REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NUMBER 66 OF 2017

BETWEEN

D G..APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an appeal against conviction and sentence in Meru Chief Magistrate's Court

Criminal Case number 67 of 2016(SO) in the judgment of Hon. E. Mbicha – SRM

delivered and dated 15th June, 2017)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Charges:

1. The Appellant herein DG was arraigned before the Chief Magistrate's Court at Meru on two counts of ***defilement*** under the ***Sexual Offences Act, No. 3 of 2006 (the Act).*** In Count I, the appellant was charged with ***Defilement Contrary to section 8(1) [as read with section 8(3)] of the Act***, The particulars thereof being that on the 5th day of February, 2015 at 10.00pm in Buuri District within Meru County, he intentionally caused his penis to penetrate the vagina of F.N, a child aged 12 years.

2. In the alternative to Count I, the appellant was charged with the offence of ***Indecent Act with a child contrary to section 11(1) of the Act***, the particulars thereof being that on the 5th day of February, 2015 in Buuri District within Meru county, he committed an indecent act to F.N, by causing his penis to come into contact with her vagina.

3. In Count II, the appellant was charged with ***Defilement contrary to section 8(1) [as read with section 8(2)] of the Act***, The particulars thereof being that on the 5th day of January, 2015 at when he appeared for plea on 29th September, 2015. As a result of the plea, the prosecution called 6 witnesses in an effort to prove in Buuri District within Meru County, he intentionally caused his penis to penetrate the vagina of W. K, a child aged 9 years.

4. The appellant also faced an alternative charge of committing an ***Indecent Act*** against the said W. K on the same day and in the same place by causing his penis to come into contact with the vagina of the 9 year old W. K.

5. The appellant pleaded not guilty to both main counts and the alternative counts the charges against the appellant. At the conclusion of the prosecution case, the appellant was found to have a case to answer and was placed on his defense. He gave sworn evidence in which he denied committing the offence. He alleged that the reason why he was charged is because his sons were bent on taking his land.

Judgment of the Trial Court

6. Upon careful analysis of all the evidence on record, the learned trial magistrate dismissed the case against the appellant with regard to count II. The appellant was however found guilty on the main charge in count I and accordingly convicted. He was sentenced to twenty (20) years imprisonment.

The Appeal

7. The appellant was dissatisfied with both conviction and sentence, hence this appeal. At the hearing of the appeal, the appellant brought in his amended supplementary petition of appeal, premised on the following grounds:-

> **1. That, the learned trial magistrate erred in matters of law and fact by failing to note that the prosecution case was not proved beyond reasonable doubts.**
>
> **2. That the learned trial magistrate erred in both law and fact by failing to note that there was no exhibit availed by the prosecution to back up the assertions by the prosecution that the appellant was actually the perpetrator of the alleged ordeal.**
>
> **3. That the evidence tendered by PW4 was inclusive. (sic)**
>
> **4. That, the learned trial magistrate erred in both law and fact by failing to note that the charge sheet is defective, it's not indicated the sex, age and nationality of the accused person.**
>
> **5. That the appellant's defense was rejected without giving cogent reasons.**

8. The appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

Duty of this Court

9. As the first appellate court this court is obliged to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. The court has however to make allowance for the fact that it does not have the opportunity to see and hear the witnesses who testified during the trial, and thus to be slow in reversing the judgment of the trial court if that judgment is based on the demeanor of witnesses whom the trial court saw and heard. For this proposition, see ***Okeno versus Republic [1972] EA 32.***

The Prosecution Case

10. From the evidence of the 6 prosecution witnesses, the prosecution case is as follows:- With regard to Count I, F. N who testified as PW2 stated that she and the appellant who is her grandfather had had clandestine sexual affair from 2014 when she went to make supper for the appellant on a date she could not remember. She further testified that on 5th February, 2015, the appellant went to the home and asked F.N's mother to let F. N go and prepare food for the appellant since the appellant's wife had gone to her maternal home. F.N was accompanied by her sister, W.K who is the complainant in Count II. After taking the supper, the appellant, F.N and W.K all slept on the appellant's bed, with F.N sleeping in the middle of the bed. In the night, the appellant undressed F. N and defiled her. The appellant promised to buy shoes for F.N in return for the sexual favour, and true to his word on the following day which was 6th February, 2015, the appellant bought the shoes for F. N. When F.N and W.K went home the next day, their mother, A.K who testified as PW3 sought to know who had bought the shoes for F.N. Though F.N told A.K that it was the appellant who had bought the shoes for her, she did not tell A.K the other side of the story.

11. F.N further testified that during the same month of February 2015, she and the appellant had another sexual encounter and this time, the appellant promised to buy her a new dress. F.N was alone with the appellant during this second encounter. On the third occasion during the same month of February, F. N was in the company of her sister W.K when they again shared a bed with the appellant, although the two girls had wanted to sleep on the sofa set. In the night the appellant undressed F.N and defiled her, after which he gave F.N Kshs.150/-. On the following day W.K spilled the beans about the appellant's sexual exploits with his granddaughter. When A.K got the information, she summoned the appellant's wife and some two elders to hear what F.N had to say. F. N told them all that had happened. Thereafter F. N was taken to Tutwa Police Station where a report of the incident was made.

12. PW4, number 33146, PC John Kiritu of Tutwa Police Station received the report of the incident from A.K on 7th February 2015. PC Kiritu, who was the investigating officer in the case interrogated both F.N and A.K when the latter told him she had become concerned when she found money in F.N's room. PC Kiritu issued A.K with P3 form and instructed A.K to take her daughters F.N and W.K to hospital. In the meantime, the appellant disappeared from home for a considerable period of time until 28th September, 2015 when he was arrested following a complaint by his (appellant's) daughter in-law that he was making sexual advances to her.

13. During her testimony, A.K told the court that F.N was 12 years old at the time of the alleged incident. She also stated that F. N and W.K used to go and work for the appellant whenever the appellant's wife was on a visit to her maternal home.

14. The medical examination was conducted by Kevin Chalo Mwania, PW5 and Dr. James Kisilu PW6. According to PW5 (Kevin) his examination of F.N on 7th February, 2015 revealed a broken hymen. He however testified that F.N had bathed and changed her clothes by the time she went to the hospital. Kevin also testified that F.N's genitalia was normal apart from the broken hymen. All examinations, according to Kevin, were negative.

15. Dr. James Kisilu, using the post rape care form earlier prepared by Kevin, also examined F. N. He testified that according to Dr. Wambugu, F. N was 12 years old as at the time of the alleged incident. From the physical examination, it was confirmed that F.N's hymen was broken though there was neither bleeding from nor laceration of the genitalia, nor was there any discharge, or infection on the vagina. When F.N was sent for age assessment in 2017, she was found to be between 15 and 16 years. The P3 form for F.N was produced as Pexh. 1 while her age assessment report was produced as Pexhibit 7.

The Defence Case

16. The appellant gave a very brief sworn statement and stated that though he knew and understood the charges facing him, he did not commit the alleged offences. He stated that the case was a frame-up because his sons wanted to take his land. The appellant did not call any witnesses.

The Submissions

17. At the hearing of the appeal, the appellant relied on his written submissions to the effect that the trial court erred when it found him guilty because the prosecution had not proved the case against him beyond any reasonable doubt.

18. Mr. Namiti, prosecution counsel submitted that the only issue for determination by this honourable court was whether there was penetration. He submitted that the fact that F.N's hymen was broken was sufficient evidence that there was penetration.

Issues, Analysis and Determination

19. Under section 8 of the Act, the offence of defilement shall be proved if there is penetration and further if it is proved that the victim is a child. The section also provides for deterrent punishments depending on the age of the child. This means therefore that the prosecution must prove the age of the child victim. Finally the prosecution in this case needed to prove that it was the appellant who caused the penetration to F.N.

20. Section 2 of the Act defines "**child**" as having "**the same meaning assigned thereto in *The Children Act*.**" ***The Children Act No. 8 of 2001*** defines "**child**" to mean "**any human being under the age of eighteen years**." Under the Act, "**penetration**" is defined to mean "**the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

21. With the above clarification, I now move to determine the issues in light of the five grounds of appeal raised by the appellant. With regard to the appellant's contention that the prosecution did not prove its case beyond reasonable doubt, I find and hold that this ground is baseless. There is, in my considered view sufficient evidence that on 5th February, 2015, the appellant went to his son's home where he found his daughter in-law A.K and asked her to let her daughter F.N go and prepare some food for him. A.K allowed her two daughters, F.N and W.K go and prepare some food for the appellant. There is also evidence from both F.N and W.K that the two of them spent the night at the appellant's house and in fact slept in the same bed, with F.N sleeping in between W.K and the appellant. There is further evidence from F.N that during the night, the appellant removed his trouser as well as the underpants and lay on F.N and defiled her. F.N told the court she did not make any noise because of the promises by appellant to buy shoes, and a dress for her and to give her money. The appellant accomplished all these promises and it was the presence of money in F.N's room and the fact that she had new shoes and a new dress that triggered the revelation of what had gone on between the appellant and F. N. Even if the only witness in this case had been F.N, this court would still have had no reason to doubt her evidence since the trial court made no adverse comments about her evidence. In fact my own analysis of F.N's evidence shows that she was a candid witness and gave details of what transpired between her and the appellant, first to her mother A. K and later to PC Kiritu and also to Kevin and Dr. Wambugu who both examined her. In this case, the proviso to ***section 124 of the Evidence Act, Cap 80 Laws of Kenya***, would come in handy.

22. Further, the evidence both by Kevin and Dr. Wambugu confirms that F.N's hymen was broken. At the time of examination, she was 12 years old. F.N's mother, A.K gave her age as 12 years at the time of the alleged incident. It is my humble view that young girls do not usually have broken hymens unless their private parts have been interfered with. Clearly the appellant had sexual intercourse with F.N not just once but on several occasions until his fortieth day came, thereby causing her hymen to break. So, all in all, the three ingredients for the offence of defilement, namely the age, the proof of penetration, and the fact that it was the appellant who caused the penetration leave no doubt in my mind that the prosecution proved its case against the appellant beyond any reasonable doubt.

23. Having reached the above conclusion, I find and hold that the second ground of appeal does not have any merit and must thus fail. Regarding ground number 5, the appellant has complained that his defense was rejected by the trial court without giving cogent reasons. In my considered view this complaint has no basis. The appellant's defense was a mere denial and his allegation that the case against him was a frame-up because his sons wanted to take his land is not supported by any evidence. If anything the record shows that his son Benson Bundi, who is father to both F.N and W.K was bent on frustrating the prosecution case against the appellant. The said Bundi had to be locked up in cells before availing the P3 forms. That is not the kind of son who was out to take his father's land and to plant a criminal case on him. In fact according to A.K, she was threatened with divorce if she insisted on pursuing her daughter's issues against the appellant. In effect, there was no defense to talk about, and even if the trial magistrate gave no reasons for not considering the appellant's defense, I am myself satisfied that the appellant's defense did not shake the prosecution's case against him in any material particular.

24. The last complaint by the appellant is that the charge sheet was defective as it did not indicate the sex, age and nationality of the appellant. It is my considered view that this complaint by the appellant, raised as it has been done at this late hour, has no legs to stand on. In any event, whatever errors, omissions or irregularities that may be in the charge sheet are curable under the provisions of ***section 382 of the Criminal Procedure Code, (The CPC), Cap 75 of the Laws of Kenya*** which provides as follows:-

> ***"382 Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings"***

25. In this case therefore, the appellant should have brought out his complaint touching on the charge sheet before commencement of the proceedings or in the very early stages of the hearing. I am of the humble view that this complaint is an afterthought.

26. Before I come to the end of this judgment, I would like to point out that because of the relationship between the appellant and F.N, the appellant should have been charged with incest ***contrary to section 20(1) of the Act***. Further, and because F.N was 12 years old, the appropriate sentence upon conviction is life imprisonment. In the circumstances, and by the powers conferred upon me as an appellate court by ***section 354 of the CPC***, I substitute the offence of defilement with one of incest contrary to ***section 20(1) of the Act***; and convict the appellant accordingly.

27. As regards sentence, and taking into account developments in the law touching on the death sentence and related long sentences, and the issue not having been raised by the prosecution, I do confirm the sentence of twenty (20) years imprisonment.

Conclusion

28. In summary, I find and hold that the appellant's appeal has no merit and accordingly dismiss the same in its entirety. The appellant still has a right of appeal to the Court of Appeal within 14 days from the date of this judgment.

Orders accordingly.

Judgment written and signed at Kapenguria

RUTH. N. SITATI

JUDGE

Judgment delivered, dated and countersigned at Meru on this 27th day of July, 2018.

ALFRED MABEYA

JUDGE