REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 62 OF 2017

PETER MBUGUA MUNGAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against original conviction and sentence in Molo Criminal Case Number 765 of 2014 by Hon. R. Amwayi (Senior Resident Magistrate) on the 4th day of September 2017)

J U D G M E N T

1. The appellant **Peter Mbugua Mungai** was charged with defilement, the charge was framed,

> ***"Defilement in violation of Section 8 (2) of the Sexual Offences Act No.3 of 2006."***

It was alleged that**;**

> ***"On 21st March, 2014 at [particulars withheld] Village in Rongai District Nakuru County had unlawful carnal knowledge of VC a girl under the age of seven years."***

In the alternative he was charged with "**indecent assault**, committing an **indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No3 of 2006.**

The particulars were that;

> ***"On the 21st March 2014 at [particulars withheld] in Rongai District within Nakuru County he intentionally touched the vagina of VC a child age 7 years."***

2. The prosecution called seven (7) witnesses. Six (6) of them were heard by *Hon. Towett R.M.,* one, and the defence and the judgment were done by *Hon. R. Amwayi***.** The case for the prosecution was that on 21st March, 2014 V.C. who was aged seven (7) years came from school at 1.00p.m., changed into her home clothes and went to play at her aunt's place. About 2.00 p.m. she came back crying and walking with difficulty. She found her mother **PW1 RK** who demanded to know what had happened. She went straight to the house where PW1 followed and told her to sit. The child could not sit so, RK forced her to sit down, and that is when she said she was feeling pain in her private parts then she told her that someone had forcefully pulled her in a grass plantation and injured her private parts.

3. PW1 tried to undress her but the child refused. She had to do it forcefully and removed her pants. All this time the child was crying and resisting. RK noticed that the child had "male discharge" on her thighs. She then asked the complainant to take her to the scene which was 500 metres away. She saw that the grass was flattened. That is where the child told her that she had been defiled by Mbugua**,** whom RK knew. She later informed her husband MK He said she went to him around 5.00p.m. while he was seated at the road while crying and told him that their child had been defiled "by the accused".

4. He accompanied his wife and they went looking for accused whom they arrested and took to the area chief **PW6 Benson Kosgei**, whose testimony was that he received a call from MK that his child had been defiled. He went to the scene and found the appellant seated on the ground surrounded by a crowd. He interrogated the child who told him that the appellant had given her 10/= "before sleeping on top of her." He then interrogated the accused. "He confessed". He took accused and complainant to the police station, he said the child's skirt was torn.

5. At the police station they found **PW3 No.51273 P.C. Evans Kapombe** who testified that PW6 brought the accused with allegations of defilement. A female officer **PW5 Ag. IP Sheila Khegode No.xxxx** interrogated the child who told her that the accused had given her 10/= to buy sweets and he defiled her. She said she visited the scene behind the nursery school, where she noticed there had been a struggle "by the look of the grass." She saw that the complainant's skirt was torn and that the complainant had a bruise on the inner thigh. PW3 interrogated the accused who denied the offence. He said he noticed the child had difficulty walking. The complainant testified as **PW4**. She said on the said date she was going to her aunt's place when she met the accused who offered to buy her sweets but she refused. He then took her behind the nursery school which she attended. He asked her to lie down on her back; she did. He then removed her under pants and then *"inserted his penis inside my private parts"* where her urine came from. She said; *"the accused lay on top of me while he was defiling me."* She said she knew him as Mbugua. She said "after the ordeal" he warned her against telling anyone while threatening her with death. She wore her pants and then went home where she found her mother to who she made the report. Her mother took her to the police station then to hospital.

6. **PW7, Dr. Bildad Bagoge** testified that he was a clinician at Rongai Sub-County hospital. He testified that he had worked with Dr. Nondi who had completed the P3 for over one year and was familiar with his handwriting. He said that on examination the child's hymen was intact, and the lab results were also intact. The conclusion therefore was that there has been attempted defilement. He produced both the P3 and the Post Rape Care (PRC). The P3 was filed on 24th March 2014.

7. In his defence the appellant made an unsworn statement. He said that the reason he had been charged was because his parents had demonstrated against the complainant's parents who were illicit brew brewers. As a result a grudge had developed and now he was suffering the consequences. On the strength of this evidence he told court (*R. Amwayi*) determined that the ingredients of defilement had not been established but that the prosecution had proved the alternative charge of indecent act under **Section 11 (1) of the Sexual Offences Act** and sentenced the appellant to fifteen (15) years imprisonment.

8. Aggrieved by this conviction and sentence the appellant filed this appeal. He relied on his amended Grounds of Appeal:-

1. That the learned trial magistrate erred in law and fact by failing to appreciate that the charge against the appellant was defective.

