REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 63 OF 2019

NMP.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence at the Senior Principal

Magistrate's court at Ngong (Hon. L.D Ogombe, SRM) dated 22nd

February 2019, in criminal case SO. No. 10 of 2016)

JUDGMENT

1. 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. Particulars were that between the months of January 2012 and July 2012 at unknown dates and time at [Particulars withheld] Township in Kajiado County, he intentionally and unlawfully caused his male organ to penetrate the female organ of NNM, a child aged 11 years.

2. He also 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. Particulars being that between the months of January 2012 and July 2012 at unknown dates and time at [Particulars withheld] Township in Kajiado County, he intentionally and unlawfully touched the private organ of NNM, a child aged 11 years.

3. The appellant pleaded not guilty and after a trial in which the prosecution called 5 witnesses and the appellant's defence and his witness, he was convicted on the main count and sentenced to life imprisonment. He was aggrieved with both conviction and sentence and lodged this appeal and raised the following grounds of appeal, namely:

> ***1. That the learned magistrate erred in law and fact by convicting him on a faulty and defective charge.***
>
> ***2. That the learned magistrate erred in law and fact by conducting a flawed trial in violation of his constitutional right to information under Article 50(1) (b), 2(b).***
>
> ***3. That the learned magistrate erred in both law and fact by not subjecting him to a fair trial as guaranteed by Articles 25(i) and 50(2) (c) and (j)***
>
> ***4. That the trial magistrate erred in both law and fact by failing to appreciate that essential witnesses never testified and therefore the prosecution did not present a water tight case against him***
>
> ***5. That the trial magistrate erred in law rendering a short shaft his defence contrary to section 169 of the criminal Procedure Code.***

4. During the hearing of the appeal, Mr. Rono, counsel for the appellant, submitted relying on the appellant's grounds of appeal, that the prosecution did not prove the case against the appellant beyond reasonable doubt. He submitted that witnesses contradicted themselves. According to counsel, PW1 testified that she was defiled between January and July 2012 while PW2 stated that defilement took place between January and August 2012. PW3 on the other hand stated that PW1 was defiled between August and September.

5. He also submitted that the prosecution did not prove penetration. He argued that PW4 stated in the P3 form that there were no fresh injuries but the hymen was broken. Mr. Rono further argued that PW1 stated that she was defiled at night while the appellant stated that he was not identified as the perpetrator.

6. Regarding sentence, counsel submitted that the sentence meted out was harsh; that the appellant was in remand for 8 years having been arrested in 2012 and that he was sentenced in 2019 without taking into account that period. He urged the court to allow the appeal, quash conviction and set aside the sentence.

7. Mr. Meroka appearing for the respondent, opposed the appeal, supported conviction and sentence. He submitted that the prosecution proved the case beyond reasonable doubt; that all the ingredients of the offence were proved; that age was proved though the immunization card PEXH 1 and that the P3 form also indicated that PW1 was 11 years. He further submitted that PW1 testified that she was 16 years at the time of hearing the case on 24th April 2016 following a retrial ordered by this court on appeal.

8. On penetration, Mr. Meroka argued that PW1, PW2 and PW3 stated that the minor was walking with difficulty which was supported by PW4 as well as PEXH 4 thus proved penetration. Regarding identity of the perpetrator, he argued that the appellant was a step father to PW1 and that defilement took place over a period of time and, therefore, there was no possibility of error. He also argued that the trial court believed evidence of PW1 after observing her demeanor.

9. On the appellant's contention that there were contradictions. Counsel argued that the alleged contradictions were minor and did not go to the root of the case. He also submitted that PW4 was clear that the date on the P3 form was a human error.

10. Regarding sentence, Mr. Meroka did not support life sentence. He left the issue at the discretion of the court. He urged the court to dismiss the appeal save on the issue of sentence.

11. I have considered the appeal; submissions by counsel for the parties and the authorities relied on. I have also considered the trial court's record and the impugned judgement. This being a first appeal, it is the duty of this court as the first appellate court, to reevaluate, reanalyze and reconsider the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see witnesses testify and given due allowance for that.

