



**REPUBLIC OF KENYA**

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

**CHHCRA NO. 134 OF 2019**

**CHARLES MAYAMBA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the Judgment of Hon. J. Mwaniki (SPM) in Makueni Senior Principal Magistrate's Court Criminal Offence No. 46 of 2018 delivered on 25<sup>th</sup> July, 2019).*

**JUDGMENT**

1. **CHARLES MAYAMBA** the Appellant was charged with the offence of defilement contrary to section 8(1) as read with sub-section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 5<sup>th</sup> day of December 2018 at around 1800 hours in Mbooni East sub-county within Makueni county did cause his penis to penetrate the vagina of **KK** a child aged 13 years.

He also faced an alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 5<sup>th</sup> day of December 2018 at around 1800 hours in Mbooni East sub-county within Makueni county did an indecent act by touching the private parts (*vagina*) of **KK** a girl aged 13 years.

2. He denied the charges and after a full trial he was found guilty, convicted and sentenced to serve ten (10) years imprisonment on the main count.

3. He was dissatisfied and filed this appeal raising the following grounds: -

- a) **That**, the corroboration of the evidence by the prosecution was not achieved as was held by the trial court.
- b) **That**, the prosecution case was rendered with malice, contradictions and harsh sentence which could have been looked upon before arising to the decision of convict.
- c) **That**, the trial magistrate erred both in law and facts by proceeding with the trial and further convicted him on the charge sheets that were defective.
- d) **That**, the trial court erred by shifting the burden of proof to him.
- e) **That**, he faults the trial court for finding that the charges of defilement had been proved against him and further denying him the benefit of doubt while delivering the judgment.
- f) **That**, the trial court erred by failing to put his defense into adequate consideration.
- g) **That**, he faults the trial court for failing to consider his conduct and the prevailing circumstances during the time the offence was committed and that the charges and their particulars were not proved.
- h) **That**, the trial court erred both in law and facts by failing to establish that the evidence adduced did not meet the threshold to base a conviction.
- i) **That**, no substantial evidence was presented.

4. The prosecution case was premised on the evidence of four (4) witnesses. The complainant (KKMA) testified as Pw1 and was aged 13 years then. It was her evidence that the Appellant whom she knew used to defile her during school holidays. She said on this particular day the Appellant removed her clothes and his and took her to his bed. He then inserted his penis into her vagina.

5. He warned her against reporting as he would beat her. He would give her money every time he did so. She said Musenya (Pw3) had told Pw2 (*her mother*) about the incident.

6. In cross examination she said she knew the Appellant since her father had once given him money to buy them shoes and he gave them the rest of the money.

7. Pw2 **CM** is Pw1's mother. She testified that she had come home on 5<sup>th</sup> December 2018 and not found Pw1 there. She returned later and informed her that she had been at the Appellant's. Further that it's the Appellant who had called her. On further inquiry she informed her that the Appellant had removed her clothes and had sex with her.

8. She reported the matter to the police and the Appellant was arrested. Both of them were taken to hospital for examination. She produced some documents showing Pw1's date of birth as 1<sup>st</sup> October 2007. She also confirmed that one **Nthenya** (Pw3) had seen Pw1 leaving the Appellant's house.

9. In cross examination she denied being in any sexual relationship with the Appellant nor receiving any Kshs.5,000/= from him. She also denied taking Kshs.30/= from Pw1.

10. Pw3 **SM** lives in Kalawa with Pw2. It was her testimony that in July 2018, she started seeing the Appellant walking together with Pw1. She would see them in the morning and afternoon yet Pw1 was a child and in school uniform. One day she saw the Appellant who was a watchman at her brother's shop give Pw1 money outside her shop.

11. In December 2018 he found the Appellant and Pw1 at the former's house as she looked for charcoal. When asked what she was doing at the Appellant's house, Pw1 kept quiet. The witness decided to report her observations to the child's mother (Pw2).

12. Pw4 **Josephine Ngangi** is a clinical officer at Kalawa health centre. She examined Pw1 and the following were her findings: -

- Broken hymen (not freshly torn)
- Tears
- No spermatozoa
- Pregnant test – negative
- Epithelial cells present

She produced the P3 form (EXB 3(a),) PRC form (EXB2), treatment card (EXB3(b).)

13. She also examined the Appellant about 16 hours from the date of the alleged incident. She found his genitalia to be normal. She produced the Appellant's P3 form as EXB4 (a).

14. In cross examination she said the Appellant had gonorrhoea at the time of examination. She also confirmed that he was H.I.V positive but Pw1 tested negative. She explained that gonorrhoea can remain inactive for upto two (2) years. That meant that one may have it and not infect anyone. She however confirmed that the Appellant was already on treatment for it before examination.

15. The Appellant gave a sworn defence and called no witness. He said he resides at Kalawa. He was a lover to Pw2 who is Pw1's mother. He denied the charges saying he was only charged after falling off with Pw1 over money issues. He further stated that Pw2 made noise at him for only assisting some children by buying them items. She also once requested him to lend her Kshs.5,000/= to take her child to form one (1) which he did.

16. He later found her with another man and demanded for his money which she threw at him and promised to teach him a lesson. That he walked with Pw1 as his daughter whom he sired with Pw2.

