REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA. NO. 11 OF 2018

MUTHOKA JAMES KIENDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Appellant was charged in Count I with the offence of Defilement Contrary to Section 8(1) of the Sexual Offences Act No. 3 of 2006.

2. Particulars being that on the diverse dates between 27th February, 2018 and 8th March 2018 at [particulars withheld] Village, Nduu Sub-location, Kithembe Location in Kilungu Sub-county within Makueni County intentionally caused his penis to penetrate the vagina of MM, a child aged 7 years.

3. The Appellant was alternatively charged to Count I with the offence of committing an indecent act with a child Contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

4. Particulars being that on the diverse dates between 27th February, 2018 and 8th March 2018 at [particulars withheld] Village, Nduu Sub-location, Kithembe Location in Kilungu Sub-county within Makueni County intentionally touched the vagina of MM, with his penis.

5. The Appellant was also charged in Count II 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.

6. Particulars being that on the diverse dates between 27th February, 2018 and 8th March 2018 at [particulars withheld] Village, Nduu Sub-location, Kithembe Location in Kilungu Sub-county within Makueni County intentionally caused his penis to penetrate the vagina of MM, a child aged 7 years.

7. The Appellant was alternatively charged to Count II with the offence of committing an indecent act with a child Contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.

8. Particulars being that on the diverse dates between 27th February, 2018 and 8th March 2018 at [particulars withheld] Village, Nduu Sub-location, Kithembe Location in Kilungu Sub-county within Makueni County intentionally touched the vagina of MM with his penis.

9. He pleaded not guilty and after trial he was found guilty, convicted and sentenced to serve life imprisonment.

10. Being aggrieved by the verdict the Appellant thus filed instant appeal.

11. In his Amended Grounds merged with Submissions he complains that;

> ***1) That*** *the learned trial magistrate erred in both law and facts by prosecuting and convicting the Appellant on a defective charge sheet.*
>
> ***2) That*** *the learned trial magistrate erred in both law and facts by not subjecting the Appellant to a fair hearing.*

***3) <u>That</u>** learned magistrate erred in both law and facts by failing to decipher that the prosecution witnesses were all suborned with ulterior motives.*

***4) <u>That</u>** the learned trial magistrate erred in both law and facts by disregarding the fact that penile penetration was not conclusively proved.*

***5) <u>That</u>** the learned trial magistrate erred in both law and facts by deliberately failing to note that essential witnesses were never procured to testify.*

***6) <u>That</u>** the learned trial magistrate erred in both law and facts by disregarding the legion of discrepancies and variances in the prosecution case.*

***7) <u>That</u>** the learned trial magistrate erred in both law and facts by giving a blind eye to the overwrought grudge between PW3 and the Appellant.*

***8) <u>That</u>** the learned trial magistrate erred in both law and facts by disregarding his intrinsic alibi which was enough to impinge the entire prosecution case.*

12. The appeal was canvassed by the Appellant relying and filling Submissions and Respondent relying on evidence on record.

<u>APPELLANT SUBMISSIONS</u>

<u>Ground 1. The Defective Charge Sheet</u>

13. Section 134 and 135 states;

> ***"Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences which the Appellant person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

14. In Section 241 of the C.P.C, in variance between charge and evidence and amendment of charge, it is very categorical and crystal clear that:-

> ***"Where at any stage of trial before the close of the case for the prosecution it appears to the court that the charge sheet is defective either in substance or in form, the court may take such an order for the alteration of the charge either by way of amendment of the charge sheet, or by the substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case."***

<u>Ground 2. Going Against the Doctrines of Fair Hearing.</u>

15. Section 50(1) of our sovereign constitution states:-

> ***"Every person has the right to have any dispute that can be resolved by the application of law decided in <u>a fair</u> (emphasis added) and public hearing before a court, or if appropriate, another <u>independent and impartial</u> (emphasis added) tribunal or body."***