12. In ***Okeno v Republic*** [1973] EA 32, the court held that:

> ***"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] EA 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"***

13. Further in ***Kiilu v Republic*** [2005] 1 KLR 174, the Court of Appeal held that:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

14. **PW1 LN** aged 16 years testified that in 2012 she lived with her mother at [Particulars withheld] where her mother worked as a cook in a hotel. She would work late up to 3-4am and would again leave home at 6am. They also stayed with the appellant who used to work in Lorries and would also come home late at night. She told the court that the appellant would defile their while their mother was away.

15. She testified that the first time the appellant defiled her, he came to the house when they were in bed and after he had had super, he went to her bed, undressed and defiled her. He then ordered her not to tell anyone. In the morning when her mother came, she informed her what had happened but her mother did not believe her. She also told neighbours but they too did not help. She told the court that the appellant continued to defile her for several months but she could not remember for how long this went on.

16. According to the witness, she attended a funeral at PW2's place and refused to go back home for fear of what was happening. Her aunt noticed how she was walking, she could not control urine and she revealed to PW2 that the appellant was defiling her. PW2 took her to hospital and then to the police station. She identified the appellant in court as the person who had defiled her.

17. In cross-examination, PW1 told the court that the appellant was her mother's boyfriend and that she was younger when he defiled her. She maintained that even though she told her mother what was happening she did not take action because her mother feared the appellant.

18. **PW2 Elizabeth Muloyian Noah** testified that on 7th August 2012, PW1 went to her home to attend a funeral. After the funeral, she asked them to go back home but PW1 declined. PW1 told her that she wanted to stay at her place. PW2 slept with PW1 on the same bed and when PW1 wanted to go for a short call, she urinated on herself before she could reach the toilet. The following morning, PW2 observed that PW1 had difficulty in walking while and looked unhappy. She interrogated PW1 about it and PW1 told her that the appellant was defiling. She also told PW2 that she had informed her mother and neighbours they did not do anything. PW2 took PW1 to the police station and Children's Office and later to hospital. PW1 was treated and issued with a P3 form.

19. In cross-examination PW2 stated that it was PW1 who told her that the appellant was defiling her and that he was arrest PW1's home. She denied that the appellant was her boyfriend. She however admitted that he had visited her house to see her sister-in-law. She also

admitted that she and the appellant attended the same primary school. She denied framing up the appellant.

20. **PW3 Dr. Joseph Maundu,** a police surgeon, testified that on 20th September2012, he examined PW1 then 11 years old on allegations of defilement. He found no discharge but the hymen was broken. He signed the P3 form on 20th September 2012. He told the court that although the date on the P3 form is 20th October 2012, that was an error. In cross-examination, he told the court that there was evidence of penetration.

21. **PW4 Dr. Peter Wanyama** from Nairobi women Hospital, testified on behalf a Dr. Njeri whom he had with and was familiar with her handwriting and signature. He told the court that on 12th September 2012, Dr. Njeri attended to PW1 with a history of inability to hold urine and difficulty in sitting. On examination, there was an old scar on the labia majora. The hymen was broken. There was also vesico-vaginal fistula. Lab tests showed pus cells and vaginal swab showed epithelial cells. Her conclusion was that there was chronic sexual assault. In cross-examination, he told the court that the report did not indicate that a suspect was taken to hospital for examination.

22. **PW5 No. 73905 PC Peter Mulwa,** a police officer attached to Ongata Rongai Police station, testified that the file was handed to him on 21st May 2018 after the investigating officer retired. After going through the file, he noted that the appellant was charged with defilement. He also noted that all witnesses had testified. He however said he had not met PW1. He saw her for the first time in court.

23. In his defence, the appellant testified on oath and called one witness. He told the court that that on 22nd September 2012; he woke up and went to work. Later he received a phone call from an Administrative officer called Thuku informing him that he was required at the Chief's office. When he went to the chief's office, he was informed that there was a complaint against him. However the chief did not give him details. He was taken to Ongata Rongai Police Station where his finger prints were taken and he was later taken to court and charged with defilement. He denied committing the offence.

24. **DW2 TNP** testified that PW1 was defiled by his son-in-law whom she had visited. He told the court that he took PW1 to Nairobi women Hospital and then reported the case at matter at Ongata Rongai Police Station where he was told that it was not possible to assist PW1 because it was over one week since defilement took place. He further told the court that the PW1 had stayed long before it was discovered that she had been defiled.

