REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 12 OF 2020

DAVID MUTUKU MBULU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate Hon. C. A. Mayamba dated 6/11/2019 in Makindu PM Sexual Offence Case No. 59 of 2019.)

JUDGMENT

1. **David Mutuku Mbulu** the Appellant herein, was charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on the 8th day of May 2019 at around 6:00 pm at [Particulars Withheld] Kibwezi sub-county Makueni county, Eastern region intentionally caused his penis to penetrate the genital organ of **NN** of a child aged 17 years who is mentally disabled.

He also faced an alternative count of committing an indecent act with a child contrary to section II(i) of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on the 8th day of May 2019 at [Particulars Wthheld] Kibwezi sub-county Makueni county intentionally touched the genital organs of **NN** a child aged 17 years with his penis.

2. After a full hearing he was found guilty, convicted and sentenced to thirty (30) years imprisonment. He filed this appeal challenging the judgment on the following grounds:

a) **That,** the learned Magistrate erred in both law and facts and misdirected himself by basing his conviction on the sole identifying evidence by Pw2 without even warning himself nor the court as to the dangers of convicting in reliance on such identification evidence hence his conviction was manifestly unsafe.

b) **That,** the learned trial Magistrate erred in law and misdirected himself by failing to take judicial notice of the fact that Pw2 upon cross examination clearly confirmed that she did not know who had thrown her into the well hence exonerated him, the Appellant into commission of the offence charged.

c) **That,** the sentence of 30 years' imprisonment term is rather too harsh and excessive.

d) **That,** his sworn *alibi* defence was unfairly rejected.

e) **That,** the trial Magistrate while imposing the sentence failed to invoke the provisions of Article 50(2)(p) of the constitution and section 333(2) of the Criminal Procedure Code.

3. In this case the complainant (N.N) who testified as Pw2 was aged 17 years. She identified her birth certificate (EXB1). It was her evidence that on 8th May 2019 at around 5:00 pm she was from school when David Mutuku asked to walk with her and she refused. He then chased her, and she went home. She was sent to the borehole to draw water. She left the jerican there and was headed to her grandmother's when she met David Mutuku again. He carried her on his back upto the borehole. He then took her to a deserted house belonging to Mutui.

4. At the deserted house he removed her inner wear and his clothes and made her lie on the floor. He wore a condom on his penis which he inserted into her vagina. He defiled her for a while as he held her neck. He thereafter took her to the borehole which had water and threw her therein and left. She was rescued by JM who had come to draw water. A rope was released into the borehole and she held it and was pulled out.

5. Her father(Pw4) was called and she was taken to hospital – where she was treated and the matter reported to the police. She was later referred to hospital again. She said the person she was referring to as David Mutuku is the Appellant.

6. In cross examination, she said the person who sent her to draw water was her mother AN. That she was taken to the house of Mueni Morris from where she was defiled. The defiler gave her Kshs.200/= which was taken by her father (Pw4). She did not know the person who threw her in the well.

7. She stated that Pw4 took her to a place where there were boys with one tied up. This was behind the shops. She picked out the boy who had thrown her inside the borehole. She said there was light when the incident took place and she knew the perpetrator since she had always seen him on the tractor.

8. Pw3 **MKK** confirmed going to the well on 9th May 2019 8:30 am when he heard a person's voice from therein. He called for assistance and the person was assisted. He identified the child and the father took her to hospital. She talked to no one upon her removal. Kshs.200/= was removed from her pockets.

9. Pw4 **PMK** is the father to Pw1. He said Pw1 had after school been sent to draw water by her mother but she never returned home. This was on 8th May 2019 at 6:00 pm. He went to the borehole and to the neighbors but never found her. The next morning at around 8:00 am he received a call from a neighbor asking him to rush as Pw1 had been removed from the water. He took her to the hospital.

10. When they returned home she started talking and explained how she had met Kisele on her way to her grandmother's. That he took her to an isolated house and had sexual intercourse with her. He gave her Kshs.300/=. Pw4 then threatened to kill Pw2. She said she was thereafter carried and thrown into the borehole. On 10th May 2019 Pw4 went with others and arrested the Appellant.

11. In cross examination he said he came home from work at 6:00 pm and found Pw2 home and it was abit dark. Pw2 told him the incident took place at 9:00pm. The Appellant was arrested from [Particulars Withheld] market and tied with ropes and taken to the police station. The Appellant was placed among twenty (20) boys and he was picked by Pw2 as the perpetrator.

