REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 7 OF 2018

GMW.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Hon. B. M. Ochoi (P.M)

vide CR. No. 13/2016 at Mukurweini Law Courts delivered on 28th February 2018)

JUDGMENT

1. The appellant herein GMW appeals against the conviction and sentence to life imprisonment for the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act as meted against him by the honorable trial magistrate on 28th February 2018.

2. According to his counsel Mr. Andrew Kariuki's submissions filed on 12th February 2019 the main ground for the appeal is that: -

> **"The trial magistrate erred in both law and fact by failing to accord any weight to the fact that as admitted by the complainant's witness who is her mother there was a long standing grudge between her family and that of the accused arising from a land dispute"**

Further that **"No samples were taken from the accused for medical analysis to establish that the laceration and breakage of hymen was caused by the penis of the accused"**

Further that neither the P3 nor the complainant's certificate of birth were included in the Records of Appeal hence the court would not be able to ascertain the age of the complainant.

3. On its part the state submitted through Mr. Magoma, prosecuting counsel, that the appellant was recognized by the child, that the child told the mother that the appellant had defiled her, that complainant's age was proved at 12 years old and that was on the record, that the child was examined by the doctor and a whitish discharge was found in her private parts- that the appellant's alibi was duly considered and was found not to have been corroborated.

4. As a first appellate court my role is well defined to re-evaluate and re-assess the evidence and draw my own conclusions.

5. According to the charge sheet the appellant was charged with defilement contrary to section 8(1) (2) of the Sexual Offences Act No.3 of 2006. The particulars were that on 2nd July 2014 in Mukurweini sub-County within Nyeri County he intentionally caused his penis to penetrate the vagina of SWM a child aged 10 years. In the alternative he was charged with committing an indecent Act with a child contrary to section 11 (1) of the same Act. That on the same date, time and place he intentionally caused his penis to touch the vagina of SWM, a child aged 10 years.

6. The accused was arrested on 11th July 2016, and plea was taken on 12th July 2016. He denied the charges. The trial took off on 21st November 2016.

7. PW1 and PW2 were heard by J. Munguti PM who was transferred before he completed the case. It was taken over by Hon. B. M. Ochoi PM- on 21st September 2017. Upon compliance with s.200 CPC, he directed that PW1 and PW2 be recalled for cross-examination by the accused. He heard PW3 and PW4 and PW5, and the further cross-examination of PW1 and PW2, and the accused's defence and that of his

witness.

8. In a judgment delivered on 28th February 2018 he rejected the accused's defence, found that prosecution had proved its case against the accused, convicted and sentenced him to life imprisonment.

9. The issues are whether the prosecution has proved its case beyond a reasonable doubt to warrant the conviction and sentence.

i. Whether the trial magistrate considered the weight of the grudge.

ii. whether the failure to conduct forensic examination on the accused was fatal to the case for prosecution.

Section 8(1) as read with Section 8(2) of the Sexual Offence 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 11 (1) of the same act provides

(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

10. The prosecution must establish;

i) The age of the complainant.

ii) Penetration.

iii) **That perpetrator**

11. The case for the prosecution is that the accused and the complainant are cousins of sorts – the complainant's mother is a step mother of the accused's father hence she a step grandmother to the accused.

12. According to the complainant's mother PW1, on the 2nd July 2014 the complainant came from school about 4:00pm. She was by then 10 years old and in class 2. She told her that she wanted to go and harvest maize, so she changed her clothes and went to the farm. This is PW1's testimony

"*The accused is like a grandchild.….. G convinced my daughter to come and ask for permission for G to be sent to shop. I allowed my daughter to go to the shop to buy accused credit and 2 cigarettes. My daughter came at 7.30pm. I came to know on Sunday after I realized my daughter was walking with difficulties. It's like her legs were together. This I learnt on Sunday 5/7/15. My fellow women were asking my daughter why she was walking like that. When we asked my daughter she said it's G who had defiled her and her private parts were painful. The defilement was at accused's house. I went to AW and told the mother to tell the son to take my daughter to hospital as I was not interested in a case. A told me to face the accused and tell him what I was telling her. The matter reached the village elder. I took my daughter to Mweru Health Centre but the nurse declined to treat my daughter. The nurse called the chief and reported the defilement. I was forced to bring my daughter to Mukurweini Hospital. She was issued with a P3 form which I wish to produce as MFI 1. I also have treatment notes MFI 2. I have birth certificate marked exhibit 3. I had not differed with accused. We have a land grudge. Very serious. Our father told me to go where I wanted to go. The accused fled after committing this offence. He was arrested after he returned home*".