25. According to the witness, the appellant was framed up that he had defile PW1. He also told the court that defilement was discovered in September after she came from PW2's home. He told the court that PW1's mother was upset because PW2 was causing trouble. When PW1's mother was asked to choose whether to support her sister (PW2) or her husband (the appellant) she opted to keep off the case completely.

26. After considering the above evidence, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced him, prompting this appeal.

27. This appeal is against conviction and sentence for the offence of defilement. The issues that arise for determination are, whether the charge was defective; whether the prosecution proved its case beyond reasonable doubt; whether the prosecution failed to called essential witnesses; and whether trial court conducted a flawed trial and whether it failed to consider the appellant's defence.

Whether the charge was defective

28. Although the appellant raised a complaint in his grounds of appeal that the charge was defective, his advocate did not submit on this complaint. He submitted generally that the prosecution did not prove the case beyond reasonable doubt. A charge should be clear and disclose an offence known to law. Particulars of the charge should also be supported by evidence.

29. I have perused the charge sheet and the trial court's record. The charge states the offence and the law. Particulars of the offence were also clearly stated to enable the appellant understand the offence he faced. I do not therefore find merit on the argument that the charge was defective.

30. Turning to the fundamental issue in this appeal, whether the prosecution proved its case, the prosecution was required to prove three ingredients as required by section 8(1) of the Act, namely; age, penetration and identity of the perpetrator.

31. The prosecution case was that PW1 was at the time of the offence a minor. PW1 testified that she was 16 at the time she testified on 20th April 2018. The offence had taken place in 2012, 6 years earlier. PW2 testified that PW1 was born in 2001; while PW3 testified that on 20th September 2012, he examined a minor (PW1) then aged 11 years.

32. There was no allegation that PW1 was not 11 years at the time the offence was committed. PW1's mother did not testify but her sister PW2 told the court that PW1 was born in 2001. The Immunization card showed that PW1 was born on 8th September 2001. The P3 form indicates that PW1 was 11 years when she was sent for medical examination. There is therefore evidence that PW1 was a minor in 2012. She even told the court that she was 16 years when she testified on 20th April 2018. I am therefore satisfied that the first ingredient, that of age, was proved.

33. The prosecution was also required to prove the second ingredient of penetration beyond reasonable doubt. The law, section 2 of the Act defines penetration as partial or complete insertion of a person's genital organ into another's genital organ. For there to be penetration, there must have been partial or complete insertion of genital organ into the complainant's genital organ.

34. In the present appeal, PW1 testified that there was insertion of the appellant's male organ into her female genital organ. PW2 testified

that PW1 had difficulty in walking and could not control urine. PW3, the doctor who examined PW1, testified that when he examined PW1, there were no physical injuries, genitalia were normal and there were no visible injuries; discharge were noted the hymen was broken. He stated that hymen is usually broken through penetration. It is however not the law that broken hymen is proof of defilement or sexual assault.

35. On the other hand, PW4 Dr. Wanyama who testified on behalf of Dr. Njeri who was the first to see PW1 told the court that when the minor was examined on 12th September 2012, there was an old scar on the labia majora. There was also vesico vaginal fistula, an opening between the bladder and vagina; there were also pus and epithelial cells. The hymen was broken. The conclusion was that there was sexual assault.

36. Although it is now clear in law that a broken hymen may not on its own be evidence of defilement, PW1 had not only a broken hymen, she also had a scar on the labia majora. The doctor concluded that it was evidence of sexual assault. There was no other explanation on the cause of the scar on the labia majora except sexual assault. I have perused the P3 form as well as the doctor's evidence. Both concluded that there was penetration. This taken together with the evidence of PW1 that she had been defiled, leads to one conclusion that indeed there was penetration. I am satisfied that this ingredient was sufficiently proved.

37. The last and final issue is on the identity of the attacker. PW1 testified that it was the appellant who defiled her. She told the court that the appellant lived with them and that he would defile her at night while her moth was away at work. Although she informed her mother about it her mother did nothing. There was no other person who could collaborate the evidence of PW1. PW2 simply testified on what PW1 told her and what she had observed.

