REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 147 OF 2017

DAVID KIARIE GATHONI.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Gatundu Chief Magistrate's

Court in Criminal Case No. 613 of 2014 delivered by L.M. Wachira (Mrs)

Senior Principal Magistrate on 18th July, 2017)

JUDGMENT

1. **David Kiarie Gathoni** the appellant herein was the accused at the Senior Resident Magistrate Court at Gatundu in Criminal Case No. 613 of 2014. He was charged with Defilement Contrary to Section 8(1)(2) of the Sexual Offences Act no.3 of 2006. The particulars of the charge were that on the 2nd day of June 2014 at [particulars withheld] Village in Gatundu South Sub County within Kiambu County he unlawfully did an act which caused penetration with the genital organ namely penis into the genital organ namely vagina of T W K a child aged 4 years. The appellant also faced an alternative count of Committing an Indecent Act with a Child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 2nd day of June 2014, at [particulars withheld] village in Gatundu South Sub County, he intentionally and unlawfully touched the buttocks of T W K a child aged 4 years old with his hands.

2. The appellant pleaded not guilty to the above charges and the case proceeded to full hearing. The appellant was later found guilty and convicted on the main count and sentenced to life imprisonment. He was dissatisfied with the judgment and filed this appeal raising the following grounds:

i. That the learned trial magistrate erred in matters of law and fact by basing his conviction on a charge that was defective ab initio for duplicity.

ii. That the Hon. Trial magistrate erred in matters of law and fact by conducting the trial in a manner that violated his constitutional rights to a fair hearing udder article 50(2), (c), (j) of the Constitution of Kenya 2010

iii. That the learned trial magistrate erred in both matters of law and fact by failing to find that essential witnesses, necessary to corroborate PW 2's allegations and justify the hearsays relied on by the prosecution were not procured.

iv. That the learned trial magistrate erred in both matters of law and fact by failing to find that the penile penetration of PW 1's genitalia was not proved to the requisite standard as required by law.

v. That the learned trial magistrate erred in both matters of law and fact by failing to consider his defence, thereby demonstrating open bias.

3. A summary of the case is as follows: Pw1 was T.W.K the complainant herein. After the trial court conducted a voire dire examination on her, it formed the opinion that she was too young to understand the nature of an oath. Hence, she gave unsworn evidence. She told the court that on a date she could not recall at about 7p.m, her mother had left her in the care of mama P as she went to her hotel. That the appellant took her from mama P house, to his (appellant's) house and on his bed, he removed his trouser and put his 'finger' in her vagina (she pointed her vagina).

4. The appellant later warned her not tell her mum, dad or mama P. Afterwards, the appellant took her to her mother's hotel where they found her mum, dad and older brother (G) and the appellant told her mother that she had been sleeping. On cross examination, she maintained that the appellant put his finger into her vagina.

5. **PW2 J N K** the complainant's mother produced her immunization card (EXB1) which showed that PW1 was born on 20/08/2009. She told the court that on 2/06/2014 she was in her hotel but had left PW1 at her sister-in-law's place. That at 7.00pm, she saw the appellant enter her hotel carrying PW1 on his shoulders. According to her it was unusual and upon inquiring from the appellant whether there was anything wrong, the appellant told her that he found PW1 sleeping and he then left.

6. On getting home and preparing to bath the child she noticed a sticky substance oozing from her vagina. On inquiring from her what the problem was, PW1 told her that the appellant had put his 'finger' in her vagina. She then called her sister in law whom she had left the child in her care. She came and examined PW1's vagina and on inquiring from her what was wrong, PW1 still maintained that the appellant had inserted his finger in her 'vagina.'

7. They proceeded to her father-in- law's house (the appellant's grandfather) and on narrating to him what had happened, the appellant suddenly appeared and started inquiring what had happened but they did not respond. They then left for hospital with the PW1 and her sister in law. Meanwhile while on their way, the appellant's grandfather telephoned them and told them that he had lied to the appellant that PW1 had a fever. The appellant joined them on the way to hospital. On arrival at Gatundu hospital, they were referred to Gatundu Police Station.

