REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 56 OF 2018

JOSEPH MAKOLO MUTUA ..... APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. C.A Mayamba (SRM) in Kilungu Senior Resident Magistrate's Court Criminal Offence No. 42 of 2018 delivered on 25th September, 2018).

JUDGMENT

1. **Joseph Makolo Mutua** the Appellant was charged with the offence of defilement contrary to section 8(1) (3) of Sexual Offences Act No. 3 of 2006. The particulars being that on the 15th day of July 2018 at [Particulars withheld] village, Kikoko location in Kilungu sub-county within Makueni county intentionally caused his penis to penetrate the vagina of **JMP**. a child aged 15 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 in respect to the same complainant **JMP**

3. He pleaded not guilty and after a full hearing he was found guilty, convicted and sentenced to twenty (20) years imprisonment.

4. He was aggrieved by the judgment and filed this appeal raising several grounds which he later amended to read as follows:

a) **That,** the trial Magistrate erred in law and fact by failing to find that the charge against the Appellant was defective in nature as it did not disclose the offence.

b) **That,** the trial Magistrate erred in law and fact by failing to find that the elements of the offence (penetration and identification) were not conclusively proved to warrant conviction.

c) **That,** the trial Magistrate erred in law and fact by relying on the evidence of prosecution witnesses whose credibility was questionable.

d) **That,** the trial Magistrate erred in law and fact by failing to find that the whole of the prosecution's evidence was based on suspicion.

5. The prosecution case was that Pw1 (JMP) a minor aged 15 years left church on 15th July 2018 at around 3:30 pm for home where she lived with her grandmother. On the way, she met the Appellant who is a neighbor who advised her to go home. He then directed her into a bush, and invited her to follow him which she did. He asked her to lie down and pull up her dress. He then removed his trouser and inserted his penis inside her vagina.

6. He left with a bucket headed for the stream when he was through. She informed a mama L who together with her grandmother took her to Nunguni hospital. She identified the treatment card, P3 and PRC forms and birth certificate (EXB1-4) as belonging to her. In cross examination she denied having been with another boy (Pw4).

7. Pw2 **WN** who is Pw1's grandmother testified that Pw1 told her that she had been with a young boy (Pw4). Pw3 who is Pw1's mother and village elder said Pw2 had come to report to her how Pw1 had taken too long at the church. She called Pw1 who was eating guavas and she came. She came and told her she had been with the Appellant who had told her not to reveal his identity. That the Appellant had, had sexual intercourse with her. She called the Appellant and later handed over the matter to Kithangathini A.P post, and also took Pw1 to hospital. She confirmed being Pw4's mother.

8. Pw4 (**JMM**) a minor aged 13 years testified that on 5th July 2018 he was walking home from church, while Pw1 and another girl were ahead of him. After Pw1 had passed him he heard the Appellant call her and tell her to wait for him to head home together. Pw1 waited for the Appellant who greeted her. They left together as the Appellant insisted he was going to their home to get a bucket. When the Appellant tried to hold Pw1's hand she resisted saying he was dirty. He denied knowing anything beyond that.

9. Pw5 **DPK** who is Pw1's father only received a report of the incident. Pw6 **No. 118979 PC Susan Ruto** the investigating officer produced Pw1's birth certificate. She also took Pw1 and the Appellant to hospital on 16th July 2018.

10. Pw7 **Eric Kasiamani** the clinical officer examined Pw1 and the Appellant. He testified that Pw1's hymen was broken and she had a whitish discharge which confirmed a venereal infection. That the Appellant had pus cells confirming venereal infection. The P3 form was filled on 16th July 2018. He produced EXB 1-4 in respect to Pw1 and the outpatient card for the accused as EXB5.

11. In his unsworn defence the Appellant stated that he had been called by his aunty **BN** to spray off bed bugs. He asked her for his eight (8) months' pay. She asked him to get elders to confirm he had worked. He went to church and he was thereafter called by a son to aunty B who asked him to pick a spade from their home. On the way he followed Pw1 and Pw4 who were from church.

12. Pw1 asked him to wait for her but he refused as he was in a hurry. He left Pw1 eating sugarcane and went to relay a message to the grandmother then left.

13. At 6:30 pm he left for his home when he met the husband to the area headman. He dragged him to his home from where he was informed of this case. Pw1 informed the grandmother that she had been with Pw4 the son of the village manager. The village headman ensured Pw4 was removed from this matter and he was fabricated.

