REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 56 OF 2018

WILSON MAMATI.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal against the original conviction and sentence from Criminal Case Number 226 of 2017 by the Hon. Y.I. Khatambi (Senior Resident Magistrate) at Nakuru Chief Magistrate's Court)

J U D G M E N T

1. The appellant Wilson Mamati was charged with defilement contrary to **Section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006.** It was alleged that:

> On diverse dates between 4th August 2017 and 15th September 2017 at [Particulars Withheld] village in Njoro Sub County within Nakuru County, unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of CW a child aged 10 years which cause penetration.
>
> **ALTERNATIVE CHARGE**
>
> **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**
>
> **PARTICULARS**
>
> On diverse dates between 4th August 2017 and 15th September 2017 at [Particulars Withheld] village in Njoro Sub County within Nakuru County, unlawfully and intentionally committed an indecent act to a child namely CW a child aged 10 years by touching her genital organ namely vagina with your genital organ namely penis.

2. After hearing six (6) witnesses and the accused person's defence the trial magistrate, on 20th March 2018 found the accused guilty of defilement **Contrary to Section 8(1) as read with 8(2)** and convicted him accordingly on 11th May 2018, the accused was sentenced to life imprisonment.

3. Dissatisfied with the conviction and sentence the accused filed this appeal, and a Supplementary Petition was later filed on grounds;

> 1. THAT the learned trial magistrate misdirected himself in holding that the case against appellant had been proved beyond doubt.
>
> 2. THAT the learned trial magistrate erred in fact in not considering that there was no material evidence sufficient or at all against the appellant which would warrant a conviction in the trial.
>
> 3. THAT the learned trial magistrate failed in law and/or in fact in not considering material contradictions in evidence of various witnesses and thereby arrived at wrongful conclusions and subsequently such conviction.
>
> 4. THAT the case against the appellant was not proved beyond reasonable doubt or at all.
>
> 5. THAT the conviction of the appellant was against the weight of the evidence and is unsafe in all the circumstances of the case.

6. THAT the learned trial magistrate erred in law and fact in not considering that the evidence adduced by the prosecution witnesses failed to satisfy the charges leveled against the accused as was presented.

7. THAT the learned trial magistrate erred in both law and in fact by failing to appreciate that the medical evidence adduced was insufficient to corroborate the charge.

4. The appeal was argued by Mr. Machafu for the appellant, Ms. Wambui for the state.

5. It was argued for the appellant that his was a case of mistaken conviction, that after the alleged offence the complainant went home never informed anyone. The offence was committed on 4th August 2017 and the appellant arrested on 3rd October 2017 yet appellant was staying in the same compound with complainant. That the PW2 contradicted herself when she testified that she noticed changes in the complainant two weeks after the alleged offence, yet her testimony was that she noticed the complainant was scared on 28th September 2017. That PW2 had a grudge against the appellant whom she owed Kshs. 3,000/= had paid leaving an unpaid balance of Kshs. 500/= and she had threatened him. That the evidence was not water tight. **Criminal Appeal number 31 of 2008.** That the medical evidence was doubtful, **Criminal Case Number 6 of 2015.**

6. For the state it was submitted that the fact that she did not report immediately did not that the offence had not been committed. That PW2 did not contradict herself, only asked her grandchild whether she had any problem after noticing changes in her. That the complainant could only be taken to hospital after the issue became known. That the issue of threats was an afterthought, even the issue of debt. That the appellant had worked for long for the PW2, no reason to frame him. Defilement was proved. Age, date of birth 1st January 2007, offence 2017, age 10 years, certificate of birth produced.

7. Further that penetration proved, complainant testified how the defilement happened twice. That the Doctor's evidence established that there was an old perforated hymen, and the cause was penile shaft. That the Appellant was identified as the culprit. He was well known to the complainant since he was working from the grandmother.

Case for prosecution

8. After conducting voire dire, the trial court formed the opinion that the complainant possessed sufficient knowledge of the difference between right and wrong, truth and false. Hence directed that she gives sworn testimony.

9. CN testified that she was in class 4 but did not know her date of birth. That the accused used to take care of their cows, and she was living with her grandparents W and GM.

