REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 67 OF 2017

(From original conviction and sentence in Criminal Case No. 506 of 2015

of the Senior Resident Magistrate's Court at Gichugu).

C K M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant CKM was charged before the Principal Magistrate's Court at Gichugu sexual offence case No. 6 of 2015 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of Sexual Offences Act. It was alleged that on diverse dates between 13/2/15 and 12/5/2015 in Kirinyaga East within Kirinyaga County he unlawfully and intentionally did cause his penis to penetrate into the vagina of GW a child aged 6 years.

2. The appellant pleaded not guilty and after a full trial he was found guilty, was convicted and sentenced to serve life imprisonment.

3. He was aggrieved by both the conviction and sentence and lodged this appeal which raises the following grounds:

1. The Learned trial Magistrate erred in law and fact in failing to make a finding that the evidence adduced by the prosecution witnesses was not about defilement C/s 8(2) but of incest C/s 20(1) of the Sexual Offences Act.

2. That Learned trial Magistrate erred in law and fact in making a finding that the appellant and the minor, PW2, used to asleep on the same bed, contrary to the evidence of PWI that the minor used to live and sleep at her grandmother's house.

3. The learned trial Magistrate erred in law and fact for failing to make a finding that failure to subject the appellant to medical examination to test for any infection weakened the prosecution case.

4. The Learned trial Magistrate erred in law and in fact in not giving due consideration to the evidence of PW1 as to the person initially named by the minor as having defiled her, and that at no one time did the minor mention the name of the appellant to the said PWI.

5. The Learned trial Magistrate erred in law and fact in not making a finding that the minor was not known to PW4 prior to the date of arrest of the appellant, and it was not therefore possible for PW4 to know where the minor lived.

6. The Learned trial Magistrate erred in law and fact in making a finding that since the vagina of the minor was hyperemic, there was discharge from her vagina and the same was mixed with blood was evidence of recent sexual abuse thus the appellant defiled the child on the stated dates, yet there was no medical evidence that could have aided to arrive at such a conclusion.

7. The learned trial Magistrate erred in law and fact in failing to make a finding that there was absolute no evidence that the minor was defiled any other day after 13th February, 2015 when she was defiled by one K and who was charged separately, yet made a conclusion that the minor had been defiled on diverse dates between 13th February, 2015 and 12th May 2015, which conclusion led to a miscarriage of justice.

8. The learned trial Magistrate erred in law and fact in failing to make a finding that failure to call the minor's grandmother as a

witness as to who used to live with the minor on the stated dates can lead to only one inference to adverse evidence on the prosecution's case.

9. The conviction was against the weight of evidence adduced.

4. The appellant prays that the appeal be allowed, conviction be quashed, sentence be set aside and he be set at liberty.

5. The state opposed the appeal through Geoffrey Obiri – Assistant Director of Public Prosecutions and submits that the appeal lacks merits and urged the court to dismiss it.

6. The facts of the case are that the complainant had been living with her grandmother between February and May 2015. Sometimes in May 12th or 13th 2015 PW-1- who is the minors Aunt went to visit her ailing father and while there the minor came from the shamba while crying and claimed that she had been defiled by one K. PW-1- washed the complainant and washed her clothes. The appellant went home after 3 days and was informed as to what the minor had alleged. The PW-1- never took the minor to hospital nor did she report the matter to the police. The minor testified as PW-3- and told the court that the appellant used to defile her many times as he was sleeping with her on the same bed. The appellant was her father. The information was given to the block leader who went and interrogated the complainant. She revealed that the appellant used to defile her. The information was given to the block leader (PW -4-) on 13/5/2015. The complainant was escorted to hospital and was examined by PW-2- the Clinical Officer who testified that the minor's hymen was broken though not freshly. She had a vagina infection and had a blood stained discharge due to the infection. He found that the minor had been repeatedly defiled. The appellant was then charge with this offence.

7. This is a first appeal and this court has a duty to re-evaluate the evidence, analyse it and make its own independent finding but bearing in mind that it had no chance to see and hear the witnesses and observe their demeanor and leave room for that. This was held in the case of **Okeno –v- R (1972) E A 32** and as submitted by the appeallant in **Collins Akoyo Okemba & 2 Others –v- R 2014 eKLR** where it was stated that:

"It is the duty to re-evaluate and re-analyse the who evidence in afresh and exhaustive way before arriving at its own independent decisions."

8. The appellant is submitting that the minor had reported to PW-1- who is her Aunt that she was defiled by one K. That though PW-4- said it is the complainant who told him she was defiled by the appellant, it is PWI and the appellant who told him that K had defiled the minor and he went to confront K . That the minor informed him (PW 4) that the appellant used to defile her with K. I have considered the evidence tendered by the witnesses before the trial Magistrate.

9. The medical evidence tendered by PW-2- Gideon Nyaga Kabute confirms that the complainant G. W. who was aged six years was defiled as when he examined her she had the hymen broken, there was Maloclorous foul smelling discharge i.e it was whitish in colour, creamish and mixed with blood and the discharge had some clots. The vigina was hyperemic, meaning it was red in colour an indication that there was some friction. Urinalysis showed some pus cells which was an indication of some infection. He concluded that there was penetration. The blood stained discharge was an indication of penetration and friction in a six year old. PW-2 testified that the child disclosed to her that she was defiled by her father and someone by name K. He filled a P.3 form and Post Rape Care (PRC) and treatment notes exhibits 1a, lab results exhibit 1b, P3 form exhibit -2- and Post Rape Care form exhibit -4-.

The age of the minor was also not in dispute. PW4 testified that she was six years old.