13. On cross-examination she told the court that it was one WE who noted that her daughter was walking with difficulty and asked what was wrong. That the child said nothing until one week later, because neighbours were asking her why her daughter was walking that way. That she confronted the child who told her what had happened. That she confronted the accused's grandmother who abused her instead- so she decided to take her child to hospital.

14. The complainant told the court that on the material date she arrived home from school about 3:30pm. She changed from her school uniform and went to the shamba where she picked 4 maize cobs. Then she met the accused.

"*He told me to ask permission and when I returned to him he removed my pants. He had a trouser- jeans. It happened in a sofa set- sitting room of his mother. There was no other person. He threatened to kill me if I dared report to anybody. He sent me credit and cigarette. I bought them and returned to him. He then gave me a piece of sugarcane and 10/-. I screamed as he defiled. It was the first time. No blood came out. I decided not to report for fear of being killed. After a few days I started feeling pain and had difficulties walking. My mother threatened to strangle me and I had to disclose to her that it is G who had defiled me. I was taken to Mweru Health Centre where I was referred to Mukurweini. We reported the case at Mukurweini police station. George is the one at the dock. G is my cousin*".

15. On cross-examination she told the court that the accused shut her mouth, threatened to kill her. She stated;

"I was injured and bled. I showed my mother the clothes which were stained with blood. We did not go to hospital with them".

16. PW3 Dr. Gachuhi Michael from Mukurweini Hospital testified that he had the P3 from SWM who was aged 10 years at the time of the filing the P3 –that the child was defiled on 2nd July 2014 but reported to the mother on 7th July 2014, and was attended at the hospital on 8th July 2014. The report showed;

-Laceration on both labia

-Broken hymen

-whitish vaginal discharge

-HVS –pus cells

-No spermatozoa

-No signs of UTI

-No signs of HIV

He relied on the treatment notes. He produced the P3 and treatment notes.

17. PW4 No.2007127332 APC Stephen Ndirangu from Gitumbi AP Post testified that the PW1 went to the police post on the 11th July 206 about a case reported on 17th July 2014 at Mukurweini Police station. She needed the assistance of the police to arrest the accused who had allegedly fled after committing the offence and had returned. The assistant chief directed them to accused's home where they arrested him and took him to Mukurweini police station.

18. PW5 No.68431 CPL Bernard Kimutai testified that PW1 the complainant's mother went to Mukurweini police station over a case she had reported vide No.17/8/7/2014. He rang the Investigating officer who had investigated the case but was now on transfer- one John Korir who told him her had opened a file on one 'John Wakaba'. He traced the file which was "complete but the suspect had disappeared to Nairobi". He wrote an arrest order for AP at Giathogo, the suspect was arrested and taken to the police station where he charged him with the offence.

19. The accused was put on his defence. He told the court that he was GMW. He was a conductor. He said his grandmother had made up the case against him- because her own son had been jailed for a similar offence. She vowed to revenge and now she had. He denied any knowledge about the defilement. His father Wakaba Maina testified that the complainant was his step mother – I think meaning the complainant's mother, that he and she had a dispute over land because his house stood where she was allocated because the family had not yet done succession.

Analysis

20. The Court of Appeal in the case of **Okeno V. R. (1972) E.A. 32 thus:**

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. 336) and 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 Vs. R. (1957) E.A. 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 finding and conclusion; 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) E.A. 434)"

21. I have carefully considered the evidence and the submissions on record. It is noteworthy that accused was arrested 2 years after the alleged offence. The I.O stated that the file he found in the office for one John Wakaba. The actual I.O never bothered to show up to testify as to what investigations he carried out. It is not explained and taking into consideration the seriousness of the offence, why when the investigations were completed, and the I.O was of the view that an offence had been committed, the accused was not charged in absentia and a warrant of arrest issued. These are people who live in the same homestead there is no evidence that accused person actually disappeared from home as alleged. No evidence was tendered to show how many times his home was visited and he was not found, or what efforts if any were ever made to arrest him immediately it was alleged that he had committed the offence.