2. That the learned trial magistrate erred in law and fact by failing to find that the complainant's age was not adequately proved as required by law.

3. That the learned trial magistrate erred in law and fact by failing to appreciate that the prosecution's case was not proved to the required standards of beyond reasonable doubt.

4. That the learned trial magistrate erred in law and fact by dismissing the appellant's defence with no cogent yet the same was believable and raised doubt against the prosecution's evidence.

9. The appellant's appeal was argued by Ms. Alwala and Ms. Kipmwei appeared for the state.

10. Ms. Alwala argued that the prosecution had failed to prove the case beyond a reasonable doubt, that the complainant was coached, she said her mother is the one who told her that a penis is called a *dudu* though in her own testimony she called it a penis, raising the question whether a seven (7) year old child would know that a penis is called a penis.

10.1 That the magistrate who wrote the judgment could not have relied on the demeanor of the complainant because she never saw the child, the child testified before a different magistrate. Hence any statement in the judgment related to the demeanor of the complainant was far-fetched.

10.2 That the Doctor's evidence was that the child's hymen was intact except for being dirty, that there was no discharge, no injury. That the defilement was alleged to have occurred on 21st March 2014 and the examination on 24th March, 2014, hence the dirt in her genitalia could not be related to what happened on 21st March, 2014 and could not form the basis for the conclusion of attempted defilement.

10.3 That PW2 testified that she forcefully undressed the complainant, she could have caused her injuries in the process.

10.4 That the appellant's defence of a grudge has been corroborated by the assistant chief who testified that the complainant's parents used to brew illicit brew and the appellant's parents had demonstrated against them, that his defence was corroborated by the prosecution witnesses.

10.5 On the sentence that the same was not illegal but excessive considering that the minimum was ten (10) years, no reason for fifteen (15) years.

11. Ms. Kipmwei opposed the appeal totally.

11.1 That the age was proved; date of birth 5/5/2007.

11.2 That the minor testified that the appellant inserted his penis inside her vagina, hence penetration was proved.

11.3 That the child knew the appellant hence he was identified.

11.4 That the *voire dire* conducted by the first magistrate led the second magistrate to form the impression that the child was truthful.

11.5 That since penetration can be partial, the medical evidence led the court to determine indecent act had been committed.

11.6 That the grudge was not established in any event prosecution said at the time of the offence the PW1 and PW2 had stopped brewing alcohol.

11.7 That the scene was visited by PW5.

11.8 That in its totality the evidence on record proved the charges beyond reasonable doubt.

12. In response Ms. Alwala submitted,

12.1 That there was no penetration despite the complainant's testimony that the appellant had penetrated her.

12.2 That there was no record from Rongai Hospital Centre to show that the child was examined there before P3 was filed on 23rd March, 2014.

12.3 That the issue of *voire dire* conducted by *Hon. Towett*, and Hon. *Amwayi's* alleged impression from the record that the child was truthful witness were two (2) different things.

13. The global issue for this court is whether the prosecution proved its case to warrant the conviction and sentence.

14. In his written submissions the appellant raised the issue of a defective charge. It is true as drawn, count 1 was defective, the same was drawn in the name and style of the defilement as defined in the repealed provision of the Penal Code of having **carnal knowledge.** Secondly the only provision of the law cited was **Section 8(2) of the Sexual Offences Act** leaving out the descriptive part of the charge which is **Section 8(1) of the same law.**

15. The prosecution need to be vigilant to guide the police officer in the framing of charges and to check the same before having them admitted in court. If the court reads the charge to the accused, instead of the court assistant, the court will see these defects before the case goes far. Hence, it is my considered view that the charge as drawn was defective and would have been subject of scrutiny had the trial court made a finding on it.

16. Were the ingredients of defilement proved?

16.1 In proof of **age**, the testimony on record is that the child was born on 5th May, 2007. This was supported by the evidence of the mother and the age as entered in the P3. Hence the age of the child was established that is seven (7) years old.

16.2 Was the penetration proved? The prosecution evidence is that the child was defiled. The child testified how the appellant inserted his penis into her vagina. The mother said the child was walking with difficulty. The child told her that someone had injured her private parts. There was no evidence of the alleged injury. The mother said they took her to Rongai Health Centre, and were referred to Provincial General Hospital. There is no record from Rongai Health Centre where the child was taken the same day. While the medical evidence is not the ultimate proof, where a seven (7) year old says that an adult person inserted his penis into her vagina, there ought to be evidence of that somehow, that is just the logical progression of the evidence. Even the alleged "male discharge" seen by PW2 was not seen by the medics or anyone else. She said she wore her panty immediately after the defilement. The pant was not produced instead a torn skirt which had no relationship to the offence was produced. From the record nowhere did the complainant say the accused tore her clothes.

