REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 119 OF 2019

PMM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate Hon. Mayamba C.A dated 18/07/2019 in Kilungu SRM S.O Case No. 54 of 2019.)

JUDGMENT

1. **PMM** the Appellant herein was charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 17th day of June 2019 within Makueni county unlawfully and intentionally committed an act which caused penetration of genital organ of **MMN** a child aged 13 years.

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. The particulars being that the Appellant on the 17th day of June 2019, within Makueni county unlawfully and intentionally committed an indecent act with **MMN** a child aged 13 years by touching her genital organs.

2. He denied the charges and the matter proceeded to full hearing with the prosecution calling four (4) witnesses. The Appellant gave an unsworn statement of defence and called no witness. He was finally found guilty, convicted and sentenced to twenty (20) years imprisonment.

3. He was aggrieved by the judgment and filed this appeal raising the following grounds:

a) **That,** the trial court erred in law by failing to analyse and re-evaluate the entire prosecution case before holding that the case for the prosecution was a proof against the Appellant whereas penile penetration was not adequately proved. In other word the element in defilement, i.e. age and penetration were not proved beyond reasonable doubt.

b) **That,** the trial court erred in law by acting upon a charge sheet whose particulars of the offence did not specify or demonstrate penetration by penis and thus ambiguous, rendering the charge sheet defective.

c) **That,** the trial court erred in law by failing to realize that the whole of the prosecution's case was riddled with material contradictions and inconsistencies, especially the age of Pw1, i.e. is to 13 or 14 years which is at border line not proved to the required standards thus likely to undermine the sentence meted.

d) **That,** the trial court erred in law by awarding disproportionate sentence.

e) **That,** the trial court erred in law by putting much weight to corroboration but failed to test the truthfulness of the complainant, corroboration is not mandatory in sexualoffence case and victim sole evidence can base conviction provided the court is satisfied the complainant is truthful.

f) **That,** the trial court erred in law by disregarding accused *alibi* defence merely because accused did not bother to bring it out in cross-examination to witness who testified. As results shifted the burden of prove to the accused and yet burden of proof always lies with prosecution.

g) **That,** the mandatory minimum sentence is unconstitutional as it violates Article 160 and 159 of the constitution. It disregards the principle of proportionality, mitigation hence denying the court inherent discretion thus against tenet of a fair trial.

4. The case of the prosecution was that Pw1 (MMN) a child aged 13 years went to a bush near their home to collect firewood, on 17th June 2019 at 2:00 pm. Her mother (Pw2) was not home as she had gone to collect her sister from [Particulars withheld] school. On the way to collect firewood, Pw1 met with a boy who asked about her mother's whereabouts.

5. He went ahead to ask what she wanted to eat and she declined his offer. The boy took the rope Pw1 was carrying to tie the firewood with and threw it away. He grabbed her and took her to the bush and warned her against screaming and threatened to kill her if she did.

6. He removed her clothes and also his and made her to lie down. He first inserted his finger into her vagina and thereafter inserted his penis in the said vagina. She was crying by the time he finished. He again warned her against telling anybody about the incident. He told her that if she did he would come to their home kill her plus all her family members. She therefore told no one.

7. When her mother (Pw2) returned on 29th June 2019 she reported the incident to her as she was having a headache and stomachache. Pw2 reported to the boy's father who called him but he disconnected his father's call. Pw2 then reported to the village elder. She was later taken to Mutungu hospital for treatment. She identified the treatment notes, P3 and PRC forms which were later produced as EXB1 – 3.

8. Pw1 identified the Appellant as the boy who had defiled her. She knew him as a neighbor and cousin. He had never done that to her before. Pw1 was taken through a *voir dire* examination before testifying. She said the incident occurred while she was home for half term.

9. Pw2 **MN** is Pw1's mother. She said Pw1 was born on 25th August 2005. Her age was later assessed at 14 years and a report filed (EXB4). She confirmed that she was away when the incident happened. Pw1 however reported the matter to her on 29th June 2019 upon her return. She told her it was the Appellant who had defiled her. She reported to the village elder, Kilome police station and took Pw1 to hospital. She denied the existence of any grudge between her family and that of the Appellant.

10. In cross examination she said the Appellant's father was the first to be informed before she went to the village elder. She also said the Appellant had threatened Pw1 with death if she reported the incident to anyone.

11. Pw3 **No. 118979 P.C Susan Ruto** received instructions to investigate the case on 1st July 2019 at 8:30 am. She took the child (Pw1) to hospital where the P3 and PRC forms were filled and she recorded her statement. The hospital documents confirmed that Pw1 had been defiled he said. The Appellant was arrested in Kola and brought to Kilome police station.

12. Pw4 **Eric Kasiamani** is the clinical officer who examined Pw1. He found the following:

- Broken hymen
- Whitish discharge
- Urine test revealed pus cells 20:25
- Conclusion was that the child had been defiled.

He produced the treatment nots, P3 and PRC forms and age assessment report as EXB1 – 4 respectively.

13. In his unsworn defence the Appellant said he works as a shamba boy and on 17th June 2019 he was at work at the place of Agnes her employer. He used to leave work at 2:00 pm to come and water his cabbages at his home in Ngiitine village. He would then leave at 4:00 pm for his employer's home. The last time he had been home was 25th December 2018. He only sends his father money. He said he considers Pw1 as his sister as they have grown up together.

14. The appeal was canvassed by way of written submissions which were filed by both parties. The Appellant has submitted on the age of Pw1 saying she was 14 years bordering on 15 years old. To him age was not proved yet it is the one that determines the sentence. He cited several cases explaining why proof of age is key in a case of defilement. See **Dominic Kibet –vs- Republic Criminal. Appeal No. 155 of 2011; Francis Omuroni –vs- Uganda, Court of Appeal in Cr. Appeal No. 2 of 2000; Kaingu Elias Kasomo –vs- Republic – Malindi Court of Appeal Criminal. Appeal No. 504 of 2010.**

15. Secondly, he submits that a missing hymen without any form of violence or bodily harm is not sufficient proof of defilement. See **Martin Charo –vs- Republic (2016) eKLR.** He took issue with the charge sheet which does not mention the word *"penis"*. He also submits that he could not disclose his defence through cross examination as that would amount to shifting the burden of proof. On this, he referred to the case of **Woolmington –vs- DPP (1935) A.C. 462 page 481.**

16. The Appellant has submitted at length on the unconstitutionality of a mandatory minimum sentence citing **Francis Karioko Muruatetu & Anor –vs- Republic Petition No. 15 and 16 of 2015. Evans Wanjala Wanyonyi –vs- Republic** Court of Appeal **Eldoret Criminal Appeal No. 312 of 2018 (2019) eKLR;** among others. He therefore faulted the trial court for not exercising discretion while sentencing him.

17. Learned counsel for the Respondent M/s Eunice Gitau opposes the appeal contending that there was sufficient evidence in support of the charge. That age of Pw1 was proved and so was penetration through the evidence of Pw2 and the medical evidence. She submits that Pw1 gave a very candid narration of what the Appellant did to her. The time of incident was daytime.

18. Counsel contends that the Appellant was at the scene of crime as he had already left his work place according to his defence. She supports the conviction and sentence as the trial court gave his reason for holding that the case had been proved beyond reasonable doubt.

19. On the issue of a defective charge sheet she submits that the charge sheet contained the statement of the offence citing the relevant law and the penal section. That the particulars were detailed and made the Appellant well aware of the charges facing him and the consequences thereof. Any omission cannot make the charge defective as the Appellant was not prejudiced.

20. It's her contention that the trial court considered the defence of the Appellant and gave reasons as to why the defence was not credible. Finally, it is her submission that corroboration is not a requirement by virtue of section 124 of the Evidence Act. However, she was satisfied that the prosecution evidence was consistent and cogent.

Analysis and determination

21. This is a first appeal and this court has a duty to re-analyze and re-consider the evidence on record and arrive at its own independent conclusions. The Court of Appeal in the case of **David Njuguna Wairimu – Rep (2010) eKLR** stated the following of the duty of a first appellate court:

> ***"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."***

22. I have therefore considered the evidence on record, grounds of appeal, submissions and authorities. I find the issues falling for determination to be as follows:

i. Whether the charge sheet was defective.

ii. Whether the prosecution case was proved beyond reasonable doubt.

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

23. It is the Appellant's argument that the omission of the word "*penis*" in the particulars of the charge rendered the charge sheet defective. I have looked at the charge sheet and confirm that:

a. The Appellant was charged under section 8(1) (3) of the Sexual Offences Act which is non-existent. It should have read section 8(1) as read with section 8(3) of the Sexual Offences Act since section 8(1) defines the offence while section 8(3) prescribes the offence.

b. The particulars do not make mention of the organ that was used to penetrate M.M.s genital organ. It is however clear from the particulars that the act causing the penetration was by the person charged.

24. Section 382 of the Criminal Procedure Code provides:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether objection could and should have been raised at an earlier stage in the proceedings"***

25. The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to the specific charge that he can understand. It will also enable an accused person to prepare his defence.

26. The issue for consideration on the issue of the charge sheet and the particulars is whether they did prejudice the Appellant and occasion a miscarriage of justice. The Appellant was clear in his mind on what the offence was all about. He denied the charge. When the hearing took off, Pw1 narrated what had been inserted into her genital organ. It was a male genital organ i.e. penis. I therefore find that there was no prejudice or injustice caused to the Appellant by the small omission of the word (*penis*).

Issue no. (b) Whether the prosecution case was proved beyond reasonable doubt.

27. Under this head, I will examine the evidence to satisfy myself as to whether there was proof of age, penetration and identification of the perpetrator.

Proof of age

28. Proof of age in a case of defilement is very important as the penal sections are pegged on age.

> **Section 8(1) Sexual Offences Act provides:**
>
> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> **Section 8(3) of the Sexual Offences Act provides that:**
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

29. In the case of **Alfayo Gombe Okello –vs- Republic Criminal Appeal No. 203 of 2009 (KSM)** the Court of Appeal stated thus:

> ***"In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."***

30. In **Francis Omuroni –vs- uganda Court of Appeal Criminal Appeal No. 2 of 2000** it was held that:

> *"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."*

31. Pw1 told the court that she was 13 years old. Her mother Pw2 said the child was born on 25th August 2005. Going by this date, Pw1 would have been 13 years plus 9 months at the time of the alleged offence. Pw1 was taken for age assessment at Makueni referral hospital. The report was produced as EXB4. It shows her approximate age as 14 years. This was never challenged by the Appellant. The learned trial Magistrate well found that to be the age of the minor. This age fell within the purview of section 8(3) of the Sexual Offences Act.

Proof of penetration

32. 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;**

33. The Court of Appeal in the case of **Sahali omar vs- Republic (2017) eKLR** held thus:

> ***"… penetration whether by use of fingers, penis any other gadget is still penetration as provided for under the Sexual Offences Act."***

34. Pw1's evidence was to the effect that after removing her clothes and his clothes the Appellant placed her on the ground and inserted his finger into her vagina. Thereafter he inserted his penis there. When he was through she stood up crying. The medical evidence confirmed that the child had indeed been defiled. Her hymen was broken and her urine had pus cells. I therefore find that Pw1's evidence on penetration was supported by the medical evidence.

Identification of the perpetrator

35. Pw1 was the only identifying witness. She stated that the Appellant is a neighbour and a cousin. The Appellant in his defence said that he takes Pw1 as his sister as they have been brought up together. It is therefore clear that Pw1 and the Appellant know each other well.

36. The time of the alleged offence was 2:00 pm which was broad daylight. Pw1 gave a detailed narrative of what transpired. She said she was threatened with death before and after the act if she ever told anyone about the incident. Her mother was away from home and so she could not tell anybody for the fear of being killed.

37. The moment Pw2 landed on 29th June 2019 she reported the matter to her. The mother (Pw2) confronted the Appellant's father the same day after receiving the report. This clearly confirms that Pw1 told Pw2 that it is the Appellant who had done this to her. Reports were made and that's how he was apprehended.

38. In his defence he said he was at work on 17th June 2019 and his routine was to leave his place of work at 2:00pm to go and water his cabbages at his home then return at 4:00 pm. He never at any point denied having been off duty on 17th June 2019 between 2:00 pm – 4:00 pm. It was during this special break that this incident occurred. I agree with the learned trial Magistrate that the Appellant never said it was impossible for him to have been at the scene of crime during his duty break.

39. Finally, I find no reason that would have made Pw1 lie against the Appellant if indeed he is not the one who defiled her. I find nothing to make me interfere with the conviction.

40. On sentencing the Appellant has cited so many decisions which have arisen out of the **Francis Muruatetu case** (*supra*). Contrary to the Appellant's belief, the Muruatetu case and others have not outlawed mandatory minimum sentences. The trial court has the cardinal duty to consider one's mitigation and the circumstances and exercise its discretion in passing the sentence.

41. The trial court heard the Appellant's mitigation but still found it just to pass the mandatory minimum sentence against him. This is a discretion he exercised and I find no reason to fault him. The victim was a minor and what the Appellant did to her was beastly. The upshot is that the appeal lacks merit. I dismiss it in its entirety. The conviction and sentence are upheld.

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