



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL APPEAL NO. 158 OF 2015

(Being an Appeal from Original Conviction and Sentence in

Criminal Case No. 1614 of 2013 of the Chief Magistrate's Court

at Naivasha, E. Kimilu – Ag. PM)

J N M.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTOR

J U D G M E N T

1. **J N M**, the Appellant herein was charged with Incest contrary to Section 20 (1) of the Sexual Offences Act. In that on diverse dates between 1st July, 2013 and 14th July, 2013 in Naivasha Municipality within Nakuru County, he intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely vagina of **E W N**, aged 7 years who was to his knowledge his daughter. The alternative charge was Indecent Act with a child contrary to Section 11 (1) of the Sexual Offences Act, based on the same particulars. He denied the charge but following a full trial was convicted on the main charge and sentenced to life imprisonment.

2. He was aggrieved with the outcome and appealed to this court, raising five substantive amended grounds of appeal as follows:-

“1. THAT, I pleaded not guilty to the above charges.

2. THAT, the learned trial magistrate erred in law and fact by convicting the Appellant in a prosecution case but failed to note that age of the complainant was not proved as required by law.

3. THAT, the learned trial magistrate erred both in law when convicting the Appellant when she failed to note that: PENETRATION of PW1 by the Appellant was not proved to the required standards.

4. THAT, the learned trial magistrate erred both in law and fact when convicting the Appellant when she failed to note that, there was a material contradiction in the evidence of PW1. There was also material contradiction between the evidence of PW2, PW3 and PW4.

5. THAT, the learned trial magistrate erred on matters of law when she held that, that there cannot be doubt he defiled his own daughter, this was a misdirection to the court; without which the court could have not convicted the Appellant; the court was supposed to weight evidence of surrounding circumstances to check whether, the offence was committed.

6. THAT, the learned magistrate erred in law and fact when she convicted the Appellant in a prosecution case that was poorly investigated, was marred with inconsistencies and lacked collaboration of evidence.” (sic)

3. All the grounds challenge the prosecution evidence at the trial, the Appellant asserting through submissions that the victim's age was not proved. Neither penetration proven as the victim's evidence and that of her mother was inconsistent with such an occurrence besides stated contradictions in their evidence. The Appellant asserts that the case was poorly investigated and the trial magistrate misdirected herself while considering the evidence.

4. The DPP through Mr. Mutinda opposed the appeal pointing to the weight of the prosecution evidence at the trial.

5. In **Pandya -Vs- Republic [1957] EA 336** the Court of Appeal for Eastern Africa set out the duty of the first appellate court as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

6. The prosecution called five witnesses at the trial. The gist of the prosecution case was that the complainant **B A (PW1)**, aged 7 years resided with her father (the Appellant) and mother and was a pupil at **[Particulars Withheld]** Pre-school. On the night of 14th July, 2013 her mother was away from their one-roomed house. The complainant was home with the Appellant and her two younger siblings. In the night the Appellant went into the children’s’ bed from his own and undressed the complainant. He then undressed and defiled the minor. The Appellant then returned to his bed. When the mother returned on the next day, **PW1** reported to her but she was dismissive.

7. **PW1** arrived late at school on the next morning and could not participate in learning. Her teacher **S W W (PW3)** noticing this interviewed the victim who revealed to her what had happened. **PW 3** reported to her supervisors. In time **T. W M (PW2)** who operates a shelter for victims of sexual abuse was called to **PW1**’s school. She too interviewed **PW1**. The women after examining the child’s genitalia decided to report to police at Naivasha. The minor was referred to Naivasha hospital for examination. She was later admitted to a safe house. The Appellant was arrested and charged.

8. In his unsworn defence, the Appellant testified that the complainant was one of his children with his wife **L M**. He lived with his family at [particulars withheld] in the material period. That he went to work on 13th July, 2013 and on return found **PW1** had not come home from school. He inquired from his wife who reported that the minor was at Naivasha Police Station. When he went to the police station to make inquiries he was arrested. He denied the offence.

9. There is no dispute concerning the relationship between **PW1** and the Appellant: the former is the daughter of the latter. And that the complainant was about 7 – 8 years old during the trial. The P3 form completed on 16th July, 2013 shows the minor’s estimated age to be 7 years.

10. The Court of Appeal stated in **Evans Wamalwa Simiyu –Vs- Republic [2016] eKLR** concerning age that:-

“[14] From the above quoted Section 8(1), it is apparent that the offence of defilement is complete immediately there is an act that causes penetration and the victim of the act is a child. Section 2 of the Sexual Offences Act, defines an ‘act that causes penetration’ as ‘an act contemplated under the Sexual offences Act’. The same section defines ‘penetration’ to mean ‘the partial or complete insertion of the genital organs of a person into the genital organs of another person.’ As regards the definition of ‘Child’ Section 2 of the Sexual Offences Act, adopts the definition of ‘Child’ provided under the Children Act, that is ‘any human being under the age of eighteen years.’ Therefore in establishing the offence of defilement proof of age is only relevant to show that the victim is under eighteen years of age and therefore a child within the definition of the Children Act. Thus the offence of defilement is complete immediately there is an act that causes the partial or complete insertion of the genital organs of the perpetrator’s genital organs into a child’s genital organs regardless of the age of the child.

[15] The appellant argued that the failure by the prosecution to provide an age assessment report or a birth certificate resulted in the failure by the prosecution to prove its case beyond reasonable doubt. The issue of age was considered in the case of **Kaingu Elias Kasomo V R**, Malindi Criminal Appeal No. 504 of 2014, (Unreported) where this Court (differently constituted) stated that age is a key ingredient to the offence of defilement and failure to prove it beyond reasonable doubt amounts to failing to prove the offence. This pronouncement was clarified by this Court in **Tumaini Maasai Mwanja V R**, Msa Criminal Appeal No. 364 Of 2010 (Unreported) and in **Stephen Nguli Mulili V Republic 2014 eKLR** that:

“Proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age.”

[16] Thus in relation to the appellant’s case proof of age was relevant at two levels. First, to establish that the complainant was under the age of 18 years and therefore a child; and secondly, to establish that the complainant was between the age of 12 and 15 years such as to bring the sentence of the appellant, if convicted, within the minimum provided under section 8(3) of the Sexual offences Act.”

In this case the Appellant confirmed the age of the complainant as proved by the prosecution, thus his second ground of appeal must fail.

11. Regarding penetration, the **P3** form tendered revealed that the child’s hymen had been breached, confirming what **PW1** had stated, and what **PW2** and **PW3** observed after examining the victim after she confided in them. On all occasions **PW1** pointed an accusing finger at the Appellant, explaining that the mother had been away from home on the night the offence took place. What reason would motivate the complainant to make such a serious accusation against her father if the events in question did not happen?

12. It is however true the child was in some respects mixed up about the details whether she felt pain or was dressed during the sexual assault

or whether that was the first time to be sexually assaulted. But that does not detract from her core evidence with regard to the incident on 13th which is corroborated by evidence by **PW2** and **PW3** as well as medical evidence.

13. It seems that the complainant's mother took the minor's complaints lightly or was an in different, and perhaps negligent mother. Whatever the case, the testimony of the minor is valid on its own and was properly accepted by the court. Further it was corroborated by other equally solid evidence. The Appellant was convicted on sound evidence. His appeal is lacking in merit and must be dismissed. It is so ordered.

Dated and signed at Kiambu, this 26th day of June, 2018.

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this 26th day of July, 2018.

JUDGE

In the presence of:-

For the DPP : Mr. Koima

Appellant : J N M – present

C/C : Quinter Ogutu