12. Pw1 **Anthony Gitonga** a clinical officer based at Masimba health centre testified that he examined Pw2 on 10th May 2019. His findings were:

- The incident had occurred 36 hrs prior to the examination.
- Whitish smelly discharge from vagina.
- There was an old tear.
- No tears or lacerations.
- HIV negative.
- HVS and urinalysis revealed moderate pus cells.
- Pregnancy test was negative
- Usage of condom noted on the PRC form
- Pw2 was not calm

He produced the treatment notes, P3, PRC forms and copy of birth certificate as EXB1 – 4 respectively.

13. In cross examination he said the examination revealed the penetration was serial meaning Pw2 was sexually active.

14. Pw5 **No. 878556 Corporal Eunice Wambui** was the investigating officer. She stated that Pw2 was slightly mentally disturbed but she knew Mutuku. That the incident occurred at around 3:00 pm. She visited the scene and the place of the borehole. She said Pw2 only knew the perpetrator physically.

15. The appeal was canvassed by way of written submissions. The Appellant in his submissions has basically raised the issue of identification which he says was not well handled by trial court. He refers to some of Pw2's responses in cross examination and the trial court's findings and concludes that Pw2 did not know who defiled her.

16. He has taken issue with the purported identification parade conducted by Pw4 whereby the Appellant's hands remained handcuffed. The Appellant seems to stress so much the state of Pw2's mind in respect to the identification. To support his arguments on identification he referred to the cases of **Roria –vs- Republic (1967) E.A 583**, **Cleophas Otieno Wamunga –vs- Republic Criminal Appeal No. 20 of 1989 (1989) KLR 424, Republic –vs- Turnbull (1976) 3 ALL E.R 549.**

In **Kamau –vs- Republic (1975) E.A 139** the court stated thus:

> *"The most honest of witnesses can be mistaken when it comes to identification."*

17. On sentence he has submitted that the same is rather too harsh and excessive. Further that in sentencing, the court overlooked Article 50(2)(p) of the constitution and section 333(2) Criminal Procedure Code.

18. The appeal was opposed by the Respondent through learned counsel Mrs. Anne Gakumu. She submits that the ingredients of *age, penetration and identification* of the perpetrator were well proved by the evidence adduced. She has referred to the definition of the word ***"penetration"*** under the Sexual Offences Act and states that Pw2's evidence on this was corroborated by that of Pw1. She adds that Pw2 and the Appellant are from the same area being residents of [Particulars Withheld] village. That Pw2 knew the Appellant as a tractor driver.

19. On contradictions and inconsistencies, she submits that there were none and if there were any, the Respondent is covered by the decision of the Court of Appeal in the case of **Richard Munene –vs- Republic (2018) eKLR** where it was stated that

> ***"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."***

20. She urged the court to uphold the sentence of thirty (30) years imprisonment given what Pw2 went through as a result of this incident.

Analysis and determination

21. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. See the case of **David Njuguna Wairimu (2010) eKLR** where it was held that:

> ***"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."***

22. I have carefully considered the evidence on record, the grounds of appeal both submissions and cited cases. I find the main issue for determination to be *whether the Appellant was identified as the perpetrator of this offence.*

23. Before I get to discuss the identified issues I wish to point out something that I have found disturbing and so common in this court's area of jurisdiction. The Appellant was charged with defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act **AND NOT** defilement of an imbecile. Somewhere at the end of the particulars are the words *"aged 17 years who is mentally disabled"* what is this meant to prove?

24. There is no offence under the Sexual Offences Act known as defilement of an imbecile or a person who is mentally disabled. This particular offence is under section 146 of the Penal Code which was not and has not been repealed. It provides:

> **Defilement of idiots or imbeciles** ***"Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years."***

25. The prosecution should endeavor to do the correct thing as they present their matters to the court. By so loading the particulars of the charge sheet with words "who is mentally disabled" does the prosecution want to have the complainant treated as a normal child under section 8(1) of the Sexual Offences Act or a child who is mentally challenged under section 146 of the Penal Code? The trial courts must also be keen on this error which can't be ignored.

26. Furthermore, in this case it is only Pw5 who stated this of the complainant

> *"I went and found the complainant who was slightly mentally disturbed"*

Even Pw1 (*clinical officer*) who examined Pw2 and the trial court which conducted a *voir dire* examination of Pw2 and saw and heard her did not note or indicate anywhere that the girl had a mental challenge. This is therefore to urge the ODPP to avoid confusing the parties and present proper charges in the proper manner before the court. Having stated the above, I now move to deal with the issues raised in this appeal.

27. Pw2 told the court she was 16 years old, and she identified her birth certificate (EXB4). The said birth certificate shows that she was born on 1st January 2002. It follows that the time of the commission of the alleged offence she was 17 years and four months. I therefore find that the age of the complainant (Pw2) was proved to be 17 years.

