



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 126 OF 2019

EMMANUEL MUTIE MUSANGO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence by Hon. A. Ndungu (SRM) in Makindu Senior

Principal Magistrate's Court Criminal Case No. 724 of 2016 delivered on 7th August, 2019).

JUDGMENT

1. **Emmanuel Mutie Musango** 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. The particulars being that the Appellant on the 8th day of June 2016 at [particulars withheld] village in Mbui-Nzau location in Kibwezi sub-county within Makueni county intentionally and unlawfully caused his male organ namely penis to penetrate the anus of MM a girl child aged 11 years. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

2. He denied the charges and the matter proceeded to full hearing with the prosecution calling four (4) witnesses. The Appellant gave an unsworn statement without calling any witness. He was later found guilty, convicted and sentenced to ten (10) years imprisonment for attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act.

3. Being aggrieved, he filed this appeal against the judgment citing the following amended grounds:

- a. **That**, the learned trial Magistrate erred in both points of law and fact by convicting him on a fatally defective charge sheet.
- b. **That**, the trial Magistrate erred in both points of law and facts by convicting him on uncorroborated evidence.
- c. **That** the trial Magistrate when convicting him erred by not considering section 333(2) of the Criminal procedure Code.
- d. **That**, the conviction based on the evidence was manifestly unsafe.

4. MM the complainant was aged 12 years when she testified on 20th February 2018 after being taken through a *voire dire* examination. Her evidence was that, on her way from school on 8th June 2016 at about 4:00 pm she heard the Appellant (*a neighbor*) calling her as she passed their home. She refused to respond. He ran after her as she also ran. He caught up with her and carried her on his back upto his home. There was no one there. Once in the house, he locked it and took her to a bed. She was still in her school uniform.

5. He removed her panty and his shorts too. He inserted his penis into her anus and she felt a lot of pain. He had covered her mouth with one hand so she could not scream. When he was done he opened the door for her to leave. She put on her panty and went home and immediately told her mother (Pw2). She even told her it was Emmanuel the Appellant who had done it. Pw2 checked her anus and she was taken to hospital in Kibwezi. The accused was arrested by a nyumba kumi person and taken to the police station at Kibwezi. MM had known him for seven (7) years and she identified him in court.

6. In cross examination she denied having been told by the mother what to come and tell the court.

7. **Pw2 EM** is MM's mother. She confirmed receiving a report of defilement from MM on 8th June 2016 at 5:00 pm. She said MM had mentioned the defiler as the Appellant. She checked the child and noted that her panty and biker were wet. She notified the assistant chief

who came to her house and she gave him the report. The assistant chief sent some nyumba kumi members to the Appellant's house and he was arrested and brought to Pw2's home. MM repeated her story in the hearing of all the people present.

8. She identified MM's clinic card, P3 form and birth certificate as (EXB1-3). She knew the Appellant as one of the neighbours though not a next door neighbour.

9. In cross examination she said MM had come home crying with a swollen mouth.

10. **Pw3 no. [xxxx] CIP Christine Cheptoo** was the investigating officer. She received the report while at Kibwezi police station on 9th June 2016 at 8:30 pm. The report was made by Pw2, MM, assistant chief and two other people. The suspect was Emmanuel Musango the Appellant and he had been arrested. MM explained to her everything that had happened to her. She had been defiled through the anus. She escorted the child to hospital. She carried out her investigations and had the Appellant charged. She produced the child's birth certificate (EXB3).

11. In cross examination she said the road MM was using is besides the Appellant's homestead. This was confirmed by the witnesses. The medical examination confirmed MM had been defiled. She denied being bribed to take only MM to hospital.

12. **Pw4 Dr. Anthony Masila** with the consent of the Appellant produced the treatment notes and P3 form as (EXB1 and 2). He said the inner garments of MM were wet with secretions and the urinalysis showed pus cells meaning she had a bacterial infection.

13. In his unsworn defence he said he was on his way from work when he met two people he knew well. They arrested him and took him to MM's home. While there Pw2 asked him if he is the one who had done to MM what she had told her. He denied and she called the assistant chief who came and ordered for his arrest. He said he had a grudge with Pw2 and he told the court about it on 20th April 2018. The said grudge was three weeks before his arrest. It was about Pw2's children trespassing through their land.

