



IN THE HIGH COURT OF KENYA AT KAKAMEGA

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 169 OF 2018

BETWEEN

EM APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. M. L. Nabibya dated 7th November 2018 at the Magistrates Court at Hamisi in Criminal Case No. 720 of 2017 (S.O. No. 54 of 2017))

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 1st August 2017 and 30th November 2017 in [particulars withheld] Sub-location within Vihiga County intentionally and unlawfully caused his penis to penetrate the vagina of RA, a girl child aged 6 years old.
2. The appellant was sentenced to serve life imprisonment and now appeals against the conviction and sentence. Before I consider the grounds of appeal it is important to recall the duty of the first appellate court is to review the entire evidence on record and reach an independent decision whether to uphold the conviction bearing in mind that it neither heard or saw what the witnesses testified (see **Njoroge v Republic [1987] KLR 19**). In order to proceed with this duty, I shall set out the evidence emerging before the trial court.
3. After a *voir dire*, the child, PW 1, gave an unsworn statement where she stated as follows:

Last year at night my dad did bad manners to me. I was with him alone. He lifted my dress and panty. He removed his belt and shirt. He defiled me. I saw his “dudu” which he put on where I pass urine from. He had held me by the hand, throwing me on the bed. I bled as a result, it was also very painful. He didn’t do it that day alone. When he goes to work, I used to remain alone. I was schooling. I was taken to hospital by [PW 2], my aunt.”
4. The aunt to the child, PW 2, recalled that on 2nd December 2017, she was informed by her mother that PW 1 was not feeling well. The child was staying with her father, the appellant, who is the brother to PW 2. She proceeded to the home and took the child to the hospital. After examining the PW 1, the doctor informed her that the child could have been defiled by several people including the appellant.
5. The Clinical Officer who examined the child, PW 4, testified that PW 1, who was brought to hospital on 2nd December 2017, complaining of lower abdominal pain. On examination he found that the child’s eyes and hands were pale, she had low blood levels and was dehydrated. The child also had a high temperature. In his view it was abnormal for a child to have lower abdominal pain. He examined the vagina which could accommodate two fingers meaning hymen was broken. The uterus was tender on palpitation and her panty contained pus at the time. Urinalysis showed few pus cells and she had a urinary tract infection. PW 1 told him that she had been defiled several times but could not report. According to PW 4, PW 1 named the appellant as one of perpetrators. She told him he used to defile her while drunk and her father’s friend would also defile her while the father was away. He concluded from the history and examination that the child had suffered serial defilement.
6. The investigating officer, PW 3, testified that on 2nd December 2017, PW 2 brought PW 1 to the police station to report case of defilement. He told the court that the child informed him that he used to stay with the father and that he had defiled her. On several occasions, and that he had threatened to throw her out if she raised alarm. He issued the P3 medical report form for medical examination. PW 3 confirmed that the appellant and his wife separated and that PW 1 was living with the appellant.
7. In his sworn defense, the appellant denied the offence. He stated that he always took care of the child and that before he was arrested, the child had been sick and he had told the grandmother and PW 2 to take the child and provide medication. He told the court he was arrested as a result of a grudge with PW 2. He accused PW 1 of lying and creating her own story. The appellant’s witness, DW 2, also supported the

appellants case, and stated that the appellant could not have defiled PW 1 as he used to take care of the child.

8. In his petition of appeal and written submissions, the appellant contended that the prosecution failed to prove penetration and that he was medically linked to the offence. He stated that the age of the child was not proved and that the evidence relied upon was uncorroborated. He also stated that his defence was not given fair consideration. In response, the respondent submitted that the prosecution all the elements of the offence. In order to prove defilement, the prosecution must establish that the accused did an act that caused penetration to a child.

9. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. “Penetration” under **section 2** of the **Act** means, “*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*”

10. In this case, the prosecution relied on the unsworn statement of PW 1, a child. Under the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, the court may convict an accused person in a sexual offence in the absence of corroborating evidence if for reasons to be recorded the court believes he child to be telling the truth. In this case, the trial magistrate believed the child was telling the truth and expressed the following view: -

I had the opportunity to look at the child while she gave her testimony. Though young, she was able to eloquently express herself. She understood the need to state the truth and was examined by court during voir dire examination. I am therefore convinced that I should believe her story, which I hereby do, the same was corroborated by that of the Clinical officer who examined her with PW2 confirming that she used to stay with the dad alone, a person she knew very well.