8. At Gatundu Police Station, they were given a referral note for PW1's treatment. She produced PW1's treatment as **EXB 2**. They were then advised to go back to hospital the following morning so that the child could receive further treatment. The following day, PW1's father went to Muhuhu AP post and came back with two AP officers, who arrested the appellant and they all went to the police post where they found a female officer and PW1 was interviewed.

9. She further stated that when PW1 told her that the appellant had inserted his finger in the vagina, she showed PW1 all her fingers and inquired which finger the appellant had used but PW1 told her none of the fingers. She explained that her sister-in- law and the appellant lived in the same compound. That when appellant brought PW1 to the hotel on the material night, her eyes were red and as they left for home, she insisted on being carried but she couldn't carry her since she had luggage. PW1 then walked but cried all the way home.

10. **PW3 R N K** (PW2's sister in law) corroborated PW2's statement and revealed that the appellant and PW1 are cousins. **PW4 S K**stationed at Muhoho AP post is the arresting officer in this case. He told the court that Pw2 and PW1's father reported the incident to him on the evening of 2/6/2014. He spoke to PW1 who stated that she had been defiled by the appellant. He then booked the report and accompanied PW2 and PW1's father to the appellants home at around 6:00a.m. On arrival, they found the appellant asleep and they arrested him and took him to Gatundu Police Station.

11. **PW5 Dr. Teddy Irungu** of Gatundu Hospital produced PW1's P3 form as (**EXB3).** He explained that when PW1 was examined, she was in a fair general condition with no injuries in her private parts. Her hymen was however broken and she had a discharge on her private parts. On examination of her discharge, it had red blood cells, pus cells epithelial cells but no spermatozoa was seen. He produced the treatment form as **EXB2** and the PRC form as **EXB4**. In cross examination, he stated that for a 4 year old child, the hymen can only break by way of penetration and that riding on a bicycle cannot break it.

12. **PW6 Corporal Marion Chogo** of Gatundu Police Station children and gender desk is the investigating officer in this case. She told the court that after receiving the report of defilement from PW1 and PW2 and after the P3 form confirmed that PW1 had been defiled, she charged the appellant with defilement. She produced the complainant's immunization card as **EXB 1**.

13. The appellant elected to give an unsworn statement with no witness to call when he was placed on his defence. He denied the charges facing him and stated that he had a land issue with his uncle who is PW1's father. He said he had assisted his uncle's family on 13/06/14 from the hospital. He was shocked to be arrested the next day

14. When the appeal came for hearing, the appellant submitted that the charge sheet was defective as he never understood the charges he was facing. That he had called for the charge sheet, witness statements, investigation diary in preparation for his defence but he was not given. He further submitted that crucial witnesses such as PW1's father were not called to testify. He also stated that PW2 had a grudge against him over land.

15. Miss Ongaki for the Director of Public Prosecution strongly opposed the appeal and submitted that the appellant was positively identified by PW1 while PW5 confirmed that the complainant's hymen was broken. She submitted that the charge sheet was not duplex as it did not contain two offences in the same count.

16. She further submitted that the appellant was not prejudiced at all as he fully understood all that went on in court. That the issue of bad blood between him and PW1'S parents never came up during the hearing. Finally, she contended that the defence was considered and the prosecution proved it's case.

17. The appellant in reply to the above submitted that he was not examined by the doctor.

18. This is a first appeal and this court has a duty to re -evaluate and reconsider the evidence adduced and arrive at its own conclusion. It has also to bear in mind that it did not see nor hear the witnesses and give an allowance for that. This was the holding in the case of **Okeno vs Republic 1972 EA 32** where the Court of Appeal stated:

> **" An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandaya v R, [1957] E.A 336) 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. (Shantilal M. Ruwala v R,)[1957] E.A 570). 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; it must make its own findings and draw its own 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, see Peters v Sunday Post, [1958] E.A 424."

19. The Court of Appeal further in the case of **Muthoko & Anor v Republic [2008] KLR 297** held as follows:

" it was the duty of a first appellate court ot analyze the evidence and come to its own independent conclusion bearing in mind that it did not hear or see the witnesses and making allowance for that."