16. Article 49(1) of our sovereign constitution states that an arrested person has the right -49 (1)(h):-

> ***"To be released on bond or bail on reasonable conditions pending a charge or trial <u>unless there are compelling reasons not to be released</u> (emphasis mine)"***

The appellant complains that during the trial court ordered;

> Court: ***"Plea of not guilty entered. Appellant shall not be granted bond at the moment until the children herein testifies."***

<u>Ground 3. The Suborned Prosecution Witnesses</u>

17. The appellant complained that witnesses were suborned and cited the case of **<u>Burunyi –Vs- Uganda Cr. Appeal No. 223 of 1968 E.A.C.A</u>**., it was held that;

> ***"It is not the duty of the court to stage manage cases for the prosecution, nor is it the duty of the court to endeavor to make a case against an Appellant person where there is none. The duty of the court is to hold the scale to see to it that justice is done according to the law and evidence before it."***

<u>Ground 4. The Pseudo Penile Penetration</u>

18. There is no P3 form in respect to the Appellant diagnosis.

19. If it's true both minors had been defiled by an S.T.I infected Appellant, how comes only one(1) is found to be positive and the other not?

20. ***Ground 5. Non Procurement of Essential Witnesses***

21. He complains that, the father to one of the kids who allegedly bumped on the investigating party at the village was not called to testify.He cited the case of **Ramson Ahmed –Vs- Republic Vol 1 Page 75**.

On Grounds 6, 7, & 8 Merged he submitted that the evidence at the lower court was so frail and meritless to warrant his conviction regarding the concoctions it had.

1ST APPELLATE COURT'S DUTY

22. The duty of the court of appeal has been established in a long line of cases. The position is that the court ought to subject the evidence tendered in the Trial Court to fresh scrutiny and subsequently determine whether the said court erred in both law and fact in arriving at the impugned decision.

23. In **OKENO –VS- REPUBLIC (1972) E.A 32**, where the role of the Appellate Court was set out as follows:-

> ***"An appellate court in first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court own decision on the evidence (Pandya –Vs- Republic 1957 E.A. 336). The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantial M Ruwal –Vs- Republic 1957 EA 570). It is not the function of the first appellate court to merely scrutinize the evidence to see if there was evidence to support the lower courts findings and conclusions. 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 so doing, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses (Peters –Vs- Sunday Post (1958) E.A. 424."***

EVIDENCE ADDUCED

24. PW1 stated that her mother died and was staying with her grandmother. It was her testimony that she knew Appellant person herein. She further stated that Appellant called her into the house, and she went. He asked her to remove her pant of which she did as directed.

25. It was her testimony that Appellant asked her in Kikamba language, ***"ambia tutombane"*** which is translated as to have sex with him. She further informed this court that Appellant inserted his *pipi* into her *pipi* while they were inside the house.

26. It was her testimony that Appellant promised to give her a mango after he was through with what he was doing as he did bad things to her.

27. PW2 stated that they were playing with MM(1) when she saw Appellant who was in their grandmother's house. He asked her to remove her pant of which she did. The child stated that Appellant asked her in Kikamba ***"ambia aenda unginda"***. It was her testimony that Appellant used his ***"kala kaindu kake kaukumala"***, translated that he had put his thing for urinating into mine, later asked her to go out after doing bad things to her.

28. PW3 stated that on the 05/03/2018, she noted M.M(2) walking with a limp while coming from school. She asked her but she did divulge anything prompting her to cane her. It was her testimony that the Complainant M.M(2) informed M that she was experiencing pain while urinating. She called her neighbour AMto help her check the child.

29. The neighbour came and upon threatening the Complainant M.M(2). She informed them that Appellant had had sexual intercourse with her. Police were summoned and the child taken to the hospital. It was revealed in the hospital that indeed the Complainant was had carnal knowledge of.

