



**REPUBLIC OF KENYA**

**AT THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL APPEAL 163 OF 2019**

**WSK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal against conviction and sentence in original criminal case No.30 of 2017 delivered on 13.9.2019 in Kimilili Senior Principal Magistrate Court by Hon I.G.RUHU]**

**J U D G M E N T**

The appellant WSK was charged with the offence of defilement of a child (girl) contrary to section 8(1) as read with sub-section 2 of Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 29th day of May, 2017 at [particulars withheld] village in Kimilili Sub-County of Bungoma County, intentionally caused his penis to penetrate the vagina of PWO a child aged 10 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11 of the sexual offences Act No. 3 of 2006 based on the same facts. The particulars of the alternative charge were that on the 29th day of May, 2017 at [particulars withheld] village in Kimilili Sub-County of Bungoma County, the appellant intentionally and unlawfully touched the vagina of PWO a child aged 10 years.

The evidence for the prosecution is that PWO the complainant is in class 3. She testified that on 29/5/2017 while from school on a Monday at 1.00PM, W called me at Kalasinga's shamba to take some mangoes to take to her mum. She testified that when she went to the shamba he accompanied her and on arrival he threatened her with a knife and held her throat. She testified she fell down and he did 'tabia mbaya' to her, he took her uniform, books and clothes and threw in the river.

She testified that a herdsman nearby helped her get out of the water and took her to Mama Rose who called her mum. She was taken to hospital and she went back home and does not know if a report was made to police.

PW2 JON testified that complainant is her daughter. On 29/5/2017 she got report from Dan a herdsman who informed her that a girl at [particulars withheld] primary school was tortured and he had rescued the girl from the river. She testified that she followed him to a lady called Rose and found the girl. She testified that complainant had blood from the private parts and the complainant informed her T's husband did so in Bernard's shamba. She testified that she took complainant to the police station then to Kimilili hospital where she was admitted for 1 day and a P3 form was issued at Kamkunyuwa Police station.

Pw3 Rose Wekesa Kapuchangi from Kimilili recalled on 29/5/2017 at around 4.00pm to 8.00pm while at home Daniel came from the river came in company of a child. She recalled that the girl was naked and bleeding and she recognized the mum and Dan informed her that W injured her. She recalled that he left the complainant with her and she gave her clothes' to wear and later on her mother came.

PW4 sergeant Michael Chumba testified he was formerly stationed at Kamkunyuwa Police station. He recalled that on 29/5/2017 a child of 10 years was brought to the station by a lady who was child's sister. The child was in pain from her legs and could neither stand nor sit. He recalled they booked report and advised them to go to the hospital at Kimilili sub-county Hospital where she was treated and later on returned to the station. He called that the child was able to identify the person who defiled her as W. It was in a maize firm and the child narrated how she was defiled. He recalled that they searched for the suspect and arrested him and charged him with the offence.

PW5 Kipsang Masai a clinical officer at Kimilili sub-county hospital. He filled P3 form for a child called Peris Wambui on 1/6/2017. He recalled that the said child had alleged to having been defiled on 29/5/2017. He recalled she didn't carry clothes worn during the incident. She had bruises on head and right neck. Her neck was swollen and tender and she could not sit properly on a motorbike. He testified that her hymen was missing and was bleeding from her vagina and he filled P3 form 4 days after the date of the incident. She recalled that he confirms an age assessment report was done which verifies her age and produced it as P. Exh 2.

After close of the prosecution case, the trial court was satisfied that the test of a prima facie case had been met by the prosecution and therefore called upon the accused to make his defence. He opted to give unsworn testimony and did not call witnesses to his defence. The accused testified that PW1 is well known to him as they are in-laws. He stated that on 29<sup>th</sup> May, 2017, he spent the entire day at home because he was unwell. It was his testimony that he was in the company of his wife T. He testified that he was shocked when he was arrested on 2nd June 2017 for allegedly defiling PW1. He denied having committed the offence.