17. In cross examination he said Pw1 and her husband are his friends. That he only bought things for two out of Pw2's children. He said Pw2 does not owe him anything. He confirmed having walked with Pw1 for some time.

18. In his submissions the Appellant disqualified each of the witnesses saying their evidence was not sufficient. For Pw1 he submits that she was not able to recall the dates she was defiled and she was not clear on how far the Appellant's home was from theirs. Further that her evidence was so contradictory owing to the fact that it is her mother who told her what to tell the court.

19. He further submits that Pw1 and Pw2 planned and chose to lie to the court in many instances e.g. the age of Pw1 and the receipt of Kshs.30/=. That Pw3 should have reported to Pw2 the first time she saw him with Pw1. He also discounted Pw4's evidence.

20. Learned counsel for the State Mr. Muriuki in opposing the appeal submits that Pw1's evidence was very well collaborated by the evidence of all other witnesses. That she explained what was done to her and she identified the Appellant as the perpetrator. Her evidence was collaborated by Pw4's medical evidence.

21. Counsel submits that there is no defect in the charge sheet. Further that all the ingredients in a charge of defilement were proved. Finally, he submits that the Appellant's defence was considered by the trial court. On sentence he argues that the trial court considered the mitigation and the fact that the Appellant was a first offender, and gave an appropriate sentence which should not be interfered with.

### **Analysis and determination**

22. This is a first appeal and thus the court is guided by the principles set out in the case of **David Njuguna Wairimu –vs- R (2010) eKLR** where the Court of Appeal stated:

*“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”*

23. Having considered the evidence on record, grounds of appeal, submissions, I find the issues for determination to be:

- i. Whether the charge sheet was defective.
- ii. Whether Pw1's age was proved.
- iii. Whether penetration of Pw1's genital organ was proved.
- iv. Whether there was sufficient evidence identifying the Appellant as the perpetrator.

#### **Issue no. (i) Whether the charge sheet was defective.**

24. In ground 4 of his appeal the Appellant states this:

*“That, the trial magistrate erred both in law and facts by proceeding with the trial and further convicted him on the charge sheets that were defective.”*

He did not however make any submission on this particular ground. I have perused the charge in both the main count and the alternative count plus the particulars. The charge sheet states the provisions of the law under which he was charged with no uncertainty. The particulars of the offence have also been clearly set out with no ambiguity. I therefore find no defect in the charge sheet.

#### **issue no. (ii) Whether Pw1's age was proved.**

25. When Pw2 testified she said her daughter (Pw1) was aged 11 years and was born on 1<sup>st</sup> October 2007. She produced documents EXB1 i.e. an application for late registration of birth, a document from the registrar of births account no. 7089422 and a certificate of water baptism all showing Pw1 was born on 1<sup>st</sup> October 2007. From these documents it's clear that Pw1 was 11 years plus 2 months old at the time of the alleged offence. The charge sheet shows she was aged 13 years but the truth of the matter is that she was 11 years and was a child. That age could even carry a heavier sentence for one found guilty.

#### **Issue no. (iii) Whether penetration of Pw1's genital organ was proved.**

26. Section 2 of the Sexual Offences Act defines penetration as:

*“Penetration”* means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

Pw1 explained to the court what had been done to her severally. She said the perpetrator used to take his penis and insert it into her vagina while on his bed.

27. The medical evidence by Pw4 was that Pw1 had an old broken hymen. She also had epithelial cells. Her finding was that Pw1 had engaged in penetrative sexual intercourse for a long time. This corroborated Pw1's evidence. She produced the P3 form and treatment notes EXB4a and b. I find that Pw1's genital organ had been penetrated by a male organ.

#### **Issue no. (iv) Whether there was sufficient evidence identifying the Appellant as the perpetrator.**

28. Pw1 said she knew the Appellant. Even the Appellant in his defence said he too knew Pw1 who was his lover's daughter. Pw3 who was a neighbor knew that Pw1's mother (Pw2) was in a relationship with the Appellant. When she saw the Appellant with Pw1 (*who was a child*)

every now and then she reported this to her mother (Pw2). She said she had once found Pw1 in the Appellant's house. She had also seen him giving her Kshs.30/= at a certain shop. There is therefore no doubt that Pw1 was close to the Appellant.

29. The Appellant in his defence said he used to walk with Pw1 as his daughter. He however never put this to either Pw1 or Pw2 in cross examination to confirm that indeed he was the father of Pw1. In any event he is not charged with walking with Pw1. The charge against him is defiling the child.

30. The Appellant in his defence said so much about Pw2 which I find to be an afterthought. He had all the opportunity to put those allegations to her in cross examination but he did not. He failed to explain why he was having Pw1 a school child in his house and even giving her money. Pw1 told the court he had been defiling her. That he used to do this during the school holidays and then give her money.

31. The moment Pw2 received the report from Pw3 she reported the matter to the police and Pw1 was taken to hospital. The report by Pw4 confirmed it all. All the evidence points at none other than the Appellant as the person who penetrated Pw1's female organ and this amounted to defilement.

32. On sentence, all I can say is that the Appellant was lucky to get away with ten (10) years imprisonment which I would have enhanced had the State applied for enhancement.

33. The upshot is that the appeal lacks merit and is dismissed in its entirety. The conviction and sentence are confirmed.

Orders accordingly.

**Delivered, signed & dated this 25<sup>th</sup> day of June 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**