REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO 67 OF 2019

DANIEL ONDIEKI KIBAGENDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **Daniel Ondieki Kibagendi**, the appellant herein, had been charged, before the Kisii Chief Magistrate's Court in Criminal Case No. 35 of 2019, with two counts of defilement.

Count 1 **Defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006**.

The particulars were that the accused on the night of 15th and 16th March 2019 within Kisii County, intentionally and unlawfully caused his penis to penetrate the vagina of MNS a child aged 8 years.

ALTERNATIVE CHARGE

Indecent act contrary to section 11 (1) of the Sexual Offences Act no. 3 of 2006

The particulars being that the accused on the night of 15th and 16th March 2019 within Kisii County, intentionally and unlawfully did commit an indecent act by rubbing his penis against the vagina of MNS a child aged 8 years.

Count 2 **Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006.**

On the night of 15th and 16th March 2019 within Kisii county, intentionally and unlawfully caused his penis to penetrate the vagina of CMG a child aged 12 years.

ALTERNATIVE CHARGE

Indecent act contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006

The particulars were that on the night of 15th and 16th March 2019 within Kisii County, intentionally and unlawfully did commit an indecent act by rubbing his penis against the vagina of CMG a child aged 12 years.

2. The appellant was tried, convicted and sentenced accordingly.Being dissatisfied with the conviction and sentence to serve life imprisonment, the Appellant lodged an appeal vide a petition of appeal filed on 20th July 2018. His appeal is on the grounds that the prosecution did not prove their case beyond reasonable doubt and his defense was not considered. The appellant also appealed against sentence.

3. At the hearing of the appeal the appellant relied on his written submissions. In his submissions he contends that the age of the minor was not proved to the required standard and that no age assessment was carried out. He further contends that the charge sheet was defective as it did not indicate the time of the offence. He also submitted that medical evidence did not prove penetration. He also submitted that the prosecution presented contradicting evidence as to where the offence took place. He also submitted that according to the P3 form the offence occurred between 15th and 16th March 2019 while Pw1 testified that it occurred on 15th March 2019.

4. The appeal was opposed by the prosecution. Senior State Counsel, Mr. Otieno, submitted that the appellant was a person known to the complainants and that it was not the 1st time they were being defiled by the appellant. That Pw1 and Pw2 corroborated each other's evidence

as the offence was committed on the same day at the same time. He contends that the medical evidence confirmed that the two victims had been defiled. He submitted further that he was aware that the mandatory life sentence had been declared unconstitutional and asked the court to consider an appropriate sentence.

5. Being the first appellate court it is my duty *to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at my own independent conclusions* (See ***Okeno vs. Republic [1972] EA 32***). *The prosecution called 6 witnesses to prove its case. MN testified as Pw1, CM Pw2, SM Pw3, GK Pw4, JK Pw5 and JMN Pw6.*

6. The trial court after conducting a voire dire examination on Pw1 found that she could give sworn testimony. MN recalled that on 15th March 2019 she was going to the Riraki River with Pw2. The accused came and instructed them to "toa panty". Pw1 complied and the accused lied on top of her body and did bad things to her which she explained to mean "aliniwekea chuchu kwa kitu yangu". She told court that she felt pain and that the appellant also did the same to Pw2. She told her mother and her siblings about the ordeal. She was taken to hospital and the chief reported the matter to the police. She testified that she had seen the accused person thrice and that the appellant had defiled her. Pw2 recalled that on 15th March 2019 they had gone to the appellant's house who instructed them to get firewood so that he could cook. She testified that the appellant removed her pant and that of Pw1 and did bad things to them. She testified that "He used his chuchu. He placed it on my private parts 'kitu ya msichana' points at the private section. I did not feel anything. He inserted in my vagina" She testified further that she left went home and told her aunt. It was the first time she met the appellant but knew him as Kibagendi. On cross examination she testified that the accused took them from the river, and they took some water to the pastor before the appellant gave them money to buy mandazi.

7. Pw3 testified that Pw1 is her daughter aged 8 years. She recalled that on the material day she met the child crying. Pw1 told her that the appellant had done bad things to her. She informed the chief who arrested the appellant. Pw4 testified that on 15th March 2019 he sent Pw2 to the river but she came back crying and told him that the appellant called her bought her a mandazi, took her to his house and defiled her. Pw4 also testified that the appellant is his brother.