After full hearing it is upon the above evidence that the trial court found the accused guilty and sentenced him to 35 years imprisonment. Having been dissatisfied with the judgment the Appellant has appealed to this court on the following grounds:

**i. That I am a first offender**

**ii. That the sentence meted on him was harsh and excessive as per the circumstances.**

**iii. That my lord the learned magistrate erred in law and facts by using fabricated information from medical report.**

**iv. That my lord the learned trial magistrate erred in law and fact to warrant a conviction without the presence of the complainant.**

**v. That my lord I request to be furnished with the court proceedings to enable me adduce more grounds.**

Appellant filed his written submissions, he submitted that the age of the complainant was not medically proved. He submitted that there was a lot of discrepancies regarding age of the minor.

He submitted that prosecution witnesses were not credible and gave inconsistent evidence. He submitted that critical witness in this case Daniel was not summoned. He further submitted that his alibi defence not rebutted and that there was irreconcilable contradictions between the prosecution witnesses testimonies.

He submitted that PW1 and PW2 was taken to the hospital on 11th January 2018 while PW4 the clinical officer stated that she attended to PW2 on 12th January 2018. He submitted that PW2 submitted that she did not bleed after the incident while Pw1 stated that she was bleeding. He submitted that the foregoing contradictions and inconsistencies render the evidence of the prosecution so unreliable.

He submitted on the medical report by clinical officer that the Clinical Officer came up with the finding of sexual assault in order to support the allegations against the appellant. He submitted that the appellant gave his evidence but the trial court did not evaluate his evidence. He submitted that offence of defilement was not proved beyond reasonable doubt and prayed that this appeal to be allowed.

The prosecution opposed the appeal through state prosecuting counsel Nyakibia and he submitted that on age that age assessment form was produced and showed that the complainant was 9 years old. He submitted on penetration that the clinical officer gave evidence which supported the penetration. He submitted that appellant raised an alibi defence and trial court considered it. He submitted that the sentence was proper.

This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno VS R 1972 EA** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to review the evidence before the trial court and arrive at its own conclusions bar should give allowance that it did not hear or see the witnesses.

On age PW 2 JON testified that the complainant was born on 5<sup>th</sup> April, 2006. The P3 form filled on 1<sup>st</sup> June, 2017 gave the age of the complainant at 10 years. An age assessment report dated 23<sup>rd</sup> march, 2019 gave the estimated age as at that day as 12 years thus making her age at time of the offence on 29<sup>th</sup> May, 2017 at approximately 10 years.

On the issue of penetration of the Complainant's genitals, Section 2 of the Sexual Offences Act defines penetration as:

**‘the partial or complete insertion of the genital organs of a person into the genital organ of another person.’**

This position was fortified in the case of **Mark Oiruri Mose vs R (2013)eKLR** when the Court of Appeal stated thus:

**‘...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ...’ (emphasis mine).**

In demonstrating this particular ingredient of the offence, PW5 the Clinical Officer who examined the complainant recorded the following notes as appearing in P3 form:-

**“Hymen was missing,”**

He also testified that pw1 was bleeding form her vagina and had bruises on her neck. He also testified she could not sit properly and limbed while walking. Going by the foregoing evidence it is clear that the act of penetration was effectively proved.

On whether the Appellant was the perpetrator, as the Appellant has denied committing the alleged offence, that calls for an in-depth examination of the circumstances so as to settle the issue as to whether the Appellant was rightly identified as the perpetrator of the offence.

From evidence on record PW1 testified that she called accused person Shemeji. The accused himself testified that they are in-laws and this corroborated evidence of PW1. From evidence it is clear that this was well known to the complainant, therefore, I am satisfied that the accused was positively identified.

The appellant has prayed for leniency on the sentence. Sentencing is the discretion of the court and the high court can only interfere if the sentence is illegal or was arrived at by applying wrong principles of law. From the evidence on record it emerged that the complainant was a minor aged 10 years old.

Section 8(2) of the Sexual Offences Act provides:

**“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”**

The trial magistrate sentenced the appellant to a life imprisonment. Considering the age of a minor that she was only 10 years old, the sentence is within the law and I find no reason to disturb the same. The sentence was also in order.

In the premises the appeal herein is without merit and is hereby dismissed.

**Dated, signed and delivered at Bungoma this 25<sup>th</sup> day November, 2020.**

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**S N RIECHI**

**JUDGE**