30. PW4 stated that she was called by PW3 as neighbour to check on her granddaughter who had been burnt by urine.

31. She checked the child on the 09/03/2018. It was her testimony that she checked the Complainant in Count 2 and threatened to cane her. She volunteered by informing her that it was Appellant who had had sexual intercourse with her. It was her testimony that the child informed her that they were playing hide and seek with the Appellant and other children.

32. They hid with the Appellant in the kitchen and the latter asked Kituva to check if someone was coming before defiling her. She immediately put the child on the table to check on her genitals. She confirmed that indeed the genitals had been interfered with. She called the police and Appellant was arrested whereas the children were taken to the hospital.

33. Upon examination their fear was confirmed by the medical practitioners at Mutungu Hospital (Kilungu Sub District Hospital). The children were issued with treatment notes and P3 forms and their PRC forms filled. She proceeded to record her statements.

34. PW5 carried out investigations and preferred the current charges as against Appellant person. It was her testimony that she received the report and proceeded to Iyaini area where Appellant had been arrested at around 9.00 p.m. by members of the public on allegations of defiling the two children. She proceeded to re-arrest Appellant person herein from the members of the public and took the children to the hospital together with their guardians.

35. It was her testimony that she also took time as the investigation officer to examine the children before proceeding to the hospital. She saw M.M(2) who was walking with difficulties had been interfered with and was emitting a lot of discharge from her private part. The children had their hymen broken as per the medical analysis. She tendered the investigations diary as PEX 7.

36. PW6 examined M.M(2) who was 7 years old. It was his testimony that her hymen was broken and had whitish discharge. It was his testimony that the Complainant had laceration on her vaginal walls with numerous pus cells was also noted. The vaginal wall was red. It was his testimony that Appellant was also investigated and confirmed to have had numerous pus cells akin to the ones noted in M.M(2) which indicated that he had sexually transmitted disease.

37. It was his testimony that he had filled the PRC form which confirmed the injuries. He further proceeded to tender medical evidence on M.M(1). He noted that the hymen was absent with no other significant findings on her. He tendered the treatment notes for M.M(1) as PEX1, treatment notes for M.M(2) as PEX 2, P3 form for M.M(1) as PEX 3 and for M.M(2) as PEX4, PRC form for M.M(1) as PEX 5 and for M.M(2) as PEX 6, treatment notes for the Appellant as PEX 7, clinic card for the children showing their ages as PEX 8 for M.M(2) who was born on the 20/04/2010 and for M.M(1) as PEX 9 who was born 09/08/2011.

38. DW1 stated that on that day, he was working and had been building for over 4 months. He was owed Kshs. 12,000/=. It was his testimony that when he went to ask for his money and insisted that he was going to take a goat for sale, the old lady dared to teach him a lesson.

39. He went home and later people came to arrest him. He was tied with ropes. Police came from Kilome and re-arrested him. He was taken to the police station. The following day, he saw a woman with two children who were playing outside. The children were later taken to the hospital and the doctor was bribed with Kshs. 3,000/= to write a lie and he was asked to keep quiet.

40. **ISSUES**

After going through material before the court, I find issues are;

Whether the charge was defective? Where the Appellant was accorded fair hearing ? and whether the ingredients of offence were proved?

ANALYSIS AND DETERMINATION

41. On the first issues, the court has looked at the charge sheet and perused content thereof but finds no defect at all.This is a belated issue brought via amendment of grounds .It was never raised during trial.

42. On the issue of whether the trial was fairly conducted, the appellant complains that he had been denied bail thus the trial as unfair trial. Of course he could have appealed or sought High court intervention. He never did so.In any event the issues has also been raise for the first time during amendment of the instant grounds of appeal.I*t appears to be an afterthought.*

43. At the onset the trial court clarified that the Complainants were two children with almost similar names. Thus to hide their identity, the court had adopted initials M.M(1) for the 1st Complainant and M.M(2) for the 2nd Complainant to avoid any confusion since the abbreviations were similar. The two alleged to have been defiled by the same Appellant person.

