REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 63 OF 2017

From Original Conviction and Sentence by Hon. N. Idagwa R. M. in Nkubu Cr. Case No. 25 of 2016 Delivered on 6th June 2017

(CORAM: F. GIKONYO J)

BIDAN GITARI MBAYA ……..... APPELLANT

VERSUS

REPUBLIC …….....……...….. RESPONDENT

JUDGMENT

Charges

[1] This is an appeal from the judgment and sentence of Hon. N. Ndagwa R. M. in Nkubu Criminal Case No. 25 of 2016 delivered on 6th June 2017. The Appellant was charged with the offence of defilement contrary to Section (1) as read with Section 8(2) of the Sexual Offences Act, No. 3 of 2006. The particulars were that on 14th Day of October 2016 within Meru County the Appellant intentionally caused his penis to penetrate the vagina of J B M a child of 8 years. In the alternative the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars are that on the 14th Day of October 2016 within Meru County the Appellant intentionally and unlawfully touched the vagina of J B M a child aged 8years with his penis. Being dissatisfied by the trial court's findings he appeals against the conviction and sentence on the following grounds:

1. THAT the learned trial Magistrate's judgment is against and contrary to the evidence adduced.

2. THAT the learned trial Magistrate erred in law in reaching a judgment that was not supported by the findings of fact; a judgment that is contrary and against the findings of fact.

3. THAT the sentence is excessive in the circumstances.

4. THAT the learned trial Magistrate erred in law and fact in failing to consider and take into account the evidence of the Appellant.

5. THAT the learned trial Magistrate erred in law and fact in failing to hold that the offence was not proved to the required standards.

6. THAT the learned trial Magistrate erred in law and fact in totally disregarding the Appellant's evidence.

7. THAT the entire finding and judgment of the learned magistrate is bad and is against the law and also the evidence on record.

Appellant's submissions

[2] The Appellant submitted that there are three critical ingredients forming the offence of defilement as stated in the case of **Dominic KibetMwareng v. R [2013] eKLR** which are:

i. The age of the complainant;

ii. Proof of penetration; and

iii. Positive identification of the assailant

[3] According to him, the three ingredients were not proved beyond reasonable doubt. The Prosecution failed to prove that there was penetration of the genital organs of the complainant by the genital organs of the Appellant. During cross-examination, PW1 stated that when she examined the Complainant she had no injuries and confirmed that she was not a virgin at the time she examined her and that she could not ascertain when the hymen was damaged. That during examination in chief, PW3 was categorical that the Accused person did not remove his trouser when he allegedly laid on her for she only stated that the Accused removed her trouser and lay on her. However, the trial Magistrate recorded:

> *"The complainant said the perpetrator removed his trouser…he sat on her and lay one her..."*

He further averred that PW3 stated that a thing she had never seen before was inserted in her genitals. Then the trial Magistrate erroneously concluded that the thing that was inserted into the Complainant's genitals was his penis. Consequently, the trial Magistrate's findings were not based on any evidence on record for the trial court misapprehended PW3's evidence and introduced some extraneous matters. Thus, the court made a finding that was not supported by any evidence on record.

[4] The prosecution did not oppose the appeal and based their concession on the fact that the age of the appellant was not properly assessed.

DETERMINATION

[5] The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal may be collapsed into three grounds;

> 1. ***That the learned trial Magistrate erred in law and fact in failing to hold that the offence was not proved to the required standards taking into consideration the evidence adduced;***
>
> ***2. That the entire finding and judgment of the learned Magistrate is bad and is against the law and also against the evidence on record; and***
>
> ***3. That the sentence is excessive in the circumstances.***

[6] This being first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses. See **KIILU & ANOTHER vs. REPUBLIC [2005]1 KLR 174**where the Court of Appeal stated thus;

> ***1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***2. 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 findings and 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.***

In doing so, I am aware that there is no any particular prescribed method of re-assessing evidence. Nonetheless, mere rehashing of the evidence as was recorded will not pass for a good style. Of great significance, therefore, is for the appellate court to employ a style imbued with judicious emphasis, an eye for symmetry or balance and an ear for subtleties of the evidence so as not to miss the grace and power of the testimony of witnesses and the law applicable thereto. Such style also insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. And ultimately, the court should, in absolute clarity and directness, make its overall impression of the evidence adduced after placing it upon the scales of the law. I shall so proceed.

Elements of offence of defilement

[7] For a person to be convicted for defilement, three key elements must be proved to the required standard, to wit: the age of the Complainant, penetration and positive identification of the assailant. See the case of ***Charles WamukoyaKarani Vs. Republic, Criminal Appeal No. 72 of 2013*** **that:**

> *"**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

I will proceed to establish whether the prosecution proved its case beyond reasonable doubt.

Age of child

[8] The Complainant in her testimony stated that she was in class two at [Particulars withheld] School but did not know her birthday. However, the evidence available show that she was a girl aged 8 years old at the time of the defilement. The P3 form so indicates. The evidence show that the Complainant was born on 23rd July 2009. Therefore, the Complainant is a child.

