



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 8 OF 2018**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**JAPHET MURITHI SILAS.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. L. Ambasi, CM*

*dated 31<sup>st</sup> January 2018 at the Chief Magistrate's Court at Meru*

*in Criminal Case (SOA) No. 51 of 2016)*

**JUDGMENT**

1. The appellant, **JAPHET MURITHI SILAS**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1) and (2)** of the *Sexual Offences Act* ("the Act"). The particulars of the charge were that on 2<sup>nd</sup> November 2014 at 9.00pm within Meru County, he unlawfully and intentionally caused his penis to penetrate the vagina of LN, a child aged 10 years.

2. As the first appellate court, I am required to re-analyse the evidence independently and reach my own conclusion as to whether to uphold the conviction and sentence. I must bear in mind that I neither heard nor saw the witnesses testify (see *Okeno v Republic* [1972] EA 32). In order to proceed with this task, I will set out the facts as they emerged before the trial court.

3. The child, PW 1, gave sworn testimony after a *voire dire*. She testified that she knew the appellant as a neighbour. On the night of 2<sup>nd</sup> November 2014, she had been left alone by her mother (PW 2) who had gone to visit her mother in hospital. She narrated what happened as follows:

*Japheth came and opened the door. He entered the house. He removed my clothes and removed his clothes. He then inserted his penis into my vagina. He defiled me and I felt pain. When I screamed, he threatened me. Since it was raining I could not tell anybody. There was light in the house. We use a lantern.*

4. When PW 2 came back, she told her what happened. PW 2 recalled that when she came back home, PW 2 narrated her ordeal and told her that the appellant is the one who molested her. She was feeling pain in her private parts and when she examined her private parts, she noted a white discharge. The next morning, she went with the Chief to the appellant's house. He tried to run away but was arrested. She took PW 1 to Meru Level 5 Hospital and reported the matter to the police.

5. PW 4, who was a neighbour to PW 2, testified that on the material day she had been with PW 2 before she left PW 1 at home to visit her mother in hospital. They asked the appellant to escort them to the hospital but he refused. They left him behind while PW 1 remained at home. When they returned, PW 1 narrated to them what had transpired. On the next day, she testified that she was present when the Chief came to arrest the appellant and he ran off but he was apprehended by some youths.

6. PW 5, an officer at Meru Police Station, was present when PW 2 came to the police station accompanied by PW 1 and reported the incident of defilement. PW 1 was referred to Meru Hospital for examination and treatment while the appellant was brought by the area chief to the police station.

7. In his sworn testimony, the appellant denied the offence. He testified that on 26<sup>th</sup> November 2016, he was in prison in Meru. He stated that he was arrested by the Chief who did not testify and complained that he was accused because of a grudge with PW 2 who gave him some shoes which were stolen but PW 2 insisted on being paid and threatened to frame him.

8. The trial magistrate was convinced that on the basis of the evidence I have outlined the prosecution had proved its case beyond reasonable doubt. The appellant relied on the amended grounds of appeal and written submissions. The thrust of the appeal was that the prosecution did not prove its case beyond reasonable doubt. He complained that he was not positively identified and that the case against him was not watertight in light of the circumstances. He also complained that the medical evidence did not support the fact of penetration.

9. Counsel for the respondent supported the conviction and sentence. He urged that the prosecution proved all the elements of the offence.

10. In order to secure a conviction for the offence of defilement under **section 8(1)** of the **Act**, the prosecution must establish that the person has committed an act which causes penetration with a child. "*Penetration*" under **section 2** of the **Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

11. In this case, PW 1 gave clear and direct evidence of her ordeal. The appellant was not a stranger to her and when her mother, PW 2 came back she told her what had transpired. This was confirmed by PW 4 who confirmed that the appellant was a neighbour and that she and PW 2 had left him in the neighbourhood when they went to visit PW 2's mother in hospital. PW 1's testimony was consistent and credible and supported by the medical evidence.

12. The appellant complained that the medical evidence was insufficient. However, in the P3 form produced by PW 3 showed that PW 1's hymen was broken while the microscopic tests revealed epithelial and pus cell. This evidence was corroborative and when taken together with the testimony of PW 1, it was indicative of penetration.

13. The incident took place at night and this calls for caution in evaluating the evidence of identification. In these circumstances the court is enjoined to consider carefully the nature and source of light, the distance between the light, the assailant and complainant and all other factors that would go towards satisfying itself that the identification was positive and free from error (see **Wamunga v Republic [1989] KLR 424** and **Maitanyi v Republic [1986] KLR 198**). In the case of recognition when the assailant is previously known to the complainant then the test is more relaxed nevertheless the court must exercise the necessary caution (see **Anjononi & Others v Republic [1980] KLR 59**).

14. In this case, the fact that PW 1 knew the appellant as a neighbour was confirmed by PW2 and PW 4. PW 1 named him as the perpetrator and that is why on the next morning he was arrested. According to PW 4, the appellant tried to run away but he was apprehended. The fact that he tried to run away when the Chief came to arrest him is inconsistent with his innocence. The appellant complained that the Chief was not called as witness but the matter of his arrest was witnessed by PW 2 and PW 4. On this issue the Court of Appeal in **Sahali Omar v Republic MSA CA Crim. App No. 44 of 2016 [2017] eKLR** held as follows:

*The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. Keter v Republic [2007] 1 EA 135).*

15. In his defence, the appellant suggested that there was a grudge between himself and PW 2 but nothing of the sort was suggested to her in cross-examination. The defence was therefore an afterthought. The totality of the evidence is that the prosecution proved that it is the appellant who committed the act of penetration against PW 1.

16. The child's age is a question of fact. Although the child's Immunization card was only marked for identification, the P3 form estimated that the age of PW 1 was 10 years old. She was therefore below the age of 11 years which under **section 8(2)** of the **Act** attracts a mandatory sentence of life imprisonment.

17. I affirm the conviction and sentence. The appeal is dismissed.

**DATED and DELIVERED at MERU this 25<sup>th</sup> day of October 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.