44. It was the prosecution's case that M.M(1) was born on the 09/08/2011 and as at the time of the Complainant she was actually 7 years old.

45. The Complainant during *voire dire* examination also indicated that she was 7 years old and was in class 1. In regard to M.M(2), it was the prosecution's case that the Complainant was born on the 20/04/2010 and so she was also 7 years old. In proof of their ages, the prosecution relied on the clinic cards for the two children tendered as PEX8 and PEX9 respectively.

46. Appellant in his defence did not counter that evidence as in his defence he also referred to the two Complainants as the ***"two children who were playing outside at the police station."***

47. The trial court looked into the meaning of a child pursuant to the **Children's Act, Chapter 141 Laws of Kenya** and did uphold that, the agreed age for one to qualify to be a minor is 17 years and below. The same is adopted under the Sexual Offences Act No. 3 of 2006 as per the provisions under Section 2 on the general applications.

48. The court relied on the case of **JWA –Vs- Republic, Court of Appeal at Nairobi in Criminal Appeal No. 100 of 2013** .

49. Tus the trial court was correct in upholding that the two children were aged 7 years and came within the ambit of Section 8 of the Sexual Offences Act No. 3 of 2006, and so they were below the age of 18 years old.

50. In making this determination, the trial court separated the two children since their complaints were out of different circumstances even

though the same Appellant was alleged to have been culpable.

51. In regard to M.M(1), it was her testimony that Appellant summoned her before inserting his thing for urinating on her and after finishing, promised to give her mangoes. In the treatment notes, it was said that she had her hymen absent but with no other significant findings.

52. In cross examination of the child, Appellant wanted to know whether he went to their homes of which the child was positive. He also wanted to know whether he had his genitals on her of which the child was positive.

53. In his defence, DW1 also did not discount the evidence by this child but only claimed that the medical officer had been bribed, something the trial court considered at the time his defence was relooked at. According to the trial court, it was clear from the deduction thereon that the child was truthful.

54. The trial court was guided by Section 124 of the Evidence Act which provides that;

> ***"….Notwithstanding the provisions of Section 19 of 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 Appellant 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 Appellant person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

55. In making its determination the trial court needed to give its reasons for such a belief. It was seized of the following facts;

a) PW1 stated that Appellant had called her into a house and asked her to lower her pant before proceeding to have sexual intercourse with her, something that the latter did not expressly deny.

b) PW1 was taken to the hospital and even though it was a few days after the incident, but still the medical officer noted that she had hymen absent, of which finding has not been disputed.

c) PW1 informed her grandmother (PW3) whom she lives with what the Appellant had done to her, and in court she gave a similar evidence in a more cogent and consistent manner in Kikamba language which was well translated with Appellant not disputing.

d) Appellant in his defence also did not deny the evidence of the child or that he did not know the child but made allegations of being arrested for a debt which did not again cloud the evidence as presented by the Complainant.

56. It was therefore satisfied the threshold of truth as envisaged under Section 124 of the Evidence Act, Chapter 80 Laws of Kenya which was also made better by the corroboration. The trial court was therefore of the considered view that the penetration was proved beyond reasonable doubt. This court has going though same evidence and has no doubt that the trial court as correct in its findings.

57. In regard to M.M(2), it was her testimony that Appellant summoned her while they were playing a game of hide and seek. They were hiding with Appellant in the kitchen. Appellant asked Kituva to check on who was coming. He proceeded to have sexual intercourse with her in what she described in Kikamba language ***"kala kaindu kake kaukumala"*** translated to mean he inserted his thing for urinating into hers.

58. In cross examination, Appellant wanted to know where they were and whether he did it, which clearly does not challenge the candid evidence of the Complainant herein. In medical examination, it was revealed that the child had her hymen torn, lacerations on her vaginal walls which were also red. She also had a lot of discharge.

