REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 160 OF 2018

DANIEL MUKWA JOB.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence made on

14/12/2018 by Hon. CAS Mutai PM in Bungoma SOA No.73 of 2017)

J U D G M E N T

1. **Daniel Mukwa Job (the appellant)**, was charged with the offence of defilement contrary to ***section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006***.

2. The particulars of the offence were that on the 6/10/2017 at [particulars withheld] village in Bungoma Central district within Bungoma County, the appellant willfully and unlawfully caused his penis to penetrate the vagina of CK a child aged 2 years and 3 months.

3. He faced an alternative charge of committing an indecent act with a child contrary to ***section 11 (1) of the Sexual Offences Act No. 3 of 2006***. It was alleged that on the same date, time and place, he willfully and unlawfully caused his penis to come into contact with the vagina of CK a child aged 2 years and 3 months.

4. He denied the charges but after trial, he was found guilty, convicted on the main charge and sentenced to serve life imprisonment. Being aggrieved by that decision, the appellant appealed to this Court setting out 7 grounds which can be summarized into 3: - ***that the appellant was not accorded a fair trial, that the prosecution case was not proved beyond reasonable doubt*** and ***that the sentence was excessive.***

5. The appellant submitted that he was not informed of his right to legal representation and was never provided with one. That ***section 211 of the Criminal Procedure Code*** was not explained to him and no Ugandan interpreter was provided for him. That the age of the complainant was not proved and there were inconsistencies in charge sheet making it incurably defective.

6. He further submitted that his defense and mitigation were not considered and that the sentence imposed on him was unconstitutional. He relied on **Ndegwa v. Republic [1985] Eklr, Yongo & Another v. Republic [1984] Eklr** and **Francis Kariko Muruatetu and another v Republic Pet. No. 15 of 2015** in support of those submissions.

7. The respondent submitted that the ingredients of the offence were proved to the required standard and reliance was placed in the case of **Simon Kipkurui Kimori v Republic [2019] eKLR**.

8. As a first appellate court, this Court is obliged to revisit and re-evaluate the evidence afresh, assess the same and make its own independent conclusions bearing in mind that the trial court had the advantage of hearing and observing the witnesses testify. See **Okeno vs. Republic [1972] E.A 32.**

9. The prosecution case was that the appellant, a Ugandan had been employed as a herder by **CNN (Pw1)**, mother of the complainant. That on the material day, he drove the cattle to graze and went with the complainant then aged 2 years and 3 months. At night, the child was having difficulties in urinating and was crying. She informed **Pw1** that the appellant had removed his long dudu and placed it inside her koko.

10. **Pw1** understood that to mean that the appellant had removed his penis and inserted it in the child's vagina. The following day, 9/10/2017, **Pw1** took the child to the hospital where **John Waremba (Pw4)** examined the child and found that the hymen was torn with bruises around

the vaginal region and some white discharge. He told **Pw1** that the child had been defiled whereby she made a report at Nalondo Police Station.

11. At the Station, **APC Richard Tuwei Pwii (Pw2)** received the report. The case was assigned to him for investigation. He went to the scene and arrested the appellant. The ages of both the child and the appellant were assessed whereby it was confirmed that the child was 2 years and 3 months while the appellant was 19 years old.

12. In his defence, the appellant denied commiting the offence. He admitted that he had been employed to herd **Pw1's** cattle. He had worked for her for 9 months but she had not paid him his wages as at the time of his arrest. He denied knowing the child.

13. The first ground of appeal was that the appellant's fundamental rights were violated. That he was not afforded legal representation, was not accorded a Ugandan interpreter and ***section 211 of the Criminal Procedure Code*** was not explained to him

14. As regards ***section 211 of the Criminal Procedure Code,*** the record shows that after the appellant was placed on his defence, the said provision was complied with and the appellant informed the court that he would give sworn testimony but call no witnesses. That complaint is therefore baseless.

15. As regards provision of a Ugandan interpreter, the record shows that the appellant did not request for any when he first appeared in Court. The language that was used was Kiswahili. He must have understood that language because, not only did he actively fully participate in the proceedings, including cross-examining the witnesses, but he had worked for **Pw1** for 9 months. They must have been communicating in Kiswahili. There was no allegation that the appellant did not understand Kiswahili.

16. On legal representation, notwithstanding the constitutional imperative that an accused be informed of the right and or be provided with such, that is only required in instances where the court is of the opinion that substantial prejudice would result if its not provided.

17. In **David Macharia Njoroge v Republic (2011) Eklr**, the Court of Appeal held: -

> ***"We are of the considered view that in addition to situations where 'substantial injustice would otherwise result.' persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."***

18. In the present case, the appellant was faced with a charge of defilement. The sentence was not death as held by the Court of Appeal in the foregoing case. Further, there was no serious prejudice that was occasioned as the appellant effectively cross-examined the prosecution witnesses and offered his defence. Accordingly, the first ground is without basis and it fails.

19. The second ground was that the prosecution case was not proved to the required standard. That, in particular, there were inconsistencies in the age of the complainant.