10. On 4th August 2017 she was sweeping the compound about 4.00 p.m. when the appellant sent her to fetch water from the tank. When she went the appellant followed and her got hold of her, removed her panty and did *tabia mbaya* to her. First he touched her vagina with his hands, then removed his trouser though not completely, and inserted his penis into her vagina. He did this while they were standing, and he was facing her. She tried to disentangle herself in vain. She did not make any noise. He wore his clothes, picked the water and left. She took her panty and went to the house. No one else was at home. She said she did not feel anything, took a bath and continued with her chores. When her grandmother came back she did not inform her. Neither did she inform her cousin K.

11. At the end of August on a day she could not recall the appellant found her at the water tank, she was in a T-shirt, trouser and pant. He took off her trouser and pant, pulled down his trouser, pushed her against the tank and defiled her. She began to cry, he left her, wore his clothes and left. She wore her trouser, fetched water for drinking and continued with her chores. She did not tell her grandmother. Somewhere in September is when she told her grandmother about the *tabia mbaya*. She was taken to hospital, then to police where she reported that Wilson had defiled her.

12. PW2 MW testified that the appellant was her employee of three years, and the complainant her granddaughter. Then sometimes in September she noticed changes in CN's behavior. She became withdrawn. When she asked what the problem was she told her that the appellant had defiled her. She took her to hospital and was referred to police. The P3 was completed and the appellant was arrested. She said she had another grandchild in the home, one K, who was older than CN. She said she treated the appellant as her own child and was shocked when CN told her that he would defile her at the water tank. She said that she and the appellant had not had any disagreement. She denied framing the appellant. She said she took the child to hospital the day after the child reported to her.

13. PW3 Jacob Chelimo, a Clinical Officer at Njoro Hospital attempted to produce the P3 and Post Rape Care on behalf of his colleague, Mutai, and the appellant's objection was sustained and prosecution directed to call the maker.

14. PW4 KM is CW's cousin. His testimony was that he did not know whether the offence was committed or not.

15. PW5 Mutahi Kipisi Maundo was the Clinical Officer who examined CW. He noted that she had an old perforated hymen. He filled the Post Rape Care and the P3 was filled by his colleague. He concluded that the complainant had been defiled.

16. PW6 No. 84654 PC Nelly was assigned the case for investigation on 29th September 2017. The complainant told her that the WK man defiled her twice behind the water tank.

17. She visited the home and the complainant pointed out the place behind the tank where the defilement had taken place. She noted that the tank area was well secured. The complainant pointed out the accused as the defiler. She arrested him and charged him with the offence. She said the complainant told her that accused had sent her for water, followed her and defiled her while she was standing.

The Defence

18. The appellant gave sworn statement of defence. He testified that he used to work as a herdsman and on 4th August 2017 he left his place of work at 7.00 p.m. and went to work elsewhere, he must have meant 7.00 a.m. because he said he ferried grass up to 11.00 a.m. when he took out the donkey to graze. He went home, around 12 p.m. Then the two PW1 and PW4 came home, ate and went back to school. They came back at 4.00 p.m. He denied committing any offence. His defence was that he had an altercation with mother of complainant. That he had been employed at Kshs. 3,000/= per month to feed the chicken and look after the cows, but when he began work he was also told to cook and wash. He demanded an increase or he would leave. She told him to work. He told her husband, who said they would discuss the issue on 2nd September. The complainant's grandmother however wanted him to leave. Her husband wanted him to stay. The money issue arose on July 6th, however on October 3rd he was arrested and framed with defilement. On cross examination he said he had no grudge with CW but she lied against him. That he had a grudge with CW's mother because of the extra work he was assigned without more pay. That he had worked for three years before the incident.

Analysis and Determination

19. The issue for determination is whether the prosecution has proved the charge against the appellant beyond a reasonable doubt to warrant the conviction and sentence.

20. Guided by **Okeno vs Republic**, the appellant is entitled to re-evaluation of the evidence and for this court to draw its own conclusions.

21. I have carefully considered the submissions by counsel, the authorities cited and the evidence on record.

22. I must point out that I noted that the treatment card, the Post Rape Care bore the names Martha and the P3 bore the names CW. Martha is PW2's first name. It is not clear why the officers at the hospital wrote the name Martha on the treatment card, yet she was not the victim.

23. Be that as it may the rest of the details fall in place, the fact that the first hospital visit was 29th September 2017 the day after the complainant told PW2 about the incident. The documents also indicate the age of the complainant as ten (10) years as established by the certificate of birth. The complainant described how the appellant committed the offence. Both times no one else was at home except she and the appellant. She did not report the incidents but became withdrawn. Is that a normal reaction to abuse? Victims respond differently to abuse, there are those who keep it to themselves and never speak about it and those who only speak because someone notices and asks.