Penetration

[9] According to Section 2 (1) of the Sexual Offences Act, penetration;

> ***"…means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"***

And, in accordance with Section 8 (1) of the Sexual Offence Act:

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

[10] The Complainant stated that the Appellant did bad things to her while they were outside and when she wascoming out of the toilet. The graphic description of the act was recorded by the trial court in this manner:-

> ***He did bad thongs to me here down here where I use to urinate…He removed my trouser and underwear. He did not remove his trouser he sat on me. I was down he lay on top of me. I could not see what he used to do bad things to me. I cried…covered my mouth using his hand…''***

I note that the complainant told the court that the Appellant did not remove his trouser but sat on her as she was down and he lay on top of her. She also stated that she could not see what he used to do bad things to her.At this point I should dispel one misconceived notion. A male specie could remove his penis through the opening provided in a trouser such as the zip and have sexual intercourse. Therefore, the fact that he did not remove his trousers alone does not mean he did not sexual contact with the child. Having stated that, PW1, clinical officer at Kanyakine Hospital said that the fact that hymen was torn and there was blood oozing from the hymen was suggestive of penetrative sexual intercourse. The complainant also told the court that she criedwhen the Appellant penetrated her genitalia but the Appellant covered her mouth with her hands and told her that if she said what he had done to her he would throw her into the water. She stated that he did not see the thing he used to do bad things on her but she saw him remove something from his pocket. She does not know what he inserted in her urinating thing for she had never seen that kind of thing before.I must admit that this case presents a difficult scenario. There is medical evidence that the complainant had injuries to her genitalia; the hymen was torn and was bleeding profusely. But, it is not clear whether the Appellant inserted his penis or some other part of the body or foreign object into the girl's genitalia.PW1 stated that certain tests to wit urinalysis and swab were not done due to the bleeding from the torn hymen. I believe such further tests would have clearly revealed whether the penetration was as a result of sexual assault or by some other part of the body or crude item. As such, the narrow definition of penetration provided in section 2 of the Sexual Offences Act recognizes penetration to be only:-

> ***…the partial or complete insertion <u>of the genital organs</u> of a person into the genital organs of another person [Underlining mine for emphasis]***

This brings me to another thought: could this be a case of indecent act with a child?

> **Indecent act with a child**

[11] In accordance with the interpretation section 2 of the Sexual Offences Act:-

> ***"indecent act" means an unlawful intentional act which causes(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration. (b) exposure or display of any phornographic material to any person against his or her will***;

There is no doubt that the Appellant caused intrusion into the genitalia of the complainant and medical evidence by PW1 supported that fact. The evidence of the complainant was that the Appellant- a person he knew well- did bad things to her urinating thing. She told her mother about it. Her mother reported the matter to the chief who advised her not to wash the girl for this was a case of defilement. Results of medical examination showed her genitalia was inquired and the doctor opined it was suggestive of forceful sexual penetration. The evidence of Jerald Mutwiri, the assistant chief of Kaaria location shows that the maize plantation where the act is said to have occurred was disturbed. The Appellant and his witness DW2 confirmed that they were at home with joy on 14.10.2016. There is every indication that these were the only two persons with the complainant on the material day. The evidence adduced by the prosecution witnesses leaves no doubt that the Appellant is the one who caused the intrusion into the genitalia of the complainant.

Identification

[12] The evidence of the complainant as I have stated identified the Appellant as the person who did bad things to her genitalia. She knows him well for he stays at their home and helps his father look for animal feed. Her evidence thereto was not controverted. I am aware of Section 124 of the Evidence Act on evidence of children, as is the case is here. The section states that:

> ***Notwithstanding the provisions of section 19 of the 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 accused 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 accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***[Emphasis added]

Accordingly, the evidence of the complainant is credible and was not controverted. It shows that it was the Appellant who caused the damage to her genitalia. The trial magistrate who recorded her evidence believed her. I see nothing in the proceedings which may cast any doubt on her evidence. Allegation by the Appellant that he had been framed or that the complainant was told by her mother on what to tell the court was not substantiated. Accordingly, the alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act has been proved. I hereby convict the Appellant for the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act which provides as follows:-

> ***11. Indecent act with child or adult***
>
> ***(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.***

Sentence

[13] Given the penalty for the offence of committing an indecent act with a child, and taking onto account that the Appellant is to be treated as first offender, I hereby sentence him to imprisonment for a term of ten years. I note that the appellant has kept on raising issues of his age. On 17.10.2016, he told the trial court that he was 17 years of age. On 6.6.17 when the trial court sentenced him to life imprisonment, his ID card was produced in court and it showed that he was born on 3.12.1998.he was therefore an adult even at the time of taking plea. This court was also mislead that he was a minor and it granted him bond pending appeal. Even if he was a minor when he committed the offence, he is now an adult going by what he told court during plea-taking. I am aware that there seems to be a dichotomy in opinion on whether a minor who at the time of conviction has attained the age of majority can be sentence3d to custodial sentence of imprisonment in the ordinary jail. in this case, the Appellant has always been an adult. He shall therefore be imprisoned for ten years for the offence of indecent act with a child. I therefor set aside conviction for defilement and the life imprisonment imposed on him. In lieu thereof, he is convicted for committing an indecent act with a child contrary to section 11(1) of the Sexual offences Act and sentenced to serve a jail term of ten years. His appeal succeeds to the extent I have expressly stated above. It is so ordered.

Dated, signed and delivered in open court at Meru this 21st day of February 2018

F. GIKONYO

JUDGE

In the presence of:

M/s. Murithi for State

Mr. Carlpeters advocate for M/s. Mutinda advocate for Appellant

Appellant – present

F. GIKONYO

JUDGE