14. The appeal was argued by written submissions. On **ground 1** the Appellant argues that the charge was defective as the word ***"unlawfully"*** was omitted from the particulars. He cited the case of **Achoki –vs- Republic 2000 eKLR.**

15. On **ground 2** he submits that the ingredient of defilement was not proved. He refers to the medical evidence adduced and the findings by the learned trial Magistrate. He argues that the medical evidence did not confirm that Pw1 had a venereal disease as found by the court. On this he referred to the case of **J.O.O –VS-Republic (2015) eKLR.**

16. He also referred to the case of **P.K.W –vs- Republic where Maraga and Rawal JJ** (as they were) held:

> **"……***They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?*
>
> **….** *In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge, that is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like use of tampons, masturbation, injury and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity lie horseback riding, bicycle riding and gymnastics, there can also be a natural tearing of the hymen. Please see also the Canadian case of the Queen v Manuel Vincent Quintanilla (1999) AB Q 769."*

17. Referring to the case of **Peter Mwangi Muthanya –vs- Republic Nakuru Criminal Appeal No. 154A of 2005** (UR) and some medical texts he submits that the medical findings of broken hymen and presence of whitish vaginal discharge was not a conclusive prove of penetration of Pw1's genital organ.

18. On the identity of the perpetrator he submits that the evidence of Pw1 and Pw2 on this is contradictory. Furthermore, Pw3 was Pw4's mother and could not allow her son to be incriminated. He contends that he was only suspected which is not sufficient to found a conviction. See **Sawe –vs- Republic (2003) 364; Mary Wanjiku Gichira –vs- Republic Criminal Appeal No. 17 of 1998.**

19. Finally, he submits that the prosecution case was not proved beyond reasonable doubt and he should be acquitted.

20. The appeal is opposed by the Respondent which filed submissions through learned counsel Mr. James Kihara. On the first ground he submits that the section 8(1)(3) should have read section 8(1) as read with section 8(3) of the Sexual Offences Act. The same is curable under section 382 Criminal Procedure Code as no prejudice or injustice was caused to the Appellant.

21. Counsel submits that the Appellant has relied on an old archaic case law which has been overtaken by the new constitutional dispensation, where technicalities are not considered as a hard and first rule. He contends that omission of the word *"unlawfully"* is curable under section 382 Criminal Procedure Code. He relied on the case of **Williamson Karimi Njogu –vs- Republic Criminal Appeal No. 31 of 2015.**

22. Counsel has argued that the medical evidence confirmed that Pw1 and the Appellant had engaged in sexual intercourse. That the Appellant never challenged Pw1's evidence on penetration, or evidence of Pw4. He further submits that the Appellant's conviction was not based on suspicion but solid evidence. The sentence he says is the minimum and should not be interfered with.

Analysis and determination

23. This being a first appeal this court is called upon to re-analyse and re-consider the evidence and arrive at its own conclusion. It should also bear in mind that it did not hear or see the witnesses and give an allowance for that. This is as guided by the case of **David Njuguna Wairimu – vs- Republic (2010) eKLR** where the Court of Appeal stated:

> ***"That the duty of the 1st appellate court is to analyze and re-evaluate 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 circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that 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."***

24. Having carefully considered the evidence on record, grounds of appeal, submissions and cited authorities, I find the following issues to fall for determination.

i. Whether the charge sheet was defective.

ii. Whether there was sufficient evidence to sustain the conviction.

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

25. A perusal of the charge sheet shows that the Appellant was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act. There is no such section under the Sexual Offences Act. The charge should have read section 8(1) as read with section 8(3) of the Sexual Offences Act. I find this to be a harmless error which did not cause any prejudice or injustice to the Appellant. The same is curable under section 382 of the Criminal Procedure Code. In any event the Appellant did not raise it as a ground of appeal. That clearly shows he understood the charge very well.

26. The issue he raises is with the omission of the word "unlawfully" in the particulars of the charge.

Section 8(1) of the Sexual Offences Act defines defilement as:

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement."***
>
> *Section 2 defines penetration as :-*
>
> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;***

27. The law is clear that any person under the age of 18 years is a child hence a minor and is not capable of giving any consent of any kind. There is therefore **NEVER** any defilement or penetration that can be said to be lawful. As long as there is an attempt, or an insertion of a male organ (*partial or complete*) into the female organ of a minor an offence called attempted defilement or defilement itself is committed. That ground therefore fails as the charge was not defective.

Issue no. (ii) Whether there was sufficient evidence to sustain the conviction.

