/8/18 where the suspect, the appellant herein was. That they found a staff worker who informed them that she had left the appellant behind the garage. They went to the garage only to find that the appellant had left. They found blue jeans, white coloured T shirt and Murphin green left in the garage. They were informed that the appellant used to come and change to his apron. He had left with the apron leaving the clothes behind. He had also left his food untouched. She stated that they also went to the neighbourhood village but he was not there. She would later proceed to Nanyuki Teaching and Referral Hospital where the found the minor, her mother and a friend. She took them to the doctor. Then went to the station and booked the report. It was also her testimony that she spoke with the minor who explained that the accused who was the gardener to her aunt had defiled her between 6th and 7th August 2018. She told the court that they asked the CID officers to help them trace the appellant. The appellant was taken to hospital where he was examined and a P3 form filled. He was then charged. In cross-examination she stated that she did not take the evidence of Josephine and the lady at the residence. She stated that she did not also establish any grudge between Josephine and the appellant.

22. These pieces of evidence place the appellants at the scene of crime and tends a positive identification of him as the perpetrator of the crime herein.

23. The foregoing notwithstanding, the court may convict on the evidence by PW2 alone as long as reasons are duly recorded that the victim was telling the truth. See **Section 124 of the Criminal Procedure Code** which provides that where the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and convict the accused person on such evidence, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. But in this case, there was sufficient corroboration of the evidence of PW2- thereby, removing the danger of possibility of mistaken identity of the perpetrator of the crime.

24. The trial court considered the testimony of PW2 and found it to be concise and detailed on how the appellant, a person who was well known to her attempted to defile her on 6/8/2018 and actually defiled her the next day. The incidents took place in the morning hence she could clearly see the appellant. Accordingly, the trial magistrate did not err in holding that the identity of the appellant as the perpetrator was clearly established by the prosecution.

Of alleged inconsistencies

25. The appellant submitted that the prosecution witness's testimony had inconsistencies but he did not give the specific aspects of inconsistencies. I have considered the prosecutions testimonies as a whole and I do not find any inconsistencies in their testimonies. They all gave account of events as they perceived or observed them. The allegation of presence of inconsistencies in the testimonies of the

prosecution witnesses is therefore a mere general sentiment by the appellant. I reject it.

The defence

26. Grounds d and f relate to the defence of the appellant that they had a relationship with Jennifer. The Appellant was a sole witness in his defence. He testified that he had worked with Jennifer for seven (7) years. That he was in a relationship with Pw1 but they fell out after he declined to marry her. That on the material date and days before the offence she had differed with Jeniffer over his salary payment. That they were in a confrontation on 8/8/2018 as a result of which she abused him and threatened to call the police. He denied that he had gone into hiding and stated that he was arrested at his shamba but later on reiterated that he was arrested in his neighbour's shamba. He also denied that the clothes found at the scene were his.

27. I have considered the appellants defence. The defence has details which ought to have been raised by the appellant at opportune time. He did not raise the details during cross-examination of PW1 or hint of the alleged relation with, to Pw1. I do not also find any element of malice on the part of the prosecution witnesses in the entire proceeding. No wonder, the trial magistrate considered the defence as a pack of lies. From the record, the defence is merely an afterthought by the appellant. I reject the defence.

28. The upshot of my analysis is that the appeal on conviction fails and is dismissed.

Of sentence

29. Section 8 (2) of the Sexual Offences Act provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. In this case I have considered the age of the victim, the mitigation and aggravating factors. I am alive to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR** that a law that fetters court's discretion in sentencing is unconstitutional. The section is couched in mandatory terms and the trial court may have imposed the only sentence provided therein, which is, life imprisonment. I have stated before that such law produces prejudice upon the category of persons charged with the offence to which the penalty applies. On that basis, I set aside the life imprisonment sentence imposed on the appellant. In lieu thereof, I sentence the appellant to 25 years' imprisonment from the date of his initial sentence. I so order.

Dated, signed and delivered at Meru this 29th day of June 2020

F. GIKONYO

JUDGE

Representation

1. Appellant in Person

2. DPP Meru for State dppmerucounty@yahoo.com