22. There is also the issue of PW1's testimony which was speculative, and in some aspects incredible. When she said that the accused who is like a grandson to her *'managed to convince complainant to ask for permission to be sent to the shop'*. How did she arrive at the conclusion that that is what had happened yet she was not there? In any event why would the child need convincing to go get permission to be sent to the shops by her "uncle".

23. That evidence however did not agree with that of the child, who stated that the accused asked her to go and greet him, she told him she could greet him verbally but she went home and sought permission to go and greet him – literally to go and visit him. From her testimony the permission she sought was not for her to be sent to the shops but to visit the accused person. That it was upon the visit that the accused defiled her on his mother's sofa set, after which he sent her to the shop to buy credit and cigarettes. After she bought and brought them he

gave her Kshs.10/- and a piece of sugar cane.

24. In her evidence in chief she said it was the first time and she did not bleed. On cross-examination she said she bled and even showed her mother her blood stained clothes. The new evidence on cross-examination clearly changed the scenario once more. That she got home in blood stained clothes. She showed her mother, who maintains in her testimony that she knew about the defilement only after neighbours and friends noticed that her child was not walking properly, and makes no mention of this very significant piece of evidence. It gives the evidence the character of a developing story instead of evidence supporting the charges relating to a specific event. From the beginning where it is not clear where the scene of crime was; the accused's house according to the mother or the house of accused's mother according to the child, to the point where the mother said she learnt about the defilement on 5th July, the doctor, that the child spoke told the mother about it on the 7th July, complainant saying that she reported to the mother at the threat of strangulation, to the mother saying that it was the neighbours who noticed that her child had a problem walking, to the point where she either bled or did not bleed and showed her mother her blood stained clothes. To the point where the mother only became interested in pursuing the case of the alleged defilement after the mother to accused refused to take the complainant to hospital. If her child was defiled why would she not be interested in a case? To the 'very serious land dispute' with the accused a fact that was confirmed by the father to accused DW2.

25. The paucity of description what happened. The complainant stated simply –

> *"when I returned to him, he removed my pants. He had a trouser –jeans. It happened in a sofa set –sitting room of his mother…..i screamed as he defiled……"*

What is this 'it happened'? It leaves it to speculation as to what happened. The minor does not say what the accused did to her.

26. The testimony of the mother and child threw a shadow of doubt on the medical evidence, breaking the connection between the appellant with the alleged defilement? The P3 and the treatment notes were all copies, the P3 – the part filled by the doctor was a carbon copy, the treatment notes were photocopies, none bore the stamp of the hospital where they are alleged to have been completed. In this case there were no investigations, the evidence did not add up. It is in **Kiilu & another Vs.Republic (2005) KLR 17** at 175 where the Court of Appeal (Tunoi, Waki, Onyango Otieno JJA) held;

> ***"The witness whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence".***

27. On the other hand the appellant's argument that the absence of forensic evidence connecting him to the offence was fatal to the case for the prosecution is not tenable. It is now settled that oral evidence can be sufficient to prove a charge of sexual offence as provided for under s.124 of the Evidence Act. See also **Kassim Ali vs. Republic (2006) eKLR** where the court held that the fact of rape could be proved by evidence of a victim/circumstantial evidence. See also **Lawrence Kamau Ng'ang'a vs. Republic (2017) eKLR.** Be that as it may, considering the nature of sexual offences, where more often than not there will be no witness, the need for forensic evidence cannot be over emphasized. Investigating officers' do not have a choice but, in addition to the actual scenes of crime, to start treating the victims and the perpetrators in sexual offences as the scenes of crime they become after the event, and to ensure proper samples are taken for examination, to gather the best evidence possible. No accused person should have to request for this. It should be done.

28. The land dispute between the accused and the complainant's family was first brought up by PW1 stated so and the same was confirmed by the father to the accused person. It was not considered by the learned trial magistrate. Looking at it vis a vis the contradictory evidence of the complainant and her mother, it could have a finger in this case. Look at manner a in which, and the time when the accused was arrested. The allegations that he had disappeared from home are not supported by any evidence. He was just at home.

29. Clearly no investigations were conducted and if they were, evidence not placed before court. It goes without saying that sexual offence cases involving minors where minors are 'used' to settle scores are not foreign to the CJS (Criminal Justice System). The most recent scenario is the one that is still trending – 'Wambua' case where the accused's child who is now an adult is alleging that her mother made her tell lies to the court – lies which led to her father getting the life sentence. Her confession is yet to be investigated for its truthfulness. However, the mixture of shock, disgust, anger and recoil from the society at large, and the blame thrown at the Judiciary is to say the least confounding. A case goes through the Criminal Justice System which begins in the community where the parties come from, and where the issues begin and the complaint arises. It is reported to the police, police carry out investigations from the same community who provide the evidence and compile a file which is presented to the ODPP, who decide whether to prosecute or not. When the case comes to court and witnesses give evidence, they are subjected to cross examination and it is the totality of all this and the applicable law and rules of procure and evidence that gives the court the material to rely on in arriving at a determination. Up until the hearing of the case is finalised and a date for Judgment or Ruling given, it is a concerted effort of everyone involved. The attainment of Justice is each and everyone's responsibility.

30. So We cannot bury our heads in the sand in the light of the possibility that it is can be true that a child can be used as a pawn. Poorly investigated cases as this one result in miscarriage of justice if the evidence is not scrutinized properly. The need to strike that delicate balance on the rights of the accused, justice for the victim and the capital society has placed on the need to punish sex offenders has never been more palpable. The zeal to protect our children from abuse by abominable human beings must be balanced with the legal duty to protect the rights of the accused person and societies need to balance our disgust at such offences and the realization that we too can be evil.

31. Sexual Offence matters have taken a certain notoriety in our society to the extent where a law that was made **to *make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes,*** has now become, something akin to the poisoned chalice that we give ourselves. We need to be slow to judge, convict, mete out sentences to suspects in the court of public opinion. Acquittals, should not be seen as denial of justice for the victim as it is possible the accused could be innocent. Putting pressure on the system to arrive at a conviction in all cases even those without sufficient evidence will only work injustice.

32. On this I found expression in the dissenting opinion of Justice Ibrahim SCJ in Petition No.39/2018) **Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR** where, while discussing The **Law vis-a-vis Public Interest and Opinion,** had this to say;

> ***[106]*** *Lastly, I would like to address an issue that came to the fore in the cause of the hearing and determination of this matter. This*
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> *is the place of public interest, opinion and perception in judicial decision making. It is a fact that this country has been a victim to*
>
> *several terrorist attacks, with the recent one being the 'Dussit Hotel Complex Attack'. As a result, the public interest and awareness in matters concerning terrorism has increased. Any alleged association of individuals with acts of terrorism is a matter that the public really frowns upon. Hence as expected, this matter attracted a lot of public interest and media coverage. To the public, the fact that the Respondents were Iranians charged with acts of terrorism was enough to have them convicted and sentenced. But how should the courts deal with public interest when deciding matters before them"*
>
> ***[107]*** *Courts are required to strike a balance between the public's interest and expectations on one hand, and the constitutional principles applicable within the criminal justice system on the other, the most fundamental principles being the presumption of innocence until proven guilty and the Rule of Law. The public's perception on the seriousness of an offence should never be a factor in determining the guilt of an accused or his acquittal. Addressing this balancing dilemma, Sachs J in his concurring opinion in the Constitutional Court of South Africa case of* ***S v Coetzee and others****, (CCT50/95) [1997] ZACC 2, stated thus:*
>
> ***"[220] Much was made during argument of the importance of combatting corporate fraud and other forms of white collar crime. I doubt that the prevalence and seriousness of corporate fraud could itself serve as a factor which could justify reversing the onus of proof. There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system.***
>
> ***Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases."***
>
> ***[108]*** *Consequently, while the public my resent and abhor the respondents' acquittal by the Court of Appeal, in determining this matter, this Court only focusses on issues that were before the Court of Appeal and the law. The gravity of the offence and the public sensitivity of the issue(s) are not given emphasis to the exclusion of very important constitutional provisions and fundamental rights and freedoms, which our Constitution guarantees to all persons, especially within the criminal justice system. (emphasis mine)*

CONCLUSION

I find that the evidence in its totality did not support the charges facing the appellant. The appeal has merit. The same is allowed. The conviction is quashed, the sentence of life imprisonment set aside and the appellant is to be set at liberty unless otherwise legally held.

Dated, delivered and signed at Nyeri this 28th day of March 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Juliet

Mr. Magoma for state

Appellant

Ms. Mwai holding brief for Mr. Andrew Kariuki for Appellant

Mumbua T. Matheka

Judge

28/3/19