28. The three major ingredients prove a charge of defilement are:

a) Age of complainant

b) Proof of penetration

c) Identification of the perpetrator

Age of complainant

29. The charge sheet shows that Pw1 was aged 15 years and that's what she told the court. A birth certificate (EXB4) produced shows she was born on 23rd January 2003. At the time of alleged incident on 15th July 2018 she was 15 years, 5 months and three weeks. So age was proved as being 15 years.

Proof of penetration

30. Pw1 explained how the Appellant whom she knew called her to join him in the bush and she went. She further stated that he inserted his penis into her vagina as she lay on the ground. This was on 15th July 2018. She was taken to hospital for treatment the same day.

31. The treatment card (EXB1) in respect of Pw1 shows that:

· Hymen was not intact.

- She emitted a foul smell from her vagina.
- She had a white discharge.
- Numerous pus cells
- She had never had sex but there was no obvious bleeding.

From these findings Pw7 concluded that there had been defilement.

32. The Appellant was also examined on 16th July 2018. His urine had plus cells. Pw7 concluded that there had been cross infection since Pw1's urine had an infection.

33. The evidence of Pw1 and Pw7 satisfies me that the former indulged in sex. I therefore find that penetration was proved.

Issue no. (iii) identification of the perpetrator

34. Pw1 testified that the person who defiled her is the Appellant who is a neighbor. He lured her into the bush and she readily went. In her evidence in chief Pw1 does not make mention of Pw4. It is only in re-examination that she states that the person she was with was the Appellant and not Pw4.

35. Pw1 lives with her grandmother Pw2. It was Pw2's evidence that when Pw1 arrived home at 3:00 pm she asked her who she had been with and she told her it was Pw4. She never told her that Pw4 had done anything to her.

36. Pw4 (JMM) testified and said he is aged 13 years old and was school going. He admitted having seen Pw1 on their way from church. He also saw her leave for her home with the Appellant who had requested him to wait for her. He was firm in his answers in cross examination on the happenings of that day.

37. The Appellant has submitted that the person who defiled Pw1 was Pw4 whom the mother (Pw3) protected. From the original handwritten proceedings this is what Pw3 said at **page 9** lines **1 -3**

> *"I took the complainant to the hospital. JMM is my son. Yes, the complainant mentioned JMM and JMM said he left the complainant with Makolo while they were going home."*

38. In cross examination she said she has no reason to fabricate the Appellant. From the record it is also clear that the Appellant never asked Pw4 about his alleged defilement of Pw1. It is therefore strange that he puts that question to Pw4's mother (Pw3) instead of Pw4 himself.

39. The medical documents EXB1-3 show that Pw1 is mentally handicapped. That explains why she could not resist when she was asked to follow a man to the bush and just go by his instructions. I am surprised the learned trial Magistrate did not observe and note down something as obvious as this. Pw1's condition also explains why she had no bruises, lacerations or bleeding in her genitals after the incident.

40. It further puts weight on the finding of a foul smelling white discharge from her vagina. The girl had by virtue of her condition been taken advantage of and sexually abused severally since she was not capable of making decisions.

41. Pw1 and Pw4 told the court that the Appellant left with the former. The Appellant in his evidence does not deny seeing Pw1 that day. He even claimed to have been asked by Pw1 to wait for her if he was going to their home but he refused as he was in a hurry. He claims to have gone to Pw2's home to deliver her son's message. He never asked Pw2 to confirm to the court if he indeed had been to the home as claimed.

42. It is true Pw1 told Pw2 that she had been with Pw4 but she never at all said Pw4 had defiled her. She was clear in cross examination that it is the Appellant with whom she had been in the bush. The two of them were not strangers to each other and the incident occurred during daytime. I am satisfied that the Appellant was well identified as the perpetrator of this offence.

43. The sentence provided for, for this offence is a mandatory minimum of twenty (20) years imprisonment. The learned trial Magistrate gave the Appellant that sentence. This was on 25th September 2018 after the **Francis Muruatetu** decision.

44. The Appellant was said to be a first offender and in mitigation he said he was still young. This is what the trial court said:

> ***"I note that accused is still a relatively a young man but the sentence contained herein is mandatory"***

Inspite of the above finding he still gave him the mandatory minimum sentence which I hereby set aside after considering the mitigation.

45. The upshot is that the appeal partially succeeds, whereby the conviction is upheld but the sentence of twenty (20) years imprisonment is set aside. It is substituted with a sentence of fifteen (15) years imprisonment from date of conviction and sentence.

Orders accordingly.

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

…….

H. I. Ong'udi

Judge