14. He stated that Pw2 had promised to show him as she did not know what he wanted with her children. He never explained the allegation of the grudge. He castigated Pw3 for not investigating the case by not visiting the scene. He wondered why he had been charged with defilement yet MM's hymen was intact. He stated that there was no evidence he penetrated the victim.

15. The appeal was canvassed by written submissions. In his submissions the Appellant states that the charge was defective because there was no evidence of defilement adduced. That the prosecution failed to amend the charge sheet to enable him prepare his defence. This to him was a breach of Article 50(2)(b) of the constitution.

16. He contends that he was never served with witness statements violating his right to disclosure of evidence. He refers to Article 25(c) of the constitution where the right to disclosure of evidence cannot be limited. He cites the case of **Thomas Patrick Gilbert Chomondley –vs- Republic (2008) eKLR**. On this he also refers to Article 50(2)(j) of the constitution.

17. On the evidence he submits that the medical evidence (P3) did not support MM's evidence. There was no proof of penetration.

18. He also submits that while sentencing him, the trial court did not consider the period he had been in remand custody after cancellation of his bond from 23rd May 2017 – 7th August 2019. He has urged this court to consider that period.

19. The appeal is opposed by the Respondent through learned counsel M/s Eunice Gitau. On ground 1 she submits that the charge and particulars were clear and the Appellant was aware of the charge he faced. Furthermore the charge was reduced under section 179 Criminal Procedure code. It's her submission on ground 2 that under section 124 of the Evidence Act, uncorroborated evidence in sexual offences can be the basis of a conviction. The trial court found that proof of penetration required corroboration. She however found the complainant's evidence credible and sufficient proof without corroboration.

20. On the issue of section 333(2) CPC counsel submits that the cancellation of bond was as a result of the Appellant's conduct of absconding court. He cannot blame anyone for that and the period spent in custody should not be considered as part of the sentence.

21. She submits on ground 4 stating that all the ingredients for proof in a case of attempted defilement are proved. The identity of the Appellant as the perpetrator was also proved. MM knew the Appellant well. She argues that the claim of failure by the court to provide him with witness statements was an afterthought. He was on bond for one year and had all the time to get all those documents. Further he was always ready to proceed with the case and never pointed out any shortfall at any given time.

Analysis and determination

22. This being a first appeal, this court has a duty to re-analyse and re-consider the evidence on record and arrive at its own conclusion. It must bear in mind that unlike the trial court it did not see or hear the witnesses. See **Okeno –vs- Republic 1972 EA 32; Kiilu & Another –vs- Republic (2005) I KLR 174; Simiyu & Another –vs- Republic (2005) IKLR 192, David Njuguna Wairimu(2010) eKLR**.

23. I have considered the evidence on record, grounds of appeal, submissions and the law and find the following to be the issues falling for determination:

- i. Whether the case against the Appellant was proved beyond reasonable doubt.
- ii. Whether section 333(2) of the CPC was considered during sentencing.

Issue no. (i) Whether the case against the Appellant was proved beyond reasonable doubt.

24. The Appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act with an alternative count of committing an indecent act with a child contrary to section 11(1) of the same act. Upon full trial, the court found the charge of defilement not proved. She convicted him of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act. The section provides that:

9(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

25. In the case of **Jonn Gatheru Wanyoike –vs- Republic (2019) eKLR** the court held that:

“It is clear that the elements of the offence of attempted defilement are similar to those of defilement save that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration which was not successful and that there was positive of the accused defiler.”

26. Therefore just as in a case of defilement the following must be proved:

- a) Proof of complainant’s age
- b) Proof of an unsuccessful act of penetration
- c) Identification of the Appellant as the perpetrator

Proof of complainant’s age

27. The Sexual Offences Act, 2006 defines “child” within the meaning of the Children’s Act No. 8 of 2001 which defined a “child as ... **Any human being under the age of eighteen years.** It is important to prove the age of a victim of defilement by cogent evidence. This is because the penalty in such an offence is pegged on the age of the victim. See **Alfayo Gombe Okello –vs- Republic Criminal appeal No. 203 of 2009(Kisumu).**

28. MM in her testimony stated that she was 12 years at the time of giving evidence. The incident had occurred over 1½ years before she testified. The birth certificate (EXB3) showed her date of birth as 9th September 2005. The incident complained of was committed on 8th June 2016. She was therefore 10 years plus nine months of age at the time of offence meaning she was a child.