59. In the case of **Allan Red Path 1962 Criminal Appeal 319** it was held that in sexual offence, the distressed condition of a Complainant is capable of amounting to corroboration. In this case, the fact that the Complainant herein had exhibited lacerations on her vaginal walls and was walking with a limp was enough corroboration.

60. The trial court was of the considered view that the child was penetrated from the *prima facie* findings noted. In determination of her truthfulness, the trial court observed the following;

i) PW2 narrated to this court that she was penetrated and clearly the findings supported that fact.

ii) PW3 saw the Complainant who was walking with a limp while coming from the school. It was revealed that indeed she had laceration on her vaginal walls which were also red. It supported that observation since the child had been breached at a tender age.

iii) PW5 saw the child as the investigations officer and also noted that indeed the child had her genitals interfered with. She also saw that the child was emitting discharge from her genitals, which further confirms infection.

iv) PW6 examined the Complainant and noted that she also had numerous pus cells which indicated that she had sustained sexually transmitted infection, and Appellant analysis also confirmed the presence of pus cells. It corroborates penetration.

61. The trial court was of the considered view that the child was truthful and her words stood out.

62. It was also notable form her demeanor as observed by the trial court that the child was stable in her recollection of the facts herein. She gave a testimony with a lot of precision which could only be described as cogent and consistent. The trial court therefore found that the Complainant was had carnal knowledge of. This court after exhaustive review of evidence herein agrees with trial court findings.

63. In regard to M.M(1) it was her testimony that Appellant summoned her into the house before defiling her. It was evidenced that Appellant was working at the home of the Complainant herein, a fact that he had confirmed in his defence. It was clear from his defence that he knew the Complainant herein and so there was no error apparent.

64. In regard to M.M(2), it was her testimony that they were playing a game of hide and seek of which Appellant was also part of. They went hiding into the kitchen where Appellant proceeded to defile her. It suffices to note that Appellant did not deny or challenge that assertion which had been supported by the medical findings. The trial court did not find any error in his identification as the culprit.

65. Appellant in his defence contended that he was arrested for going to demand for his money amounting to Kshs. 12,000/= having worked for the old woman for 4 months. The trial court did not know who he was referring to as the old woman, but for justice sake the trial court assumed that he was referring to PW3.

66. In his cross examination of this witness, Appellant did not allude to any money owing from this witness which made the claim an afterthought.

67. Appellant also in his defence contended that the medical officer was bribed with Kshs. 3,000/= to lie against him. It was not clear why Appellant was making such an allegation but still refusing to give details as to who had given the bribe. It was also not clear from his evidence where he was when the bribe was being given.

68. It was also not clear as to how he came to finding that it was Kshs. 3,000/=. It was clear that Appellant was just maligning the name of PW6 which demonstrated his wanting character.

69. The trial court cited the case of **Fred Wanjala –Vs- Republic, Criminal Appeal No. 61 of 1984**, where the court of appeal held that;

> ***"It is not mandatory to obtain medical evidence in a case of defilement or that matter a sexual offence."***

70. The claim by the Appellant was therefore an afterthought which did not cloud the trial court's judgement. Appellant in his defence did not expressly deny that the children had been defiled. He also did not deny that he was mentioned as the person who had done so, and this court is at loss on what defence he was advancing.

71. The Appellant had not alluded to any grudge by the children to warrant this case to be fabricated on him.

72. In his claim on the old lady, he did not claim that the former had declined to pay him money. It was also clear from the evidence on record that Appellant was arrested after the date of the incidents which these two children had recounted.

73. In a nutshell the trial court found that the defense was a mere denial, full of half-truths and an afterthought. The identification of the Appellant was flawless and of which the trial court agreed with the prosecution.

74. The court finds that the appeal has no merit and proceeds to make the following orders;

> **i. Appeal is dismissed, conviction is affirmed and sentence confirmed.**

SIGNED, DATED AND DELIVERED THIS 31ST DAY OF MAY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE