REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO.26 OF 2017

JAPHETH INYANYA MUKHALULE............APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From original conviction and sentence in Sexual Offence Case

No.34 of 2016 of the Chief Magistrate's Court at Nyeri)

J U D G M E N T

The appellant **Japheth Inyanya Mukhalule** was charged with the offence of defilement **contrary to section 8(2)** of the Sexual Offences Act. In the alternative he was charged with the offence of Indecent Act with a child **contrary to section 11(1)** of the same Act.

It was alleged that on the 19th day of July 2016 at M Academy School, in Nyeri County within the Republic of Kenya, intentionally and unlawfully caused his genital organ namely penis to penetrate genital organ namely vagina of L N W a child aged 9 years.

The prosecution called 8 witnesses.

The appellant testified on oath and did not call any witnesses.

After a full trial the trial Magistrate in her judgment delivered on 2nd May 2017 found that the prosecution had proved its case beyond a reasonable doubt. She found the appellant guilty of the offence of defilement contrary to section 8(2) of the Sexual Offences Act and convicted him accordingly. Consequently, she sentenced him to imprisonment for life.

It is against this conviction and sentence that the appellant brings this appeal.

In his memorandum of appeal filed on 12th May 2017 the appellant set out four grounds of appeal: -

> 1. THAT the learned magistrate fell into error in affirming conviction and sentence in failing to find that the alleged penetration of PW1 was not proved as per the proviso of Section (2) of Sexual Offences Act.
>
> 2. THAT the trial magistrate equally fell into error in affirming conviction and sentence in failing to hold that the purported identification or recognition was doubtful and unsatisfactory and insufficient to form a basis of conviction.
>
> 3. THAT the learned magistrate erred in law and facts in convicting the appellant in failing to note that the prosecution failed to prove its case as required in law.

4. THAT the learned magistrate fell into error in failing to find that I had no burden to discharge a plausible explanation regarding the offence in question and hence my defence was credible and displaced the reliability of the prosecution's case.

Submissions by the Appellant

In his submissions the appellant relied on the written submissions he filed together with his Memorandum of Appeal.

On the 1st ground, he submitted that the prosecution failed to prove penetration as required by section 8(2) of the Sexual Offences Act. He produced in court the Post Rape Care Form and the P3 forms that were supplied to him by the prosecution- pointing out that the Post Rape Care Form bore no name of the victim, and secondly bore contradictory information to the P3.

He further submitted that there was no evidence of any penetration/sexual intercourse. That the child on being interrogated by various persons told them that *"a stone got into my wound"* as the explanation for walking with a limp. She also said she had stomach pains. He also submitted that there was no forensic evidence as to what the alleged 'white things' on the child's clothes could be nor any explanation for the delay in filing the P3 on 27.7.2016 when the offence was alleged to have been committed on 19.7.16. The P3 also indicated that there was no treatment prior to the filing of the P3 laying further doubt against the medical evidence.

On the 2nd ground the appellant submitted that the evidence of identification or recognition by the complainant was not satisfactory to found his conviction. The offence was alleged to have been committed on 19.7.16. The appellant was allegedly known to the victim. The complainant did not tell anyone – her grandfather told her to tell the head teacher. She was taken to head teacher on 22.7.2016, then her mother was told to report to the police. His submission is that if they had known all along he was indeed the culprit they ought to have done so at that earliest otherwise the evidence as to who committed the offence became doubtful –**see Peter Ochieng -Vs-Republic Criminal Appeal No.185 of 1987 Rv. Eria Sebwato 1960EA 174.**

On the 3rd ground the appellant submitted that prosecution failed to prove the case beyond a reasonable doubt. There was no evidence of penetration. That the child clearly explained that she was not walking properly because a stone had gotten into her wound.

The fourth ground related to his defence which he complained the trial magistrate had not taken into consideration. That the trial magistrate failed to give reasons for disbelieving his defence.

The state opposed the appeal through Ms. Jebet prosecuting counsel.

On the 1st ground, she relied on the evidence of the complainant and the fact that it is a teacher who noticed that the child was not walking properly. That her parents, grandparents testified and doctor established there was penetration, that the Post Rape Care form that was produced had a name, that the P3 was properly completed after the doctor had conducted an examination, and the hymen was found to be missing.

She submitted further that on identification the child at first did not tell the truth because she was fearful. That there was no evidence of a grudge with the family against the appellant.

Finally, on the 4th ground she submitted that the trial magistrate had considered and dismissed the appellant's statement of defence.

In addition, she submitted that the trial court believed the child and under section 124 of the Evidence Act was entitled to rely on the child's testimony.

In his rejoinder the appellant submitted that a certain 'mama Charity who was the person who had conducted investigations had not testified and that confirmed that the charges were made up against him.

The case for prosecution

The complainant **LNW** was 9 years old at the material time as per the certificate of birth serial /no.[particulars withheld] showing that the child was born on 18.10.2006. The trial magistrate conducted a voire dire examination and satisfied herself that the child was intelligent enough to understand the importance of telling the truth and giving evidence on oath. The child gave sworn testimony.

At the material time she was living at [Particulars withheld] with her mother and grandfather.

On 19th July 2016, after school, she went home. Then she and her cousin N went to buy milk. The appellant was the casual labourer at the place where they bought the milk. Upon buying the milk, N was told to take the milk home. She remained behind. The appellant told her to get into the house but she refused. The appellant then forced her into the house. While inside he told her to remove her clothes. She refused. He removed them, her panty and stockings. He then applied oil on his finger and inserted it in her *vagina*. He then applied on her *vagina*, slept on top of her and did tabia mbaya to her by inserting his urinating thing into her urinating thing. She felt pain and saw white things on her private parts, and a *white discharge* on her clothes He told her not to tell anyone.

She put on her clothes, went home and later went to her grandmother's and told her what Japheth had done to her. She testified that her grandmother later informed her grandfather. That Friday she was taken to the head teacher. She was taken to hospital at Endarasha, and her private parts examined. Her mother was advised to report to the police. The following day she was taken to hospital by her grandfather and her mother. She identified the appellant as the person who did tabia mbaya to her, stating further that he was a casual labourer at Mama Ndung'u's and he normally fed cattle.

On cross-examination the child told the court that she told her grandmother after the incident. That when they collected the milk she remained behind while her cousin went home. That she told the head teacher on 21st July 2016 because her grandfather told her to do so. She said she told her grandfather that when she was going to the shop a stone got into her wound. She again said she never told the head teacher anything. That her grandfather took her clothes to the police station.

PW2 W M M the complainant's grandfather testified that on 19th July 2016, he came home from the farm at 5.00pm. He then went to

deliver milk to a hotel at Charity shopping Centre. Upon his return he learnt from his daughter E W that the complainant and her cousin had gone to collect milk from the appellant. He knew the appellant as the casual employee at the local school. E W told him that she had punished the children for going to collect the milk from the appellant.

On 21st July 2016 around 5.00pm he met the head teacher at the complainant's school. This head teacher told him that he had noticed that the complainant was not walking normally. He asked the grandfather to investigate as he suspected that the child had been defiled.

When he got home he called the complainant and told her to run. He noticed that she was dragging her left foot. He then sent the child to someone by the name W to talk to the child and find out what was wrong. She rang him and told him what the child had told her.

He rang the head teacher and told him what the child had said. The head teacher also interrogated the child. They then went with the child's mother to report at Endarasha police post and Endarasha Health Centre and later to Nyeri Provincial General Hospital.

On cross-examination by the appellant he told the court that it is Charity Wangeci who interrogated the child and told him that the child told her that appellant had oiled his finger, inserted it into her vagina. He said he could not 'investigate' the child as she is female and he had to get someone else to do it. He denied framing the appellant.

PW3 JWM the mother to the complainant told the court that she was rang by PW2 on 21st July 2016 who is her father to tell her that her child LNW had been defiled. She went home the following day. They took the child to hospital Endarasha where she was treated, Post Rape Care and P3 were filled. She said the child was in pain in her private parts.

The appellant was arrested.

In cross-examination she said her father rang her on 21st July 2016at 7.00pm. She did not have the referral from Endarasha.

PW4 R W M was a teacher at the child's school in 2016. On 21st July 2016, a Wednesday, she reported to the head teacher she had a child who was not feeling well. She said she had noted that the complainant was walking uncomfortably, in pain and with her legs apart. On inquiry the child told her that she had fallen on a stone while going to the shop, and had been hurt on her stomach as well.

The following day the child was taken to hospital. She later learnt that the child had been defiled by the appellant.

On cross-examination she told the court that the child told her she had fallen on a stone.

PW5 T G W the head teacher at the child's school told the court how he received the report from PW4 the class teacher, and called PW2 the grandfather, who in turn told them he would take the child to one lady at Charity who would interrogate the child and establish the truth.

Later the PW2 had called to say the child had been defiled. The following day they met with the child. He said he interrogated the child. She was shy but she later told him "Japheth had sex with me".

That she told him in front of the teachers that Japheth inserted his penis but she did not bleed. Japheth was later arrested.

On cross-examination he said that the appellant had been in the school as a casual labourer for less than one month, that the child told him that she had stomach pains and when she was sent to shop she fell on a stone. Later she said she had been defiled by Japheth.

PW6 No.54118 PC Isaak Chibui from Endarasha Police post received the report on 22nd July 2016 from PW3 and the complainant that Japheth had lured the child into his house and defiled her when she went to collect milk. He booked the report, issued P3, and went and arrested the appellant.

PW7 Dr. Mavin Gathigo from Provincial General Hospital Nyeri produced the Post Rape Care and P3 on behalf of his colleagues. The only finding was that the hymen was perforated. He concluded that there was evidence of penetration.

On cross-examination he said the child had no other injuries.

PW8 No.234918 IP Amos Nyongesa the OCS Endarasha Police Post at the material time testified that on 22nd July 2016 he was on duty when he received the report. He sent PW6 to the school to arrest the appellant, recorded statements. He gathered that the minor had been walking abnormally for one month, and on 21st July 2016 the head teacher instructed the grandfather to the child to take her to hospital. He instead took her to some lady at the local market who interrogated the child who revealed that the appellant had defiled her.

Under cross -examination he said he did not know what transpired between the child and the lady at Charity market. That the he lady refused to testify or record a statement. He confirmed that when he spoke to the child, at first she told him she had fallen on a stone. He also confirmed that no statement was recorded from the complainant's cousin who had escorted her to buy milk. He also said that the child recorded her statement on 23rd July 2016. He also said that the grandfather sent the child to the lady at Charity shopping Centre because that lady would "safeguard the family secret".

In his defence the appellant made a sworn statement. He told the court that he and the complainant's grandfather were employed at the same school. That the school committee had entrusted the appellant with everything and the complainant's grandfather was not happy with that

and threatened to ensure he would be sacked. That the taking the child to some unknown person at Charity to examine her was part of the frame-up. That the child had denied being defiled, that he had only been at the school for barely a month and did not know the child; that it was the grandfather who collected milk from him but not the child. He said the perforation of the hymen could have been caused by other factors.

He did not call any witness.

In her judgment the trial magistrate found that the charge was proved against the appellant through the following. The complainant's age by way of a certificate of birth, that there was penetration from the evidence of the child and that of the doctor, that the appellant was identified by the child as the perpetrator by way of recognition, and that the case for the prosecution was consistent.

She found that the it was the teacher PW4 who noticed that the child was walking with her legs apart, and refused to play at break time. That this teacher then informed the head teacher who in turn informed the grandfather, who sent the child to a female family friend to whom the child opened up to the effect that the appellant who was a casual labourer had defiled her. The incident was then reported to the police, child escorted to hospital, defilement confirmed, appellant arrested and charged.

From the foregoing the issue to be determined is whether the prosecution proved the charge against the appellant beyond a reasonable doubt: -

a) Whether the evidence on record can support the conviction

b) Whether there was defilement

Analysis and Determination

This being a first appeal, my duty is to re -evaluate the evidence afresh, re asses it and draw my own conclusion always alive to the fact that I never saw or heard the witnesses in person. This has been stated in many cases and just to cite one;

Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR held that: -

"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

A reading of the entire record appears to present three distinct scenarios of the case.

Scenario one:

The child and her cousin went to collect milk. The appellant kept her behind and defiled her. She went home, reported to her grandmother same day of 19th July 2016, who informed her grandfather, who in turn took her to the head teacher, and told her to tell the head teacher what had happened. Then she was taken to hospital from where they were referred to the police.

Scenario 2:

PW4 the class teacher notices that the child is walking abnormally. It is not the first time she is noticing this. Enquires from the child who says she was hurt by a stone on her leg, and she has a stomach ache. Teacher reports to the head teacher, who calls the grandfather and informs him. Grandfather does his own testing, tells the child to run, she is dragging her left foot, sends the child to a certain lady at the local market, who interrogates child, and reports defilement.

Scenario 3:

According to investigating officer the child was not walking properly for a period of one month. On 21st July 2016 the head teacher instructed the grandfather to take her to hospital. The child is taken to the lady by name Mama Wangechi at Charity. She initially states the problem is that she fell on a stone but further investigations reveal the defilement.

The story of the stone hurting her leg runs through her testimony and it is unfortunate it was not interrogated further by the prosecution so as to get it out of the way. The child also said she told her grandmother the same day it is alleged she was defiled. What happened to this information? How then did it come to be that it is the teachers who found out what that there was a problem three days later, yet the child had already reported to her grandparents? Why was it necessary to send her to a stranger to interrogate her? Neither the grandmother nor Mama Wangechi testified to tell the court what the child told them. What is the purport of the investigating officer 's statement that the child was sent to Mama Wangechi for interrogation because she could keep the family secret? What family secret needed to be kept here?

These are questions that the trial magistrate did not interrogate yet the answers could have a bearing on the charges facing the appellant and whether or not they could affect the basis for a conviction.

Be that as it may the prosecution was expected to prove the age of the child, penetration as defined by s. 2 of the SOA and the identity of the perpetrator. In arriving at her findings the trial magistrate relied on the proviso to section 124 of the Evidence Act and the holding in the

Court of Appeal case **Geoffrey Kionji vs. Republic** Nyeri Criminal Appeal No. 270 of 2010 where the court is empowered to convict on the evidence of the victim of a sexual offence if the court is satisfied that the witness is telling the truth.

In her evidence in chief the child stated;

> '…At home I changed from my uniform to my home clothes. Thereafter we went to buy milk. I was with N my cousin. My grandfather was on the farm. N was told to take the milk home and I was left with Japheth who is a casual laborer where I normally buy milk. Japheth then told me to go into the house. I refused but he held me by force. He told me to remove my clothes, but I refused and he removed my clothes... my panty and stockings. He applied oil on his finger, and inserted in my vagina (witness points in between her legs). After applying the oil, he slept on top of me. He did tabia mbaya to me. He inserted his thing which he uses to urinate into my thing I use to urinate. I felt pain. I saw white things on my private parts. He then told me not to tell anyone. I saw white things also on my clothes. "

This testimony was not shaken on cross examination by the appellant. She confirmed that no one had told her to lie in court, that she knew the appellant before the incident She confirmed that she did not tell the class teacher anything about the incident and only told the head teacher when her grandfather told to do so.

This evidence was supported by the P3 and the PRC which indicated that the child's hymen was perforated. Granted, the perforation of the hymen could be from other causes apart from sexual assault. However, the child clearly described how the appellant first used his oiled finger, then his urinating thing, to penetrate her private parts. I noted that the testimony given by the child was consistent and credible despite the two other scenarios provided by the adults in this case.

It is correct that the testimony of the child did not require corroboration. The trial magistrate's finding that she was satisfied that the child was indeed telling the truth is founded on the clear and unchallenged testimony of the child. She also found that the appellant was not a complete stranger to the child as the evidence shows that her family was living in the same compound with the appellant at the material time.

I have considered the appellant's defence. The trial magistrate did not find it credible that the whole case was a frame-up. I did not find any basis for the claim that the charges were a frame up especially in the light of the clear evidence given by the minor as to the events that took place on the 19th July 2016.

In my view the trial magistrate correctly applied the principles set out in the proviso to section 124 of the Evidence Act in finding that the child's evidence did not require corroboration. Hence despite the apparent mix up in what the other witnesses stated, the child was very clear on what happened.

In conclusion and from the foregoing I find no reason to disturb the findings by the trial magistrate.

The appeal fails.

The conviction and sentence are sustained.

Dated, delivered and signed in open court this 16th Day of April 2018

Mumbua T. Matheka

Judge

In the presence of

Court Assistant Atelu

Appellant

Njue for state