Proof of an unsuccessful act of penetration

29. **What is an attempted defilement?** *It is an unsuccessful act of penetration of one’s genital organ by another. In other words, every action geared towards penetration must be complete save for the actual penetration. In other words it’s a failed defilement. Attempt to commit an act is defined under section 388 of the Penal Code as:*

(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial except so far as regards punishment whether the offender does all that is necessary on his part for completing the commission of the offence or whether the complete fulfillment of his intention is prevented by circumstances independent of his will or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

Some decisions on this issue are: **Benson Musumbi –vs- Republic (2019) eKLR, Daniel Simiyu Wanyonyi –vs- Republic 2019 eKLR, David Ombasa Omwoyo –vs- Republic (2016) eKLR.**

30. In the instant case MM explained how a male neighbor carried her to his house, placed her on bed and removed her pant. He also removed his pair of shorts and inserted his penis in her anus, and she felt pain. He released her when through. She went home and informed her mother (Pw2) who examined her. She saw wetness in her pants and biker. She was seen at Kibwezi sub-county hospital (EXB1) on 8th June 2016 at 8:30 pm which was the same day of incident. All tests and examination done revealed negative results. The anal region had nothing notable on it. She had no physical injuries on the body, and her hymen was intact.

31. The urinalysis revealed the presence of pus cells. In re-examination by the prosecution Pw4 (*Dr. Anthony Masila*) said the pus cells had no relation to the sexual assault. It follows that the only evidence left as to what really happened to MM is her own evidence which may be the basis of a conviction under the proviso to section 124 of the Evidence Act which states that:

124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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.

32. The trial court which heard and saw the witness (MM) found her to be truthful and credible. That her evidence was clear and consistent. She also reported this encounter to her mother (Pw2) immediately she arrived at home. There is something that was done to this child's anus even if it was not a penetration. She made it clear that she had not been sent by the mother to come and implicate anybody. I find that the charge of defilement or attempted defilement was not proved but the alternative count of committing an indecent act was proved.

Identification of the perpetrator

33. The incident occurred in broad daylight. The child knew the perpetrator by name and as a neighbour. She said she had known him for seven years. She was taken through a *voir dire* examination and cross examination and she answered the questions satisfactorily.

34. In his defence the Appellant talked of a grudge and threats by Pw2. In cross examination of Pw2 there is no indication that he asked her about any grudges and threats by the said witness. He also never asked her about her children trespassing on his family land. MM gave the mother (Pw2) and the assistant chief the names of the perpetrator who was brought by nyumba kumi officials and she repeated the same report before all those present. I do find that the Appellant was properly identified as the perpetrator.

35. In his submissions he alludes to the fact that the charge was defective because no defilement was proved. I have examined the charge and particulars in both the principal count and alternative count and find no defect in either of them.

36. He has also raised issue with violation of his right to Article 50(2)(b) and (j) which is about fair hearing and preparation of the defence. The record shows that the Appellant first appeared in court on 10th

June 2016. MM (Pw1) first testified on 20th February 2018. It is only when the investigating officer appeared to testify on 19th September 2018 that he stated that he did not have the medical documents.

37. This is what he said:

"I am ready to proceed with the investigating officer. I don't have documents from the doctor. I requested the investigating officer before court and she told me to wait she will give me. She did not give me and then proceeded on transfer."

Prosecutor: I confirm we have supplied the P3 form and PRC form to the accused".

Accused: "I confirm to have now received the PRC and P3 form. I will be ready to proceed with the doctor at the next hearing".

38. The Appellant was on bond from 14th June 2016 – 23rd May 2017 when his bond was cancelled for failure to attend court. Every time the matter came for hearing he was ready to proceed. He cannot therefore turn around to claim breach of his right to fair hearing.

39. Upon assessing and analyzing the evidence on record I find that the medical evidence does not support defilement or even attempted defilement. What was established was the alternative count of committing an indecent act with a child.

40. It is true he was given the mandatory minimum sentence for the offence he was convicted of. In view of the alternative count he is now being convicted of, I am taking into account the victim impact statement, his brief mitigation and the period he was in custody before conviction (23/05/2017 – 07/08/2019).

41. The upshot is that the appeal succeeds to the extent that the conviction for attempted defilement is quashed and substituted with a conviction for committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

42. The sentence of ten (10) years imprisonment is set aside and substituted with a sentence of six(6) years imprisonment from the date of sentence.

Orders accordingly.

Delivered, signed & dated this 11th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge