



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 5 OF 2016

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 60 OF 2017

BETWEEN

DAVID MORWABE GWAKO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Were – SRM dated 11th December 2014 at the Chief Magistrate’s Court at Nyamira in Criminal Case No. 661 of 2014)

JUDGMENT

1. The appellant, **DAVID MORWABE GWAKO**, was charged with two counts of defilement under **section 8(1) and (2)** of the *Sexual Offences Act* (“the Act”) as follows;

(1) On the 26th day of May 2014 at Omonono Sub-location in Nyamira District within Nyamira County, he unlawfully and intentionally caused his penis to penetrate the vagina of FN, a child aged 7 years.

(2) On the 26th day of May 2014 at Omonono Sub-location in Nyamira District within Nyamira County, he unlawfully and intentionally caused his penis to penetrate the vagina of JB, a child aged 7 years.

2. The trial magistrate acquitted the appellant on the two main counts, but convicted him on the alternative charges of committing an indecent act with a child contrary to **section 11(1)** of the Act. He sentenced the appellant to 10 years’ imprisonment on both counts to run concurrently.

3. The appellant now appeals against conviction and sentence on the grounds set out in his petition of appeal and written submissions. In his petition of appeal, he only raised the issue of the sentence which he argued was excessive and that he was 61 years and has since reformed. In his written submissions, he complained that the evidence on which the conviction was based was hearsay and the medical evidence did not support the conviction.

4. As this is a first appeal, I have re-appraised the evidence and I am satisfied that the conviction was well founded. The evidence of **FN** (PW 1) and **JB** (PW 2), implicating the appellant, was clear and direct. PW 1 testified as follows:

PW 1 stated as follows: I recall what happened on 26/5/2014. PW 2 asked me to escort her to go and drink water. We found David the accused outside. We were from school. The accused was outside his house. He asked us to go to his house and drink water. We got into the house. Inside the house he asked us to eat. There was ‘omena’. It had pepper. I only ate twice and then stopped. It was about 4 pm. The accused told us he has no wife so we should go and sleep with him. He asked us to go and sleep in his room. We did so. In his room, he removed our pants and then did to us bad things. He began to defile me first and when I screamed he held my mouth. We were on his bed. It is the accused who removed my pants. The accused defiled me with me down and he was on top of me. The accused used his organ (penis) to defile me. He inserted it into my vagina. He began with me and then went to PW 2. He also defiled PW 2. I can’t tell how long it was. It took a short while. When I wanted to scream, he covered my mouth. After he defiled us he gave each of us Kshs. 10 and then opened the door for us. He told us we could buy mandazi with the money. After we bought the mandazi we went home. I went home and PW 2 also went home. I didn’t tell my mother when I got home. My mother didn’t ask me

where I had been after school.

On her part PW 4 stated as follows:

PW 4 stated that It is because David did to us bad things. I can't recall the date he did the bad things but I recall what he did. He did for me bad things here (points to her vagina). The incident took place in his house. We had gone to take water at his house. I was with PW 1 We had come from school. PW 1 is bigger than me. We go to the same school. We both go to standard 1. We were from school headed for home. I was the one who was thirsty. The accused gave us water. He then gave us ugali and omena. He gave us 20/= and said we share 10 each. I didn't tell my mother the accused had done bad things to my vagina in his house. He defiled me. He did to me on his bed. He used his penis. He made me lie on his bed. He removed his clothes. He removed his penis from his clothes. He had his pants, inner pants and he didn't remover his inner pants. He removed my clothes, my pants. He then inserted his penis into my vagina after removing his penis from his inner pants. He defiled me for a long time. I didn't scream. He told me not to scream. I felt pain when he was defiling me. I felt pain in my vagina. I was with M when I was defiled. He also defiled M. After being defiled, we left his house.

5. After considering this evidence and that of the clinical officer who examined both children after 4 days, the trial magistrate found that penetration was not proved. He also held that the age of the children was not proved and that is why he could not convict the appellant of the offence of defilement. Although the State did not cross-appeal against the conviction and sentence, I must state that this was a grave misdirection on the part of the trial magistrate.

6. First, medical evidence, where the same is available is only corroborative of the complainant or victim's testimony. The trial magistrate was entitled to rely on the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which provides as follows;

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.

7. In **Geoffrey Kionji v Republic Criminal Appeal No. 270 of 2010 [2010]eKLR**, the Court of Appeal applied this principle earlier stated in **Kassim Ali v Republic MSA CA Criminal Appeal 84 of 2005** where it held that:

*Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that the defilement was perpetrated by the accused person. Indeed, under the proviso of Section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief. What the Court of Appeal had stated in **Kassim v Republic** is that, "[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence."*

8. Second and on the issue of age, I would do no better than quote what the Court of Appeal stated in **Moses Nato Raphael v Republic NRB CA CRA No. 169 of 2014 [2015] eKLR**;

*On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in **Tumaini Maasai Mwanja v. R, Mombasa CR.A. No. 364 of 2010**, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.*

9. In this case all the evidence points to the fact that the children were below the age of 18 years. The apparent age of the victims, which determines the sentence, is a question of fact. While the court is entitled to rely on documents like birth certificates, baptism cards, health and immunization cards and school reports, in the absence of such documents, the court is entitled to consider the circumstances of the case, what the children state during the voire dire, their class in school and the testimony of the parents and any other evidence that would assist the court come to an appropriate conclusion (see **Evans Wamalwa Simiyu v Republic NRB CA Criminal Appeal No. 118 of 2013 [2016] eKLR**).

10. As I noted earlier the State did not cross-appeal on these issues hence the appellant is entitled to the benefit of the conviction and lesser sentence imposed on him. The appellant was sentenced to the mandatory minimum sentence under **section 11** of the **Act** hence this court lacks discretion to alter it.

11. I affirm the conviction and sentence. The appeal is dismissed.

Dated and delivered at Kisii this 30th day of March 2019.

D.S MAJANJA

JUDGE

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.