16.3 Significantly the issue of the male discharge was not told to the police or the investigating officer.

16.4 The investigating officer's testimony on a sign of struggle on the ground is not supporting the child's testimony who just said she was asked to be undressed and she did. There was no struggle, hence the investigating officer's testimony that the grass behind the nursery school showed sign of struggle appears far-fetched.

17. All I am saying is that the evidence on record did not establish any contact between the complainant and the appellant.

18. What emerges from the judgment is that the trial court treated the indecent act charge as a default charge. The indecent act charge is an alternative charge which if the prosecution fails to prove the main charge, they must prove the alternative. It is not automatic that if defilement is not proved then the alternative falls in place.

19. For alternative charge the prosecution ought to have proved that there was contact between the body of the appellant and the genital organ or breast or buttocks of the complainant. The allegation that there was contact between the vagina of the complainant and the appellant's penis was not proved.

20. The trial magistrate in her judgment stated:-

> *"Did the prosecution then prove the alternative charge of indecent with a child? Section 2 (1) (a) of the Sexual Offences Act defines indecent Act as follows:*
>
> *"Indecent act means an unlawful intentional act which causes any contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include an act that causes penetration."*
>
> *The complainant stated that the accused took her behind the nursery school undressed her and he also unzipped the trousers and he* ***inserted his penis into her vagina****. She felt a lot of pain and could not walk or sit properly due to the* ***contact of her genital organs with that of the accused person****. The offence herein occurred during broad day time* ***and complainant was able to see what was inserted into her vagina which she named as penis. The accused's penis therefore had contact with the genitalia of the complainan****t. This act was intentional and unlawful. I therefore find that the offence of indecent act was committed against the complainant."* (emphasis mine)

21. What the trial court relied on was the evidence that was intended to prove the offence of defilement. Medical examination showed that everything was normal. If the trial court found the complainant to be a truthful witness as stated, then her testimony should have proved penetration. The fact that that evidence was not credible with respect to the charge of defilement, it could not become credible for the alternative charge.

> 21.1 The trial court found that the child was able to see appellant penis and actually said he inserted his penis into her vagina by using those specific terms. The question is whether the child knew that specific term for that genital organ. The fact that under cross-examination she said her mother told her that a penis is called a "*dudu*" raises the question whether the story about a penis and a vagina was hers or someone else's.

22. Did the complainant identify the appellant as the assailant? PW2's testimony is telling, the child allegedly told her a person pulled her into the grass and hurt her private parts. After she had forcefully undressed the crying and resisting child, and made the child take her to the scene. It is at this point that the child allegedly named her assailant as one ''Mbugua'' PW2 immediately knew who this Mbugua was yet apart from the name there was no other description. The question is how did the complainant's mother knew it was this Mbugua, yet there was no specific description and the child had not identified him. She simply said when the child said it was Mbugua she immediately knew it was the appellant. This seems to support the appellant's position that there was an underlying issue that made him the target of these allegations.

23. This is supported by the evidence of arrest. She and her husband went to arrest the Mbugua she "knew. In fact, **PW6** the assistant chief testified that the appellant in a different Sub Location from the parents of the complainant who were residents of his Sub Location. It was there for imperative for the complainant to say how she knew this Mbugua. Was he their neighbour? Their family friend? How did she know him?

24. The assistant chief testified that the appellant confessed the crime, and that is why he took him to the police station but there was no such evidence. His testimony was that the appellant was surrounded by a crowd. It is possible that in that circumstance he could say anything. But even then, no such confession is admissible.

25. There is no reliable evidence that the appellant was the Mbugua or person who allegedly defiled the child.

26. Guided by **Okeno vs Republic,** I have carefully re-assessed and re-evaluated the evidence before the trial court. I arrive at the conclusion that the age of the complainant was not in dispute. The offence of defilement was not proved as there was no penetration. The offence of indecent act was also not proved as there was no evidence that the appellant's body came into contact with the complainant's vagina. The alleged perpetrator was not sufficiently identified making the appellant's defence of the grudge believable.

27. Regarding the sentence, it is always necessary to give reasons for the sentence, and especially when it exceeds the recommended minimum.

28. In the upshot I find that the appeal has merit. The same is allowed. The conviction is quashed, the sentence set aside. The appellant to be set at liberty unless otherwise legally held.

Dated and signed at Nakuru this 12th day of June, 2020.

Mumbua T. Matheka

Judge

In the presence of: VIA ZOOM

Edna Court Assistant

Githui & Company Advocates for appellant N/A

For state Ms Wamboi

Appellant present