8. Pw5 testified that on 17th March 2019 he was informed by Corporal Peris that a complaint had been made against the appellant on a defilement case. He went to the assistant chief and found that the appellant who was suspected of defiling Pw1 and Pw2. He conducted his investigations which included taking statements from the Pw1 and Pw2 and also took them for examination at Marani hospital. His investigations revealed that the appellant defiled the girls on the nights between 15th and 16th March 2019. Pw5 testified on cross examination that the complainant in her statement said that they had slept at the appellant's place.

9. Pw6 testified that Pw1 had claims of alleged defilement by a person known to her. Upon examination Pw5 found that she had injuries, a broken hymen and pus cells in her vagina. The laboratory test revealed that she had pus cell in the urine and the pregnancy test turned negative. He came to the conclusion that Pw1 had been defiled. Pw2 had a broken hymen and was tested for pregnancy and HIV, both test were negative. Pw5 came to the conclusion that Pw2 too had been defiled.

10. The appellant gave a sworn statement. He testified that on the 12/3/2019 he had come home from Miranga to mourn a child who had died. He was home for 3 days. He was called at night and told that the chief was calling him. He accompanied the community policing members to the chief's office. They found the chief. There were 2 men and 2 women and 2 minors who were female. Two of his nephews had been chained. He was not told anything. He was arrested. The 2 were taken to Rioma Police Station and later to Kisii Police Station. In cross examination he stated he knew the 2 children PW1 & PW2 very well and that on 15 and 16 he did not see PW1 and Pw2. He was at his brother's place. He is the only one who slept at the home of the deceased.

11. The Appellant contends that the charge sheet was defective as it did not provide the exact date and time of the offence.After perusing the record I find that there was an unreconciled discrepancy as to the exact date when the alleged offence took place i.e on the night of 15th and 16th March as per the charge sheet and evidence of Pw5 or 15th March, 2019 as per the evidence of Pw1, Pw2, Pw3, Pw4 and Pw6. **Section 134** of the **Criminal Procedure Code** provides that:-

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

Section 214(2) of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** provides that *variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof*. I therefore find that the inclusion of a wrong date in the charge sheet was not a fatal defect no prejudice was occasioned to the appellant. Pw1, Pw2, Pw3, Pw4 and Pw6 all testified that the complainants were defiled on 15th March 2019.

12. I now turn to whether prosecution proved penetration a key ingredient in an offence for defilement. Section 8(1) of the Sexual offences Act which provides: "*A person who commits an act which causes penetration with a child is guilty of the offence termed defilement*."

13. For the prosecution to prove the offence of defilement they must establish that there was penetration, the age of the child and the accused must be positively identified. In this case Pw6 came to the conclusion that Pw1 and Pw2 had been defiled after physically examining them and entered into evidence the P3 forms as exhibit. According to the P3 Forms it was noted that both Pw1 and Pw2had no lacerations or injuries, they had a whitish discharge from the urethra. Pw5 also noted that the hymen of Pw1 and Pw2 were broken.

14. The appellant contends that in the absence of any other medical or physical evidence, a broken hymen is conclusive proof of penetration. I agree with the appellant that a broke hymen is not conclusive proof of penetration. In the case of **PKW vs. Republic [2012] eKLR** on the issue of the absence of a hymen the court of appeal observed:

Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge.That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen.Those who are, there are times when hymen is broken by factors other than sexual intercourse.These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen.See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769.

15. However, Pw1 gave clear testimony that the accused defiled her.She testified that the accused *"aliniwekea chuchu kwa kitu yangu"* and told the trial court that she felt pain. She also stated that this was the second time she was being defiled by the appellant. This is corroborated by evidence in the p3 form which notes that she had old debris of brown hymen as her hymen could not have freshly been broken. I have also considered the evidence of Pw2 who was also present when the offence was committed. Pw2 testified that the appellant removed her pant and that of Pw1 and did bad things to them. She described bad things as placing his *'chuchu'* on the private parts. Pw3 told court that he found Pw1 crying and she told her mother that the accused did bad things to her. Pw4 also testified that he found Pw2 crying and she explained that she had been defiled by the appellant. Given that the direct witnesses of the offence were minors this court must satisfy itself that PW1 and PW2were telling the truth. **Section 124** of the **Evidence Act** as amended by **Act No. 5 of 2003** and **Act No. 3 of 2006** provides as follows:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." (Emphasis added)

16. The trial magistrate conducted a *voire dire* examination to PW1 and was satisfied that Pw1 was intelligent enough to understand the meaning of an oath and directed that her evidence be taken under oath. Evidence of Pw1 and Pw2 remained unshaken even on cross examination. From the conduct of the complainants after the offence, I have no reason to believe that they were not being truthful.

17. The next question is whether the minors were able to identify the appellant as the perpetrator of the crime. Pw1 testified that the incident occurred during the day. Pw1 testified that the appellant was known to her as she had met him before. She told court that before the occurrences of the 15th March 2019, Pw2 had once taken her to the appellant's place who defiled her. Pw2 testified that the appellant usually calls them when they go to the river. Pw4 testified that Pw2 was his daughter and the accused his brother. In fact Pw2 testimony was that she knew the appellant person as Kibagendi. I find and hold that the appellant was indeed positively identified by Pw1 and Pw2 as the perpetrator of the crime. He was a person well known to PW1 & PW2, he was their relative.

18. The appellant attacked the prosecution evidence in his submissions claiming that he had a land dispute with his brother and had been framed for the offence. From the evidence before the trial court, the appellant is only related to Pw2 and Pw4. Pw3 and Pw1 are independent witnesses and I therefore do not find that the appellant was framed on the basis of a family dispute.

19. For the offence of defilement to be established it is mandatory that the complainant must be a child. The appellant contends that the age of the minor was not proved as the prosecution failed to produce an age assessment report. The age of the complainant is an in important aspect for the offence of defilement and also in sentencing. Pw3 who was the mother of Pw1testified that she was aged 8 years and Pw4, the father of Pw2, testified that Pw2 was born in 2006 which would make her 13 years at the time of the offence. According to the P3 forms Pw1 was found to be 8 years old while Pw2 12years old and therefore find that the prosecution established the age of Pw1 was 8 years old. Since it is not clear whether Pw2 was 12 or 13 years the benefit goes to the appellant and I find that Pw2 was 13. In the case of ***Francis Omuroni - Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000***the court arrived at the decision that there were various ways of roving the age of the child, it held that:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents

20. The trial court convicted the appellant on both counts. **Section 8(2)** of **the Sexual Offences Act,** under which the trial court had passed the sentence, provides that *"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".* The trial court having convicted the appellant on count 1 and 2 out to pronounce its self on the sentence for both count 1 and 2.

21. It was established that Pw1 was 8 years old and in accordance to **Section 8 (2)** of the **Sexual Offences Act** the appropriate sentence would be life imprisonment. Before making a determination in regard to sentencing on count 1, I have however considered that court of appeal decision in ***Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR***, where the court guided by the supreme court decision in ***Francis Karioko Muruatetu & another v Republic [2017] eKLR***held that:

In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by ***Section 8 (1) of the Sexual Offences Act****, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in* ***Francis Karioko Muruatetu & another – v- Republic (supra),*** *we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment.*

22. In regard to count 2, **section 8 (1) of the Sexual Offences Act** provides that a person who commits an offence of defilement with a child between theage of twelve and fifteen years is liable upon conviction to imprisonment for a termof not less than twenty years.

23. Having affirmed the conviction by the trial court on both Count 1 and count 2, I hereby quash the sentences imposed by the trial court and substitute them with the following sentences:

Count 1 – 30 year imprisonment from the date of sentence

Count 2 - 20 year imprisonment from the date of sentence

24. The sentences on counts 1 and 2 shall run concurrently. The appellant has a right of appeal within 14 days.

Dated, signed and delivered at Kisii this 24th day of October, 2019.

R. E. OUGO

JUDGE

In the presence of;

Daniel Ondieki Kibagendi In person

Mr. Otieno Senior State Counsel Office of the DPP

Ms. Rael Court clerk