10. PW-1- testified that the complainant had reported to her that she was defiled by K. But she also confirmed that when they went to Kianyaga Police Station the complainant stated that her father who is the appellant in this case used to defile her.

11. The complainant gave unsworn evidence and described in details how the appellant used to defile her and that he had done that to her many times. She maintained in cross-examination that the appellant defiled her.

12. PW-4- Albert Muthike testified that he received information that there was a child being defiled by his father. He went to the home of the child who is the complainant and she confirmed that the appellant who is father had defiled her many times. The complainant also told her that there was one man by name K who also defiled her twice.

13. The evidence tendered was overwhelming. There was no material contradiction. The child was candid that the appellant and one K had defiled her.

Issues arising;

Evidence adduced was not defilement but of incest

Evidence adduced was that the appellant was the father of the complainant. Therefore this was a case of incest but the appellant was charged with defilement.

Section 8(1) and (2) of the Sexual Offences Act provides:

(**1**) *A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

(**2)** *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.*

Section 20(1) of the Sexual Offences Act provides:

Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

14. The sentences for both offences are similar, that is life imprisonment.

15. The ingredients of the charge are the same. That is committing an Act which causes penetration.

16. The appellant did not suffer any prejudice. The failure to charge the appellant with incest does not weaken the prosecution case. ***Section 382 of the Criminal Procedure Code*** Provides:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings"

Penetration and the age of the complainant are key ingredients in the charge of defilement and incest. The evidence was tendered to prove the ingredients.

In **D K K O v Republic [2018] eKLR**

In a case involving uncle and niece, the charges preferred was defilement and not incest and the Court held;

I therefore find and hold that the preference of the charge of defilement instead of the charge of incest by the investigator and the prosecution did not prejudice the appellant in any way.

The appellant herein although having been charged with defilement instead of incest, no prejudice was occasioned to him. The charge of defilement was proved to the required standard.

Contradictory evidence

The appellant alleges there was a contradiction on who used to sleep with the complainant.

PW 1 stated complainant lives with her grandmother.

PW 3 on the other hand states that she used to sleep with the appellant when she was defiled.

There is slight contradiction.

In **Erick Onyango Ondeng' v Republic [2014] eKLR**

The Court of appeal held;

Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial court, after hearing all the evidence accepted that the offence was committed at *"about 7 pm"* **in accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in *TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA*, 6 it is not very contradiction that warrants rejection of evidence. As the court put it:**

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

The above contradiction is minor and they do not affect the main substance of the prosecutions' case that PW 3 was defiled and the culprit

was identified as the appellant. This was further proved by the medical evidence.

Complainant mentioned K as defiler.

The complainant stated that both K and the appellant had defiled her both were arrested and charges were preferred.

Lack of medical evidence.

The appellant was not subjected to medical examination but even so failure of the same was not fatal to the case. The complainant's evidence was corroborated by the medical evidence.

Despite the existence of Section 36 of the Sexual Offences Act it is now settled law that sexual assault is proved by evidence and not by medical examination of the perpetrator. Evidence of the victim or even circumstantial evidence is enough to prove rape or defilement as the case maybe. The court of Appeal when considering this issue in the ***case of Fappyton Mutuku Ngui –v- R (2014) eKLR*** stated as follows:

> "***In our view , such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW-2's testimony which was trustworthy as to the person who had defiled her."***

In this case the complainant was candid as to who defiled her. Medical evidence corroborated her testimony that she was defiled. It was not necessary to produce D.N.A evidence to prove the charge. What was necessary was prove of penetration being the main element by oral evidence of the victim and it was not necessary to adduce D.N.A test to prove the charge. ***Section 36 of the Sexual Offenes Act*** gives court discretion to order medical examination. It is not a mandatory requirement. The court may make such order depending on the circumstance of this case. In this case there was sufficient evidence to prove the ingredients of the charge. The trial Magistrate who saw the complainant believed her. The proviso to ***Section 124 of the Evidence Act*** the court could convict once it believed the complainant and gave reasons for believing her.

1. Failure to call crucial witness

The prosecution did not call the complainant's grandmother.

In **Erick Onyango Ondeng' v Republic [2014] eKLR**

The Court of appeal held;

> **In *BUKENYA & OTHERS VS UGANDA (supra),* the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case;……**
>
> **While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso *to section 124 of the Evidence Act* and the medical evidence must be borne in mind as well *Section 143 of the Evidence Act (Cap 80)* which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In this appeal, it is not clear to us what value the evidence of Violet would have added to the evidence of PW2, which the court found trustworthy, as well as the medical evidence. In our opinion, Violet would have been a peripheral witness as she was said to merely have happened by when the appellant was with PW2 on a different occasion.**

The proviso to ***Section 124 of the Evidence Act*** therefore allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

In this case, though the grandmother was not called, the evidence of the prosecution witnesses together with the medical evidence proved that PW 3 had been defiled and it was the appellant who had defiled her. In addition, the complainant first informed PW 1 and thereafter narrated again in front of the police who testified to this fact.

2. Did the prosecution prove its case beyond reasonable doubt?

Looking at the whole evidence adduced, I find that the prosecution proved its case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 1 in the manner described.

PW 3 stated that she was defiled by both the appellant and K. She explained in details what was done to her by the appellant.

The trial court having considered all the evidence presented, came to a proper and inevitable conclusion that of the guilt of the accused.

17. **In Conclusion**:

Having considered the evidence analysed it and evaluated it,

1. I find that this appeal is without merits.

2. The charge was proved beyond any reasonable doubts with overwhelming evidence.

3. I dismiss it.

Dated at Kerugoya this 21st day of February 2019

L. W. GITARI

JUDGE