20. I have considered the evidence on record, the grounds of appeal, the submissions by both parties and the cited authorities. The appellant has raised a total of 5 grounds of appeal. Upon considering all I have stated above, I will narrow them to 4 issues which are:-

i. Was the appellant charged on a defective charge sheet?

ii. Whether he was not able to understand the charges he was facing?

iii. Were the ingredients of the offence of defilement proved?

iv. Was the appellant identified as the culprit?

21. What constitutes a defective charge sheet was spelt out in the case of **Yosefu and Another -Vs- Uganda (1960) E.A., 236**. The East Africa Court of Appeal held:-

"The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act."

And in **Sigilani -Vs- Republic (2004) 2 KLR, 480**, it was held that:-

"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that hecan understand. It will also enable the accused to prepare his defence."

22. Further, Section 134 of the Criminal Procedure Code provides what the components/ingredients of the charge sheet constitute as follows:-

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

23. From the onset, the appellant knew that the charge facing him was one of defilement. Its particulars were clearly spelt out, which included the date of the offence, the place of the offence, the act constituting the offence and the name of the victim. I find that, the appellant understood the charges facing him as he was even able to cross examine the prosecution witnesses and also give his defence. I find no defect in the charge that the appellant faced. This answers issues (i) and (ii)

24. This Court is mindful of the ingredients of defilement which were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

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

25. PW1 was said to be a minor. Her immunization card produced as **EXB1** showed she was born on 20th August 2009. She was therefore 4 years and 10 months at the time of the alleged offence. The trial court confirmed that PW1 was a child of tender years and was subjected to a *voire dire* examination. I am therefore satisfied that age was proved.

26. It was the evidence of PW1 that the appellant took her to his bed and inserted his finger in her vagina. She gave the same report to her mother (PW2). PW2 saw a sticky substance oozing from PW1's vagina. She called her sister in law (PW3) who came. PW3 also confirmed seeing what PW2 had seen.

27. PW5 is the doctor who examined PW1 on 4th June 2014. She found that her genitals had no injuries but she had a discharge from her vagina. The discharge was examined but no spermatozoa was seen. It however had red blood cells, pus cells and epithelial cells and the the hymen was broken. She explained that for a 4 year old the hymen can only break through penetration.

28. Section 8 (1) of the Sexual Offences act states that:

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

"Penetration" under 2 of the said Act is defined to mean " the partial or complete insertion of the genital organ of a person into the genital organ of another person."

29. The evidence of PW5 confirms the evidence of PW1, PW2 and PW3. The child was indeed penetrated. Besides the broken hymen there were red blood cells, epitherial cells and pus cells found in the discharge oozing from her vagina. I therefore find that penetration was proved.

30. **Issue No. (iv) Was the appellant identified as the culprit?**

31. On the material day PW2 left her daughter at her sister in law's (PW3) as she went to run her hotel. They all stay on the same compound with their nephew (the appellant). It was PW1's evidence that the appellant took her from mama P house to his house upto his bed. This was around 7 p.m. After inserting his finger in her vagina he told her not to tell her parents or mama P.

32. I have noted that this incident occurred on 2nd June 2014. PW1 first testified on 3rd July 2015. She was later recalled for further cross exam on 13th February 2017. These were her answers in the further cross examination by appellant.

"I came today with mum and dad. You are not my relative. I have seen you before. My mother has not said I say anything."

Re- examination by prosecution

"I do not recall who the accused is. I do not know why I am in Court."

33. My take on this is that PW1 having been only 4 years 10 months when the incident occurred and 7½ years when recalled for another cross examination she may have forgotten a few things. It is obvious a lot had taken place between 2nd June 2014 and 13th February 2017 and being a child of her age indeed she could not even recall who the appellant was as she had put everything behind her. That to me does not alter her initial testimony to the court as alleged by the appellant.

34. After the incident he took her to PW2's hotel where they found her parents, and G. It is PW2's evidence that on the said evening he saw the appellant arrive at the hotel while carrying PW1 on his shoulders. She found it unusual and asked him what was wrong. He told her he found her asleep but did not say where and he left.

35. PW1 and PW 2 have confirmed that indeed it is the appellant who took the former to the hotel that evening. The appellant in his defence did not say anything about this. He only explained something about the meeting they had as a family on 2nd June 2014 evening involving PW2 and PW3. He never asked these two witnesses anything about, the said meeting.

36. Had he not taken PW1 to the Hotel that evening he could have put PW1 and PW2 to task over this. He did not and he did not also raise it in his defence. It was not by coincidence that the appellant is the one who took PW1 to her mother at the hotel. The child had been left at the home of PW3 and not the appellant. PW1 identified him well in court and referred to him by his pet name 'DAVE'.

37. It is not also lost to the mind of this court that PW 1 and the appellant are cousins. They were not strangers to each other. I am therefore satisfied that it is the appellant who inserted his finger in PW1's vagina. The child reported to PW2 and PW3 the same day this had occurred. PW1 was clear in her evidence that the appellant put his finger in her and she repeatedly said that. PW2 and PW3 also said that is what the child told them. PW2 interpreted the finger to mean an erect penis. In his submissions the appellant contended that the trial magistrate had erred by giving her own interpretation of the reference to his sexual organ.

38. The learned trial magistrate's finding in this regard was as follows as stated at page 8 of the judgment lines 3-9

"On this issue that a finger other than the penis was inserted, my view is that a four year old may not differentiate between a big finger and an erect penis. In any event, to a child something that is inserted is either a finger or a stick. In many times children will imagine that it is a stick that has been inserted. My view is that the fact that the child stated that it was a finger does not actually mean a finger on the limbs. It means the male genital organ. In any event, the fact that there was a discharge is further evidence that the organ that was inserted cannot be a finger because a finger cannot produce a discharge."

39. The said trial magistrate gave an interpretation to the finger inserted in PW 1's vagina to mean an erect penis. I have checked and confirmed from the record that it is nowhere indicated that the court sought any clarity from the child or even a demonstration as to which part of the body the finger she talked about was. The child did point at her genitals as the place where the finger was inserted. For the place of the finger she did not show anything in demonstration. Had she done that the issue before the court could have been easily resolved.

40. The trial court's interpretation of the finger is not supported by any evidence. PW1 was taken to hospital on the same night of incident. This is supported by the evidence of PW1 and PW2. The treatment notes **(EXB2)** also confirm that. The discharge from PW1 was examined that night and no spermatozoa was seen. The trial court indicated that because there was a discharge a finger could not have caused it. There is evidence that the child's hymen was broken. Could that not cause a discharge to be released?

41. My view is that without any supporting evidence it could be dangerous to conclude that it is only an erect penis that could have penetrated PW1. It is safer leaving "finger" to be given its ordinary meaning as it is an organ that can be inserted inside the female genital organ.

42. The appellant had in his submissions said he was never issued with witness statements and so was unable to prepare his case. The record of 8th November 2016 shows the following at pg 26-27 record of appeal.

8/11/16

Before Hon. A.M. Maina SPM

Court prosecutor - Keitany

CC Dominic

Accused present

Inter Eng/Swahili

Pros: I have 2 witnesses.

A.M. Maina SPM

Accused: I am yet to be supplied with witness statements. Once am supplied with them I will be ready to proceed.

A.M. Maina SPM

Court: File placed aside. Accused to be supplied with witness statements at the station's cost.

A.M. Maina SPM

8/11/16

Later at 11.20 a.m.

Coram as above

Accused: I now have witness statements and PW3 form. I am ready to proceed.

A.M. Maina SPM

Court: Hearing to proceed in camera.

A.M. Maina SPM

8/11/16

There is nothing to add to that. I find that the appellant was supplied with the documents and he was ready to proceed.

43. After reconsidering all the evidence on record and law I am satisfied that the minor was sexually penetrated by the appellant. The use of the male genital organ was not established and so the appellant should not have been charged under section 8 (2) as read with section (2) of the Sexual Offences Act.

44. I hereby set aside the conviction and sentence. I substitute it with a conviction for sexual assault contrary to section 5(1)(a)(i) as read with section 5(2) of the sexual offences Act No 3 of 2006. He is sentenced to 25 years imprisonment from the date of conviction.

45. Save for the above the appeal stands dismissed.

Orders accordingly.

Dated, signed and delivered this 3rd day of August 2018 in open court at Kiambu.

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HEDWIG I. ONG'UDI

JUDGE