11. In my view, the evidence of the child, which I have outlined elsewhere in the judgment, and the observation of the trial magistrate are sufficient to support the conviction. However, there is further corroborative evidence to support the testimony of PW 1. The testimony of PW 4, is in my view, independent. PW 1 narrated to him what happened to her. He was a stranger and on medical examination he confirmed that indeed there was evidence of penetration. When cross examined by the appellant on this issue, PW 4 stated as follows:

The child was a minor, I am not engaged in soliciting for patients, I don't investigate cases. It was a serial defilement. She was brought to hospital because she was sick, she had back ache and lower abdominal pain, during the treatment is when she opened up and the other problem discovered. Probably she knew all what was happening though the pain staying with her. She was even using words that were more than her age. She wasn't a virgin, there was no blood, there were no tears. There was a foul smelling discharge.

12. The appellant submitted that he should have undergone a DNA test to confirm that he committed the offence. The appellant relied on the provisions of **section 36(1)** of the **Sexual Offences Act** which stipulates as follows:

Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

13. The power of the court to order a DNA or other medical evidence is discretionary. The Court of Appeal has upheld that the principle that the absence of medical evidence is not a decisive as the fact penetration can be proved by oral testimony of the victim or by other circumstantial evidence (see **Kassim Ali v Republic, MSA CR APP NO. 84 of 2005 [2006]eKLR** and **Dennis Osoro Obiri v Republic NRB CR APP NO. 279 of 2011 [2014]eKLR**). Likewise, and as regards medical examination of an accused, the Court of Appeal in **Geoffrey Kioji v Republic, NYR CR. APP. NO. 270 of 2010 (UR)**, observed as follows:

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 there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to 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.

14. From the foregoing, the question of the appellant's guilt or otherwise was to be resolved by whether the trial magistrate believed PW 1's testimony and other corroborating evidence as I have shown elsewhere in this judgment. In **Fappyton Mutuku Ngui v Republic NRB CA Criminal Appeal No. 32 of 2013 [2014] eKLR** while considering a similar issue of medical examination in a defilement case, the Court of Appeal stated:

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 PW2's testimony which was trustworthy as to the person who had defiled her.

15. In his defence, the appellant stated that he was being framed by PW 2 and that the child was not intelligent and could say anything that could implicate him. I reject that defence because PW 2 only came to know of the child's situation when she took the child to the hospital following complaints of a back ache and further the child did not tell anyone of her ordeal as she was in fear and could only tell her doctor when she was being examined. DW 2 implied that the examination was falsified because as she was chased away as the child was being examined. This issue was not put to PW 2 in cross examination. Likewise, it was not put to the Investigating Officer, PW 3.

16. The totality of the evidence is that the prosecution proved that it is the appellant who committed the act of penetration. In the circumstances, I dismiss the appellant's contention that he ought to have been charged with the other named perpetrators with the offence of gang defilement.

17. The appellant submitted that the age of the child was not proved. In his defence, he did not dispute the fact that PW 1 was his child. He did not suggest that she was an adult. At any rate, PW 1's birth certificate was produced and it showed that she was born on 28th October 2011. She was therefore 6 years old at the time the offence was committed. The prosecution therefore proved that PW 1 was a child.

18. As regards the sentence, the mandatory minimum sentence for a child under 11 years under **section 2** of the *Sexual Offences Act* is life imprisonment. I am aware that the Court of Appeal has declared the mandatory minimum sentences under the *Sexual Offences Act* unconstitutional and in similar cases has reduced the life sentence (see *BW v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019]eKLR*, *Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR* and in *Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014*). I therefore quash the sentence of life imprisonment and substitute it with a sentence of 35 years' imprisonment.

19. For the reasons aforesaid, I affirm the conviction but allow the appeal only to the extent that I quash the sentence of life imprisonment and substitute it with the sentence of 35 years' imprisonment.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT KAKAMEGA THIS 26th day of SEPTEMBER 2019.

W. MUSYOKA

JUDGE

Appellant in person.

Ms Ombega, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.