



IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 11 OF 2020

CORAM: D.S. MAJANJA J.

BETWEEN

NICHOLAS MUKARIA ALIAS NJAATI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. P. M. Wechuli, SRM

dated 23rd December 2019 at the Magistrate's Court at Tigania

in Sexual Offence Case No. 24 of 2018)

JUDGMENT

1. The appellant, **NICHOLAS MUKARIA GATU ALIAS NJAATI**, was charged and convicted on one count of the offence of defilement contrary to **section 8(1)** as read with **section (2)** of the **Sexual Offences Act** (“the **Act**”). The particulars of the charge were that on 1st August 2018 at around 1730 Hours at [Particulars withheld] Village, Kiguchwa Location in Tigania East Sub-County of Meru County, he intentionally caused his penis to penetrate the vagina of LM, a girl aged 7 years.

2. The appellant was sentenced to serve life imprisonment. He now appeals against conviction and sentence. As this is a first appeal, it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**). In order to consider the grounds of appeal, it is necessary to set out the evidence emerging at the trial.

3. The complainant, PW 1, recalled that on the material day she had been sent by her mother to give money to her grandmother. She narrated what took place as follows:

I met Njaati and he held me. He carried me. He took me to a certain small farm which had been cultivated. He told me to remove my clothes. He removed his clothes and lay on me. He took my money. He told me to keep quiet or he shall kill me. He removed his clothes and put the thing he uses to urinate in mine (she points to her crotch). I felt pain. He told me to go home. He stopped, stood and started staring at me. He went to the hotel and used the money to eat, I had been given by my mother to give to my grandmother.

4. The child's mother, PW 2, confirmed that on the evening of 1st August 2018, she had sent PW 1 to get money from her grandmother. PW 1 stayed for about 20 minutes and when she returned she was crying and shaking. She narrated her ordeal with the appellant. She went to report the incident to the police. PW 3, an aunt to the child, recalled that PW 2 accompanied by PW 1 came to see her at about 6.00pm and informed her what happened. She noted that PW 1 was in distress and crying and when she inspected her vagina, she saw some fluids.

5. The Clinical Officer, PW 4, testified that he examined PW 1 and filled the P3 medical form and Post Rape Care (PRC) form on 3rd August 2018. He testified that PW 1's hymen was torn and the labia majora and minora had bruises. He produced the treatment notes which showed that the initial examination was done a few hours after the incident.

6. The Investigating Officer, PW 5, told the court that PW 2 reported the incident of defilement on 1st August 2018. The appellant was arrested on 3rd August 2018 by members of the public.

7. When put on his defence, the appellant denied the offence in his sworn testimony. He denied the offence and pointed out in his defence that the prosecution had not proved its case. When cross-examined, he told the court that he was hawking on the material day and he did not know PW 1.

8. In order to prove the offence of defilement under **section 8(1)** of the *Act*, the prosecution must establish that the complainant was a child, that there was penetration and the act of penetration was by the accused person. "*Penetration*" under **section 2** of the *Act* means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

9. PW 1's testimony of what took place on the material day was lucid and direct. She knew the appellant and the incident took place in the evening at about 5.30pm. Given the nature of light, duration and proximity of interaction, I am convinced that the appellant was positively identified. Her description of what took place leaves no doubt that the appellant committed an act of penetration. The complainant's testimony alone is capable of supporting a conviction as the proviso to **section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* dispenses with corroboration if the trial Magistrate, for reasons to be recorded believes the child to be telling the truth. In this case though, there was sufficient corroborative evidence.

10. In this case there was sufficient corroborative evidence. Both PW 2 and PW 3 saw the child in a state of distress soon after the incident. PW 2 confirmed that she had indeed sent the child to the grandmother and when she returned she narrated her ordeal. Finally, both PW 2 and PW 3 confirmed the identity of the appellant as someone who was from the areas and was well known.

11. The medical examination on the child was done soon after the incident and the bruises on the genitalia and torn hymen in the circumstances could not have been caused in any other way other than an act of penetration described by PW 1. Proof of spermatozoa as urged by the appellant is not a necessary ingredient of defilement. What was proved was the act of penetration. The appellant's defence was a mere denial and in my view the prosecution's evidence was sufficient. It was not necessary to call other people and no law states that family members cannot testify. Their evidence was credible and well corroborated.

12. The prosecution proved that PW 1 was a child by producing a notification of birth which showed that she was born on 27th November 2010. She was therefore aged 7 years old. From the totality of evidence, all the elements of the offence of defilement were proved. I therefore affirm the conviction.

13. On the issue of the sentence, the trial magistrate imposed the mandatory minimum sentence under **section 8(2)** of the *Act* which is life imprisonment. The Court of Appeal has since declared the mandatory minimum sentence unconstitutional in several cases among them; *BW v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR*, *Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR* and in *Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014*. In line with the decisions I have cited, I set aside the sentence of life imprisonment and

substitute the same with a sentence of 25 years' imprisonment.

14. The appeal is allowed only to the extent that the sentence of life imprisonment is quashed and substituted with a sentence of 25 years' imprisonment.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 20th day of AUGUST 2020.

A. MABEYA

JUDGE

Appellant in person.

Mr Maina, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.