20. ***Section 8 (1) of the Sexual Offences Act No. 3 of 2006*** gives the definition of the offence of defilement. From the definition, the prosecution is required to prove three ingredients of the offence beyond any reasonable doubt. These are, the age of the victim, the act of penetration and the identity of the perpetrator.

21. On the age of the complainant, the same can be proved by either medical evidence, eg. age assessment report, birth certificate, clinic immunization card or other acceptable cogent evidence such as the evidence of the victim herself, the parents or the guardian of the victim.

22. In **Fappyton Mutuku Ngui v Republic [2012] Eklr,** the court stated: -

> ***"I would be prepared to clarify that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean that there has to be a formal age assessment report or the production of a birth certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."***

23. **Pw1** testified that the complainant was born in 2015. At the time of testifying, she told the court that the child was 3 years and 1 month. **Pw4** assessed the age of the child scientifically and concluded that she was aged 2 years and 3 months at the time of the incident. He produced the P3 form, immunization card and age assessment report which proved the age of the child beyond any reasonable doubt. The discrepancy of one month in the charge sheet, in my view, was not material.

24. On penetration ***Section 2(1) of the Sexual Offences Act*** defines the same to be either p*artial or complete insertion of the genital organ of a person into the genital organ of another.*

25. **Pw1** testified that the child told her that the appellant removed his long dudu and placed it inside her koko. The child was uncomfortable and cried throughout the night. Upon examination by **Pw4**, the child's hymen was found to be torn. She also had bruises around the vaginal region and some white discharge. He concluded that there had been penetration. Accordingly, this Court is satisfied that penetration was proved.

26. On identification, **Pw1** stated that the appellant left with the child as she wanted to play with P. That the appellant later told her at 9pm

that the child had refused to play with P so he, the appellant, went with the child to where the cattle were.

27. She further testified that when the child wanted to sleep, she told her that the appellant had removed his long dudu and put it in her koko. **Pw3** stated that when he went to bath, he left the child with **Pw1** and the appellant. When he came out from showering, **Pw1** told him that the appellant had gone with the child to her grandmother.

28. It was not clear where the cattle were grazing and where P who was supposed to play with the child went. It was also not clear whether it was the appellant who came back with the child and at what time of the day. It was also not clear who the appellant and the child found at home when they allegedly returned and what the child said if at all she said anything.

29. In the present case, the complainant did not testify. She was brought to court on 4/07/2018 but was found to be too young to testify. The court dispensed with the child due to her age.

30. ***Article 50 (7) of the Constitution*** provides for services of an intermediary in a criminal trial. The same provides: -

> ***"(7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court."***

31. The purpose of an intermediary as stated under ***section 2 of the Sexual Offences Act,*** is to give evidence on behalf of a vulnerable witness who may be a child, a person with disabilities or an elderly person. ***Article 50 (7)*** does not distinguish between complainant and accused.

32. However, ***section 31 of the Sexual Offences Act*** particularly provides that the intermediary service is only available for the benefit of the complainant, who is a vulnerable witness, and not an accused person. The proper procedure must be followed for one to be appointed as an intermediary.

33. In **M.M v Republic [2014] Eklr,** the Court of Appeal explained as follows: -

> ***"It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voir dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed".***

34. In its judgment, the trial Court presumed that the complainant, being a child, had said the truth. The child did not testify but the mother told the court what she had narrated to her. It was an error for the trial court to have treated the evidence of **Pw1** as that of an intermediary having not taken the necessary steps to appoint her as such.

35. **Pw1's** evidence ought to have been regarded as that of an independent eye witness. There is nothing to show that the trial Court tried to ascertain the vulnerability or the inability of the child to testify. Despite the tender years of the child, the Court should have ascertained if she could explain what had happened.

36. Alternatively, ***section 33 of the Sexual Offences Act*** allows the trial court to rely on surrounding circumstances.

37. In his defence, the appellant stated that he had worked for **PW1** for a period of nine (9) months and he did not know the complainant. He denied the charges and stated that on the material day he was at work.

38. The prosecution has the burden of proving its case beyond reasonable doubt. The prosecution relied only on the evidence of **Pw1**, who was an independent witness. She stated that stating that the complainant identified the appellant as the perpetrator. This was not corroborated as provided for under ***section 124 of the Evidence Act***. Moreover, no forensic examination was done to ascertain that the appellant was the perpetrator.

39. There was nothing to show that after the appellant allegedly left with the child, he continued to be with her and that he is the one who brought her home. Further, not until 9pm was the offence allegedly communicated to PW1. This was circumstantial evidence. The same was not too tight to found a conviction. The circumstances did not unerringly point to the appellant as the only one who had the opportunity to commit the offence. The gaps left by the prosecution evidence leaves doubt in the mind of the court. That doubt must be resolved in favour of the appellant.

40. In this regard, this Court is not satisfied that the appellant was positively identified as the perpetrator.

41. Accordingly, this Court finds the appeal to be meritorious. I quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT MERU THIS 12TH DAY OF AUGUST, 2020.

A. MABEYA

JUDGE