REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 24 OF 2019

JACKSON OGWORA OBAGA.....APPELLANT

-VRS-

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. C. W. Waswa – RM Nyamira

dated and delivered on the 31st day of May 2019 in the original Nyamira

Chief Magistrate's Court Sexual Offence No. 67 of 2018}

JUDGEMENT

The appellant was charged with **defilement** contrary to **Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act.**

The particulars of the charge were that on 23rd and 24th December 2018 in Nyamira North Sub-county within Nyamira County, he unlawfully and intentionally caused the penetration of his penis into the vagina of OMG a child aged 7 years.

He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act whose particulars were that on the 23rd and 24th December 2018 in Nyamira North Sub-county within Nyamira County he intentionally and unlawfully touched the genital organ of OMG a chid aged 7 years with his genital organ namely penis.

The accused pleaded not guilty to the charges but upon considering and evaluating the evidence brought before him, the trial Magistrate found the appellant guilty of defilement, convicted him and sentenced him to thirty (30) years imprisonment. Being aggrieved the appellant preferred this appeal.

The gist of the appeal is that the appellant was not furnished with the statements of the prosecution witnesses and even the P3 Form; that his right to a fair trial was also violated as he was not afforded sufficient time to prepare his defence; that the trial Magistrate did not record the answers to all his questions and that his plea that his case go to another court was not heeded but was instead compelled to proceed with the trial against his wish.

The appeal proceeded by way of written as well as oral submissions. The appellant relied on written submissions in which he expounded the grounds in the petition. Learned prosecution Counsel Mr. Majale opposed the appeal and submitted that the evidence adduced by the prosecution was consistent and corroborative. He submitted that the appellant did not raise any objection when the prosecution indicated that it was ready to proceed; that for his submissions he was given a whole week to file the same but he did not do so and did not give any reasons and that therefore it was a misrepresentation for the appellant to allege that the trial court did not look at his submissions. Counsel further submitted that penetration was corroborated by medical evidence; that the age was proved by way of an age assessment which confirmed the complainant was between 7 and 8 years old and that although the law provides for a minimum sentence of life imprisonment the appellant was sentenced to thirty (30) years imprisonment. Counsel urged this court to uphold the conviction and sentence and dismiss the appeal.

As an appeal is in the nature of a re-trial this court has a duty to analyse and re-evaluate the evidence in the court below so as to arrive at its own independent conclusion bearing in mind that it did not see or hear the witnesses who gave evidence - **(see Okeno v Republic [1972] EA 32).**

The offence of defilement is created by **Section 8 (1) of the Sexual Offences Act** which states: -

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement." (Underlining mine).**

To sustain a conviction therefore it must be proved beyond reasonable doubt that the **victim is a child, that there was penetration** and t**hat the accused person before the court is the perpetrator.** It is my finding that much as the prosecution proved that the complainant in this case was a child and that the complainant was well known to her and hence there was no possibility of a mistaken identity, the core ingredient of the offence which is penetration was not proved. The **Sexual Offences Act** defines penetration as follows: -

> **"penetration"** means **the partial or complete insertion of the genital organ of a person into the genital organ of another person."**

It follows that to prove penetration there must be proof that the perpetrator of the offence inserted his genital organ into the genital organ of the victim be it partially or completely. In her testimony, the complainant is recorded as having stated that the appellant "**defiled"** her without describing what it is that he did that would give rise to the conclusion that he defiled her. The word defile which is attributed to her is a legal term which by itself does not establish the act of penetration as defined in the Act. Defilement is a technical/legal term whose definition the child would not be expected to have knowledge of. It is unlike the use of the words **"tabia mbaya"** often times used by children to describe what was done to them and which has over time been accepted by the courts. In this case it was encumbent upon the prosecution to prod the child to tell the court what exactly the perpetrator did to her and the trial Magistrate should then have recorded her exact words. In the case of **Muganga Chilejo Salha v Republic [2017] eKLR** the Court of Appeal while acknowledging the use of euphemisms by children when describing acts of sexual intercourse stated: -

> ***"Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a courtroom. If the trend in the decided cases is anything to go by, courts in this country have generated/accepted the use of euphemisms like,*** *"alinifanyia tabia mbaya",* **(IE v Republic, Kapenguria High Court Criminal Case No. 11 of 2016)** *"he pricked me with a thorn from the front part of this (sic) body."* **(Samuel Mwangi Kinyati v Republic, Nanyuki HC Criminal Appeal No. 48 of 2015),** *"he used his thing for peeing",* **(David Otieno Alex v Republic, Homa Bay HC Criminal Appeal No. 44 of 2015),** *"he inserted his "dudu" into my "mapaja"* **(Joses Kaburu v Republic, Meru HC Criminal Case No. 196 of 2016),** *"he used his munyunyu"* **(Thomas Alugha Ndegwa, Nairobi HC Criminal Appeal No. 116 of 2011)** ***as apt description of acts defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me" which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony.*** **See AM v Republic Voi HC Criminal Appeal No. 35 of 2014, EMM v Republic Mombasa HC Criminal Case No. 110 of 2015, among others.** ***Trial courts should record as nearly as possible what the child says happened to him or her." (emphasis added).***

In this case it is my finding that there is nothing in the evidence from which one can deduce that there was insertion of the appellant's genital organ into the genital organ of the complainant whether partially or completely and therefore penetration was not proved. This is more so given that the evidence of the other witnesses was contradictory and inconsistent. The complainant's mother seemed to suggest that she was defiled on 26th December which totally contradicted the complainant's testimony that she was defiled before Christmas. Javance Nyanaro (Pw2), the Chairman of Nyumba Kumi on his part seemed to suggest that the offence was committed on 27th December 2018 which was inconsistent with the evidence of the complainant's mother that she took her to hospital on 26th December 2018. To quote her words: -

> **"On 26/12/2018, I was heading home from work. A small child called AM told me that the accused had defiled my child O……I found O in the house…….. I examined O and saw that it was true. I took O to Ekerenyo hospital and then I went and reported at the police station. I first took O to the police station and also went to Ekerenyo Hospital."**

Whereas in court the complainant's mother alleged to have learnt about the defilement from her daughter AM what she told the investigating officer (Pw8) was totally different. Pw8 stated that she told him that she only got to know about it two days later after detecting a bad odour from the complainant. My finding is that the evidence of the complainant's mother was therefore not credible, trustworthy and reliable. The medical evidence cannot stand on its own to prove defilement when no evidence was adduced that the appellant inserted his genital organ into the genital organ of the complainant. Perhaps the case would have been saved had the prosecution called AM who it is alleged was present when the offence was committed and indeed this court is tempted to draw an adverse inference that her evidence would not have favoured the prosecution.

As for the alternative charge, there was no evidence that the appellant touched the complainant's vagina with his penis. The appeal is merited and it is allowed. Accordingly, the conviction is quashed and the sentence of thirty (30) years imprisonment is set aside and the appellant is to be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered in Nyamira this 28th day of November 2019.

E. N. MAINA

JUDGE