28. Penetration is defined under section 2 of the Sexual Offences Act as:

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

Pw2 explained to the court what was done to her after she was taken to Mutui's or Mueni Morris's half-finished house. She said her clothes were removed and she was made to lie on the floor from where she was defiled by a man who had worn a condom.

Pw1 who examined her produced EXB 1-3 confirming that she had been penetrated. I therefore find that penetration of her female genital was proved.

Having found that Pw2 was indeed defiled, the next issue to determine is *whether the Appellant was identified as the person who did this to Pw2.*

29. Pw2 testified that she met David Mutuku whom she knows on 8th May 2019 at around 5:00 pm as she came from school. He chased her when she refused to walk with him. She then went home from where she was sent to the borehole to draw water by her mother who did not testify. She left the jerican at the borehole and headed to her grandmother's and that's when she again met David Mutuku, who she identified as the Appellant.

30. In his evidence Pw2's father (Pw4) said he arrived home from work at 6:00 pm on the date in question and found Pw2 there It was abit dark he said. Pw2 then went to draw water having been sent by her mother.

31. From this narrative, it is clear that the time Pw2 left home for the borehole was not 5:00 pm nor even 6:00 pm since it was after Pw4's arrival and it was abit dark. That being the position one is left to wonder why **PMK** (Pw4's) wife would send Pw2 with her known challenges to the borehole to draw water when darkness had set in.

32. The court was never told where the borehole was and how far it is from Pw4's home. The court was also not told how far Pw2's grandmother's home is from the borehole. This information was important inorder to assist the court put the pieces of evidence together.

33. Furthermore, Pw4 said Pw2 told him that the incident occurred at around 9:00 pm. He claims to have gone to the borehole to look for Pw2 but he never found her. He did not say what time he went to the borehole and whether he found any jerican there.

34. Putting together all these pieces of evidence, I come to the conclusion that this incident occurred at night as Pw2 and Pw4 have stated. So how was Pw2 able to identify the defiler? There was no mention of the source of light.

35. In the case of **Murube & Another –vs- Republic (1986) KLR 356** the Court of Appeal stated this of such identification:

> ***(1) Though a fact may be proved by the testimony of a single witness, there remains the need to test with the greatest care the identification evidence of such a witness especially when it is shown that the conditions favouring a correct identification were difficult.***

Further in **Anzaya –vs- Republic 1986 KLR 236** the same court stated thus-

> ***(2) There is a danger in relying solely on the evidence of a single witness regarding identification, particularly when the identification is said to have occurred at night.***

Much later in **Kiilu and Another –vs- Republic (2005) I KLR 174** the Court held as follows:

> ***(1) Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."***

36. It was Pw2's evidence that the person who dropped her in the borehole is the same one who had defiled her. In cross examination she said:

> *"I did not know who had thrown me into the well .... my father took me to a place where there were boys with one tied up. I was taken behind the shops. I was asked to point at the boy who had dropped me into the borehole. I went and picked him out."*

37. Pw4 confirmed that after arresting the Appellant they tied him with ropes. They then subjected him to a kangaroo identification parade where he was placed among 20 boys. Pw2 obviously picked the one tied with ropes as the culprit.

38. Pw4 is the one who with others went to arrest the Appellant. What description had Pw2 given to him? At page 11 lines 12-14 record of appeal he says this:

> *"She informed me that she was going to her grandmother's when she met Kisele whom we refer in the village (sic). She indicated she knew the person"*

39. It is not clear if this means the defiler is known as Kisele only in the village. If that was the case pw2 would have strictly referred to him as such. She referred to him as “David Kituku and not Kisele. At no point does she refer to him Kisele.

40. If indeed Pw4 and his team had arrested the person Pw2 had told him had defiled her why were they subjecting him to the kangaroo identification parade? It clearly means there was some doubt somewhere.

41. Since this incident occurred at night there was need for the trial court to satisfy itself of the conditions that prevailed which would have favoured a positive identification. There was no form of light at the scene. The mere fact that Pw2 had been chased by the Appellant on the way from school during the day and in the presence of other pupils was not reason for Pw2 to assume that he is the one who had carried her on his back that night and defiled her. When carried Pw2 never screamed and struggled to jump off the back. This was a 17-year-old!

42. There is no dispute that Pw2 was a child and was defiled. The dispute is whether indeed the Appellant was the perpetrator of this crime. There are several gaping holes in this case which have created a doubt in the court’s mind as to the identification of the Appellant, as the perpetrator. He will benefit from that doubt.

43. I find merit in the appeal which I hereby allow, quash the conviction and set aside the sentence. The Appellant to be released unless lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong’udi

Judge