REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 182 OF 2019

CORAM: D.S. MAJANJA J.

BETWEEN

SILAS MWANGI

ALIAS KIAMWANGI ARAYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. G. Sogomo, SRM dated 14th August 2018at the Magistrate's Court at Tiganiain Sexual Offence Case No. 23 of 2017)

JUDGMENT

1. The appellant, **SILAS MWANGI ALIAS KIAMWANGI ARAYA**, was charged and convicted on two counts 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 24th May 2017 at around 1800 Hrs in Tigania East Sub-county within Meru County he intentionally and unlawfully caused his penis to penetrate the vagina of JNA, a child aged 7 years and JNB, a child aged 4 years old.

2. The appellant was sentenced to 30 years' imprisonment to run concurrently on both counts. 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**).

3. In order to consider the grounds of appeal, it is necessary to set out the evidence emerging at the trial.

4. JNA (PW 1) testified on oath after a voire dire while JNB (PW 2) gave unsworn testimony. They testified that on 24th May 2017, they were having lunch with other children when the appellant arrived, he chased away the other children. He told both of them to accompany him to his house. The two children finished their meal whereupon the appellant told them to get into his bed. Although they resisted, the appellant threatened to beat them if they raised alarm.

5. JNA told the court that the appellant removed his clothes and did "*bad manners*" to both of them. JNB recalled that the appellant demanded that they remove their clothes. He removed his own clothes and proceeded to lay on both of them despite their protestations.

6. On the same evening, PW 3, a motor cycle operator, who was passing by the appellant's house at about 5.00pm heard JNB crying. She was calling out his name. When he attempted to open the door, it was locked. She shouted that the appellant was doing bad manners to them. PW 3 kicked the door open and the appellant emerged with a machete. He was able to see JNA naked while JNB had put her clothes. Both girls were crying. The appellant ran away while threatening people with the machete.

7. JNA's mother, PW 4, recalled that on the material evening, JNA and JNB went to play with other children. After a while, other children returned and told her that the appellant had taken the two children and that he was doing bad manners to them. The children informed her that the appellant was wielding a machete at PW 3. She called the community policing chairman who relayed the information to the chief. She reported the incident to the police and took the children to hospital. JNB's mother, PW 5, was told by PW 4, that the appellant had sexually assaulted the children. She found he had been arrested. She also accompanied the children to the hospital.

8. The doctor who examined the children, PW 6, produced the P3 medical forms and the Post Rape Care forms after examining them. As regards JNA, he found that the hymen was broken but there were no lacerations, bruising or discharge of spermatozoa. He opined that the

longstanding broken hymen was an indication of repeated acts of defilement over a long period of time. JNB's hymen was also broken and in her case he did not observe any lacerations or injuries although he noted that there was evidence of repeated defilement over a long period of time.

9. The investigation officer, PW 7, recalled that on 24th May 2017, JNA and JNB were brought to the police station by their mothers to report the incident of defilement. The appellant was also escorted to the police station by the mob who arrested him at the scene of the incident. He issued the P3 medical form and recorded statements.

10. When put on his defence, the appellant denied the offence in his sworn testimony. He stated that he knew the children and that on the material day he saw the children stealing bananas from his shamba. He tried speaking to the children but they fled. PW 3 accosted him while armed with a machete upon seeing him and he retaliated. He accused PW 3 of telling the complainants to report to the police that he defiled them.

11. The appellant contested the appeal based on the amended grounds of appeal and written submissions filed on 25th July 2020. He complained that the prosecution failed to prove the elements of the offence of defilement beyond reasonable doubt. He particularly pointed out that the trial magistrate failed to consider this defence without giving cogent reason. He also complained the he was not given the right to recall witnesses when the charge was amended.

12. 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."*

13. The evidence against the appellant was the direct testimony of the two complainants, JNA and JNB who gave similar and consistent testimony of how the appellant took them to his house and proceed to sexually assault them. The appellant was a person well known to the complainants, a fact he admitted in his defence and the incident took place at daytime. The childrens' testimony was clear and the trial magistrate was satisfied that they were candid and forthright. Their evidence alone was capable of supporting a conviction as the provisoto **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.

14. In this case though, there was sufficient corroborative evidence from the testimony of PW 3 which put the children and the appellant in his house. He found them there in a state of distress whereupon the appellant ran away while threatening violence. Since the medical evidence was merely corroborative, the fact that it did not directly support evidence of penetration does not displace the direct testimony of PW 1, PW 2 and PW 3 which overwhelmed the appellant'sdefence. In cross-examination of PW 1 and PW 2, he suggested that it was PW 3 who was stealing bananas from his farm yet in his defencehe stated that it is the children who were stealing from him, a fact he did not put to them in cross-examination.

15. The age of the children is a question of fact and may be proved by documents like birth certificates, immunization and health records, baptism cards. Even if these documents are not available, a mother will testify on oath based on direct knowledge of the date of birth. Medical evidence also may be used to determine the age of a child. I do not fault the trial magistrate when he concluded as follows:

> *The entries in the P3 forms and medical card in regard to the ages of the complainants in addition to the testimonies of their respective mothers established beyond question that the 1st complainant and 2nd complainant were 7 years and 4 years old respectively.*

At any rate it was proved that the complainants were children for purposes of the offence of defilement. The prosecution proved all the elements of the offence of defilement.Consequently, I affirm the conviction.

16. In his submissions the appellant raised the issue that the trial magistrate erred in failing to allow him to recall the witnesses for cross-examination when the charge was amended. The initial charge contained two main counts; defilement and attempted defilement. After PW 1, PW 2 and PW 3 had testified, the charge was amended to include defilement in respect of the two children.

17. **The power of the court to amend charges is provided for at section 214(1)**of the ***Criminal Procedure Code***which provides as follows:

> *Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either is in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge sheet as the court thinks necessary to meet the circumstances of the case:*
>
> ***Provided that -***
>
> ***(i) Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***
>
> ***(ii) Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.***

18. In this case, the court failed to comply with subsection (ii) of the proviso by giving the appellant the chance to recall the child and witnesses who had testified either to give evidence afresh or to be cross-examined. In ***Harrison Mirungu Njuguna v Republic*** **Criminal Appeal No. 90 of 2004*(UR)***,the Court of Appeal held that *'the right to hear the witnesses give evidence afresh on the amended charge or to cross-examine the witnesses further is a basic right going to the root of a fair trial…"*The court found the proceedings substantially defective

and explained that the failure of the court to inform an accused of his rights given to him by law was not a procedural technicality which could be cured under the provisions of **section 382** of the ***Criminal Procedure Code***. In this case, the alteration on Count II from attempted defilement to defilement was made without compliance with the law. I am therefore constrained to quash the conviction on Count II. Since the charge on Count I remained the same, the conviction thereon is affirmed.

19. I now turn to the issue of the sentence. The appellant was charged under **section 8(2)** of the ***Act*** which refers to the defilement of a child under the age of 11 years. JNA and JNB wereaged below 11 years. The trial magistrate was alive to the fact that the sentence of life imprisonment was not mandatory when he imposed the sentence of 30 years' imprisonment. I am not convinced that the sentence is harsh or excessive in the circumstances. I affirm the sentence.

20. Save that the conviction and sentence on Count II is quashed. I dismiss the appeal.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

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

A. MABEYA

JUDGE

Appellant in person.

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