24. From the evidence on record the appellant was treated as a child of the home. He had a very good relationship with the complainant, her cousin KM and her grandparents including MW (PW2). He had lived with them for three years. There were no grudges except a misunderstanding between him and the mother of the complainant over salary. Hence the complainant had no reason to frame him. Her grandma PW2 had no reason to frame him. The complainant's mother did not live with them and the family liked him. It appears that in this backdrop the complainant would find it very hard to report that the appellant had defiled her. This case, classic case of the person closest to the child becoming the abuser.

25. I find that that the appellant's defence that he was framed because of Kshs. 500/= that MW owed him an afterthought and of no consequence. The complainant's testimony is credible. It was not shaken by the defence and the circumstances of the offence add up, there was a water tank in the compound, in a well secured area, and the appellant held the complainant against the tank and defiled her. Penetration was proved in that by the time the complainant reported the defilement the injury had healed. The case cited by the defence is distinguishable**. (Chrispine Waweru Njeri v Republic [2015] eKLR)** It is clear why the appellant was not arrested immediately, the complainant had not reported the incident to her grandmother. He was arrested as soon as she reported. Secondly she was taken to hospital as soon as the same was reported.

26. The age of the complainant was proved. She was a minor at the time of the offence aged ten (10) years. The appellant relied on **Salim Hamisi Kiswere v Republic [2018] eKLR** where the court stated;

> **41.Evidence of having sex does not necessarily entail penetration and is not conclusive proof of penetration. Sex is defined in Black's Law Dictionary, Ninth Edition at pages 1498-1499 as the structures and functions that distinguish a male from a female; sexual intercourse; or sexual relations. In addition, sexual relations is defined either to be sexual intercourse or physical sexual activity that does not necessarily culminate in sexual intercourse.**
>
> **42. Therefore, it is not always the case that sex is synonymous with penetration, hence the definition of penetration that is set by Section 2 of the Sexual Offences Act, which is required to be proved beyond reasonable doubt. This court in Julius Kioko Kivuva v Republic [2015] eKLR held as follows as regards specificity required in proof of penetration:**
>
> **"Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and it particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal.**
>
> **43. The evidence by PW4 that PW1's hymen was broken at the time of her medical examination on 8th June 2017, and that she was 16 weeks pregnant was corroboration of penetration, however it did not identify the person responsible, and was therefore not corroboration as to penetration by the appellant. There was no other corroborating evidence adduced that placed the appellant with the complainant at the time of the alleged defilement. In addition, in the absence of a DNA test, there was no evidence linking the Appellant to the child born out of the pregnancy.**

27. While I agree with the foregoing, it is also the position of those who deal with trauma that a person who is abused can become numb, to numb out the effect of trauma, and unless they are taken through professional counseling, some of these details expected from a child of tender years may not be available. The complainant described in the detail she was capable of what she saw and what the appellant did.

28. Looking at the evidence and the fact that the appellant did the same twice, at the same place, is sufficient, together with the medical evidence. Most importantly, there is no evidence of malice or reason to frame the appellant. I find that the conviction was justified.

29. Regarding the sentence now we have **Dismas Wafula Kilwake** where the Court of Appeal did away with the mandatory nature of the sentences in **Sexual Offences Act** cases. Following that the hands of the courts have been freed with the discretion to award appropriate sentences to the appropriate circumstances. The appellant was sentenced to life imprisonment based on the age of the complainant. He was a first offender. He was more than an employee to the family and had good relations with the complainant before these two incidents. There were no aggravating circumstances, or threats to the complainant. It appears to me that he simply thought it was ok to have sexual intercourse with the girl when everyone else was away. While what he did and its effects will remain with the complainant for long, he too needs time to reflect on what he did. That time does not have to be his whole life.

30. The appeal on sentence succeeds. The sentence to life imprisonment is set aside and substituted with a sentence of 20 years' imprisonment.

31. Right of Appeal 14 days.

Dated, delivered and signed at Nakuru this 3rd day of August, 2020.

Mumbua T Matheka

Judge

VIA ZOOM in the presence of:

CA Martin

For the state: Ms Wambui

Appellant: Present

For Appellant: Mr. Machafu N/A