38. The appellant denied that he defiled PW1. His case was that he was being framed up by the complainant and PW2. DW2 on the other hand testified that it was his grand-son who defiled PW1 and that he in fact reported the matter to Ongata Rongai Police Station but advised him that it was late to do anything since the matter was reported after one week. DW2 did not disclose the name of his grandson he claimed defiled PW1.

39. Section 124 of the Evidence Act allows the court to convict on the sole evidence of a victim of sexual assault if it believes that the witness is telling the truth. The section provides:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

40. PW1 testified when she was 16 years old. She must therefore have known what she was saying when she told the court that the appellant defiled her on several occasions. The appellant was known to her and lived with them. He would defile her at night while her mother was away at work. There was no other evidence on the attacker except the testimony of PW1.

41. The trial court believed the testimony of PW1 regarding the person who defiled her. I have myself reevaluated that evidence and reanalyzed it. I am not persuaded that there would be reason for PW1 to frame the appellant as the person who defiled her. The appellant further contended that PW2 was responsible for framing him. He even claimed that she was her girlfriend. PW1 was clear that the appellant was her mother's boyfriend. That perhaps explained if at all why her mother did not take any steps when PW1 informed her that the appellant was defiling her.

42. I also note that PW1 did not allege that the appellant defiled her sister although they were sleeping on the same bed. For that reason I am satisfied that the trial court did not err when it believed PW1's evidence that it was the appellant who defiled her. The trial court heard the evidence and observed her demeanor and this court must give that allowance.

43. The appellant complained that the prosecution did not call essential witnesses. In his view, this affected the prosecution's case. i have considered the appellant's concern in this respect and reevaluated the evidence on record. The prosecution did not call PW1's mother. However I do not think failure to call her affected the prosecution case. Had she been called she would have only testified on what PW1 told her. She did not witness the appellant defile PW1. Furthermore, section 143 of the Evidence Act is clear that there is no number of witnesses the prosecution must call to prove a fact. It calls essential witnesses through whom it proves its case. I find no merit in the appellants argument that essential witnesses were not called to testify.

44. The appellant further complained that the trial court conducted a flawed trial. I have perused the trial court's record. The appellant participated to the trial cross examined witnesses and called his own witnesses. I do not find an aspect that would have vitiated the trial to make it flawed. I again reject this complaint as of no merit. The trial court was satisfied that the prosecution proved its case as required and I find no fault on that finding.

1. It has been settled as to the degree of proof of beyond reasonable doubt. in ***Bakare v State (***1987) 1 NWLR (PT 52) 579, ***Oputa, JSC,*** writing for the Supreme Court of Nigeria, amplified that phrase, stating:

> ***"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the***

administration of criminal justice. <u>Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability"</u>.(emphasis)

45. In ***<u>Stephen Mulili v Republic</u>*** (CRA No. 90 of 2013), the Court of Appeal stated that;

> ***"[The degree is well settled; it need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean beyond a shadow of doubt…If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."***

46. I have considered this appeal, submissions and the law. I have reevaluated the evidence and considered it myself. I find no merit in the appeal on conviction.

47. On sentence, the appellant was sentenced to life imprisonment. The Supreme Court has since held in the ***Muruatet***u case that mandatory sentences violate accused persons fundamental rights and deny the court the discretion to mete out appropriate sentences depending on the circumstance of each case. As Mr. Meroka does not support the life sentence imposed against the appellant, the appeal on sentence succeeds and is allowed.

48. The law requires the court to consider the period an accused spent in custody or remand when imposing sentence. According to the record, the appellant was arrested on 22nd September 2012 and produced in court on 24th September 2012. He was tried and convicted. His appeal against conviction and sentence was allowed and a retrial ordered. The retrial commenced on 27th April 2016 and he was sentenced on 22nd February 2019.

49. Having considered the appeal submissions and the law, the appeal against conviction is dismissed. Appeal against sentence is allowed. The sentence of life imprisonment is hereby set aside and in place therefor, the appellant is sentenced to fifteen (15) years imprisonment.

50. Taking into account the circumstances of the appellant's case, that he went through two trials and two appeals and was in custody throughout the two trials and appeals, the sentence of 15 years shall run from 22nd September 2012, when he was first arrested and charged in Criminal Case No. 4389/2012 at Kibera Law Courts.

Orders accordingly.

Dated, Signed and Delivered at Kajiado this 18th day of September 2020.

E. C. MWITA

JUDGE