REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.28 OF 2017

J K M.....APPELLANT

-V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, **J K M** was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

The particulars of the charge are that on 8/10/2011, at [Particulars withheld] Village in Kipipiri, Nyandarua County, intentionally and unlawfully caused his genital organ (penis) to penetrate the vagina of M W M, a child aged 6 years.

In the alternative, the appellant faced a charge of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act, in that on 8/10/2011 at [Particulars withheld] Village, unlawfully and intentionally caused his genital organ to come into contact with the genital organ of M W M, a child aged 6 years.

The appellant was sentenced to life imprisonment. Being dissatisfied with the conviction and sentence, the appellant filed this appeal through the firm of Nderitu Komu dated 10/4/2014 citing the following grounds:

(1)That the court did not consider the appellant's mental status;

(2) That the court failed to consider the investigating officer's evidence;

(3) That the trial court erred by failing to find that the appellant had a mental disability which affected the conduct of his case;

(4) That the medical evidence did not support the charge;

(5) That the court failed to find that the complainant implicated one muiruri;

(6) That the charge was not proved to the required standard;

(7) That the sentence was excessive and harsh.

The appellant was represented by Mr. Nderitu who submitted that from the complainant's own testimony as to what transpired between her and the appellant, there was no proof of penetration; that the medical evidence did not corroborate the complainant's evidence and that if there was a defilement, it is not the appellant who committed the offence; that it is one Muiruri who tried to defile her but nothing was done to him; that the appellant was not given a fair chance to defend himself.

The appeal was opposed and Mr. Mong'are submitted that PW2 reported to her mother that the appellant had done *'tabia mbaya'* to her; her private parts were checked and found to have injuries and the medical report confirmed that there was penetration. As regards the defence, counsel submitted that the appellant did not offer any explanation.

This being the first appeal, it behoves this court to examine all the evidence tendered before the trial court afresh, analyze it and make its own findings see ***Okeno v Republic (1972) EA 32***.

In brief, the case before the trial court is as follows:

PW1, L M, the mother of the complainant left her at home on 8/10/2011 and went to church having left PW2 with other children. Later, her husband informed her that they had to rush home because PW2 was in trouble. On arriving at home and questioning PW2, she informed PW1 that K had done '*tabia mbaya'* (bad manners) to her.

On observing PW2's private parts, PW1saw some injuries to the private parts and some discharge. They reported at Kipipiri Police Station, were referred to Manunga Hospital and later to Ol Kalou Hospital and they reported back to the police station. The complainant's trouser and pants were handed over to the police. PW1 produced in court PW2's birth certificate which indicates that she was born on 12/10/2004. PW1 knew K who lived in her father's plot and sometimes did casual jobs for her. They had never disagreed.

PW2 M.W. underwent a *voire dire* examination after which the court found her fit to give unsworn evidence. She recalled that the appellant found her seated, told her that he would take her where the father was and she went with him. He then told her '*tufanye tabia'* while in the bush; he pulled her, made her lie down, removed her trouser but did not remove her pant but lay on her and that he did not do anything else to her. He gave her 10/= and told her to go home. She went home and informed her sister, PW3 (FW) who in turn told her uncle who then called her parents to come home. She went to police station and was taken to hospital while wearing the same clothes.

PW3 FW, a girl aged 11 years and a sister to PW2, gave unsworn evidence to the effect that she was left with her sister PW2 at home on 8/10/2011. They went to look for firewood; that K went to their gate and asked where their mother was and she informed him that she had gone to church and he left. They finished with firewood and on the way home, left PW2 on the road; that PW2 later came back home and informed her that K had taken her to the bush and done '*tabia mbovu'* PW3 informed Mama Flora, who called her father to come home, and PW2 was taken to hospital. PW2 knew K as he lived in the neighbourhood.

PW4 Susan Wairimu Kamau recalled that on 8/10/2011 about 4 to 5pm, PW2's father told her that he had got information that the child had been defiled. The child was taken to her house by both parents and they took the child to hospital then to police station. PW4 said that PW2 also told her what K had done to her. PW4 observed the child and noted a scratch to the private parts and her pants were stained.

PW5 Police Constable, Peter Mburu of Kipipiri Police Station said that on 8/10/2011, the complainant and her parents reported to the station that PW2 had been defiled. He issued her with a P3 form and he was shown treatment chits from Manunga Dispensary. PW5 rearrested accused from members of public on 9/10/2011. He took possession of the complainant's trousers and pants (P.Ex.1) for further investigations.

PW6 Dr. Peter Nginyo of Ol Kalou Hospital completed the P3 form for the complainant on 9/2/2011; he examined her and found the vulva to be tender with lacerations; traces of blood stains on vulva and the hymen was freshly perforated; the laboratory test revealed pus cells but no spermatozoa was found.

Accused gave an unsworn statement in his defence. All he told the court is that he had been sick and was treated and now he was well.

The appellant faced a charge of defilement under Section 8(1) of the Sexual Offences Act. To sustain a conviction, the prosecution had a duty to prove the following:

(1) Penetration;

(2) The age of the complainant;

(3) The identity of the perpetrator;

Section 2 of the Sexual Offences Act defines penetration as "***penetration***" means "***the partial or complete insertion of the genital organs of a person into the genital organs of another person***".

In the instant case, there is overwhelming evidence that there was penetration of the PW2's genital organs. PW1 and 2 checked the minor (PW2) on the same day of the incident and found injuries to the private parts. The said evidence was corroborated by the findings of PW6 who examined PW2 on the same day and found that there were lacerations to the vulva, tenderness and the hymen was freshly perforated and there was bleeding. The doctor concluded that there was penetration of PW2.

Under Section 8(1) of the Sexual Offences Act, penetration need not be complete, but can be partial. It is therefore follows that there would be no requirement that spermatozoa be found in the complainant because the penetration may have been incomplete.

PW2 is a child of tender age, about 7 years old. The birth certificate (P.Ex.5) that was produced in evidence she was born on 12/10/2004. By 8/10/2011 when this incident occurred, she was exactly 7 years of age. She described what occurred to her. She stated "***he pulled me, then lay me down. I was wearing a 'mufuto', trouser. He removed it. I was also wearing a panty. He did not remove my panty. He lay on top of me after he removed his pant. He never did anything else to me***." Apart from describing what was done to her as '*tabia mbaya*' or '*mbovu*' which is a term commonly used to refer to '*sex*', PW2 did not explain exactly what was done to her. However, in cross examination by the defence counsel, she said as follows:

Question: ***"Did K remove his 'gathugumi***'?" (meaning penis).

Answer: "***Yes***"

Question: "***Did he put it in yours***?"

Answer: "***Yes***"

This cross examination by the defence counsel clearly reveals that PW2 told the court that the appellant put his penis into her genitalia. This case is distinguishable from the cited authorities.

In ***Peter Ngari v Republic Cr.A.231/2010***, the complainant, who was a much bigger girl aged about 15 merely described the act that occurred to her as rape.

The court or prosecution had not enquired what she meant by rape. Further, there was no medical evidence to support the complaint's claim in that case. Similarly in ***Ben Maina Mwangi v Republic Cr.A.47/2001***, the court found that there was no evidence of defilement and the complainant who was a small girl did not say what may have happened to her after the appellant lay on her.

PW1 knew the appellant as K as he lived nearby and that she went with him because he said he was taking her where her father was. PW1 confirmed that the appellant lived in her father's plot and sometimes did casual jobs for her, PW3 corroborated this evidence too. This incident occurred during broad daylight. PW3 told the court that it is PW2 who reported to her what the appellant had done to her and PW3 in turn reported to her aunt and uncle who in turn reported to the complainant's parents. Identity was not an issue nor is there any reason why the three witnesses would frame the appellant.

The report of the incident was made to police on the same day. Under cross examination, PW2 maintained that it is K who did "*tabia mbaya*" to her and denied that it was Muiruri who had also tried to lure her. The trial court believed PW2 for her consistency and ability to distinguish incidents that were not interrelated and found that Section 124 of the Evidence Act was satisfied. Under the above Section, there is no requirement for corroboration in Sexual Offences provided the court believes the victim and gives reasons for it. I have no doubt in my mind and I agree with the trial court's finding that it is the appellant who defiled the complainant.

The appellant complains that no medical evidence linked him to the offence. As observed earlier, defilement is not necessarily proved by medical evidence because penetration may be partial or complete. In the case of ***Kassim Ali v Republic Cr.A.84/05***, the Court of Appeal held:

> ***"The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."***

In the instant case, there is overwhelming evidence that there was evidence of penetration of PW2's genital organ. PW2 immediately pointed at the appellant as the culprit. There was no reason for her to frame the appellant. She was truthful.

During cross examination of PW2, she was asked what Muiruri did to her and she was categorical that he did nothing to her but K did. PW2 never implicated Muiruri.

The appellant has also complained that the court should have taken into account the fact that he was mentally ill. The appellant was at all times of the trial represented by counsel. Counsel never brought it to the attention of the court that the appellant was mentally ill. If the appellant was mentally ill, the counsel should have noticed it and notified the court from the time of plea throughout the trial.

After the prosecution closed its case, on 7/2/2012, a report was presented to the court to the effect that accused was mentally unstable and was not able to proceed with the trial. The court made an order for committal of the appellant to Mathare Mental Hospital. The appellant reappeared in court on 12/3/2013 after a report was received that he was fit to proceed with the trial. I have seen the letter dated 8/2/2012 in which the Doctor recommended that the appellant was mentally unstable and then he had mental retardation, low IQ. The doctor did not recommend what treatment, if any, the appellant should have been accorded. The counsel on record did not plead insanity. If the court had noted any kind of inability for the appellant to understand the proceedings, he should have told the court and the court would have investigated.

In my view, the court cannot be blamed for not noticing the appellant's condition but counsel should have raised it if at all it was necessary. The appellant said nothing in his defence save that he had been mentally ill and was now well.

Having considered the evidence tendered in the trial court afresh, and the reasons given by the trial court, I have no doubt that it is the appellant who defiled the complainant (PW2) and the conviction was well founded.

However, it seems the appellant may have been incapable of knowing what he did and I will find him guilty but insane. I set aside the sentence of life imprisonment. He will be held at the president's pleasure under Section 166(2) of the Criminal Procedure Code.

Dated, Signed and Delivered at *NYAHURURU* this *12th* day of *February,* 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut - Prosecution Counsel

Mr. Soi - Court Assistant

Appellant - present

Mr. Nderitu - for appellant