REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 41 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

PATRICK MURITHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J. Irura, SRM

dated 12th March 2018 at the Senior Principal Magistrate's Court

at Nkubu in Criminal Case (SOA) No. 535 of 2015)

JUDGMENT

1. The appellant, **PATRICK MURITHI**, 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 11th May 2015 at an unknown time in [particulars withheld] Sub-location, South Imenti District within Meru County, he did an act which caused the penetration with his genital organs namely the penis into the vagina of SN, a child aged 3 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. PW 1, the mother of SN, the child, told the court that SN was born on 3rd May 2011 and that the child was mentally challenged. She recalled that on 11th May 2015 at about 2.00pm she went to fetch water when she heard someone screaming that her child had been defiled. She went towards the area and found SN unconscious without her underpants. There were many people at the scene and the appellant, who had removed his trousers to the knees, had a knife and was threatening the lady who she had heard screaming. She took SN to the police station and was referred to the hospital. She had noted that SN was bleeding from her nose and mouth and also her private parts.

4. PW 2 testified that on the material day at about 2.00pm, she was heading to the shops when she heard some noise coming from some napier grass bushes along the road. When she moved closer to find out what was happening, she found the appellant lying on SN. He was holding her mouth with one hand holding her with the other hand as he was sexually assaulting her. She told the court that he had removed his trouser halfway and there was a panga on the ground nearby. When she saw what happened, she jumped and moved towards the road and when the appellant saw her, he followed her and she asked him why he had killed the child. In the meantime, she saw PW 1, beckoned to her and screamed. She testified that PW 1 came and took the child to hospital.

5. The investigating officer, PW 4, recalled that on the material day at about 2.00pm, PW 1 came to Mitunguu Police Station carrying SN, who was unconscious and with her clothes soiled in blood. She booked the report and they escorted PW 1 and SN to hospital where SN was treated and admitted. The appellant was arrested by Administration Police officers and brought to the station. PW 3, a clinical officer at Kanyakine Hospital, filled the P3 form after examining her three 3 days after the assault and injury. She noted that the vagina had deep lacerations and bleeding from the vaginal orifices. She opined that the lacerations on the vaginal wall were suggestive of forcible penetrative intercourse.

6. The appellant gave sworn testimony and called a witness DW 2. The appellant testified that on the material day he was working cutting

napier grass along the road when his neighbour, DW 2, told him to take his child, a girl aged about 2 years to her grandmother as he going to the market. He took the girl and as he was going back, he met PW 2 screaming near where he was cutting grass. When he asked her why she was screaming, she accused him of defiling a girl near the napier grass. Shortly people gathered around. He told the court that he was being framed by PW 1 as she had declined his advances.

7. DW 2 confirmed that on the material day he asked DW 1 to take his child to his grandmother. He told the court that he met PW 2 screaming and when he asked her why, she did not talk to him but continued screaming attracting members of the public. Since there was a child under a mango tree, she told the crowd that she suspected the appellant had defiled the child.

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 through his counsel relied on the amended petition of appeal dated 5th October 2018. The thrust of the appeal was the prosecution did not prove its case beyond reasonable doubt and that the prosecution case was full of contradictions. He also contended that no DNA test was conducted to connect the accused to the offence despite the appellant having requested the same. The appellant also complained that the trial court failed to note that there was a grudge between the appellant and PW 2.

9. Counsel for the respondent supported the conviction and sentence. He argued that the prosecution had proved all the elements of the offence, in as much as the prosecution did not call the child, SN, to testify as she had been declared vulnerable due to mental incapacity.

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, SN did not testify as she was mentally challenged. This was confirmed by PW 5, a medical doctor, who testified that the child had hydrocephalus and could not testify due to her age. I do not think the mental capacity or otherwise of the child was material in this case as the offence of defilement is defined by reference to an act of penetration with a child and not consent or the mental state of the child. Moreover, proof of the offence does not necessarily require the testimony of the child. It may be proved by independent, direct or circumstantial, evidence. As the Court of Appeal noted in ***M.M v Republic*** **NRB CA CRA No. 41 of 2013 [2014] eKLR**:

> *Turning to the appeal before us, we reiterate that the victim did not herself testify due to her tender years. In cases like this where the victim is too young to give evidence,* ***section 33*** *of the Sexual Offences Act allows the trial Court to rely on either the evidence of the surrounding circumstances, or under* ***section 31 (4),*** *to give evidence through an intermediary or both. In the absence of the complainant's testimony, there was independent evidence of the complainant's mother, that of the father and the clinical officer that linked the appellant to the defilement of the complainant.*

12. There was evidence of PW 1 and PW 2 who saw and found the child in a state of distress bleeding from her private parts. PW 1 took her to the police station immediately and PW 4 also noted that the child was bleeding from her private parts while PW 3 testified that the lacerations on the child's vaginal walls were consistent with and suggestive of penetration. I am therefore satisfied that the fact of penetration was proved.

13. The question is whether there was independent evidence pointing to the appellant as the person who caused the act of penetration. The key witness in this case was PW 2 who found the appellant in the act lying on top of the child. She screamed and attracted PW 1 who also arrived at the scene and found the appellant. Counsel for the appellant attacked this evidence on the ground that the testimony of PW 2 was undermined by the fact that there was a grudge between her and the appellant and there were inconsistencies.

14. Before I deal with the two issues, I note that the appellant PW 1 and PW 2 came from the same locality and were known to each other and in his defence, the appellant admitted that he was at the scene. On the first issue, whether there was grudge, I note that the issue was never put to PW 1 or PW 2 in cross-examination despite stating in cross-examination that PW 2 had threatened her if he refused to work for her. Like the trial magistrate, I find the appellant's defence an afterthought particularly given that he was represented by counsel.

15. As regards contradictions and inconsistencies, the Court of Appeal in ***Erick Onyango Ondeng' v Republic*** **NBA CA CRA No. 5 of 2013 [2014] eKLR** observed that:

> *With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.*

16. Counsel for the appellant pointed to the fact that PW 1 stated that when she arrived at the scene, the appellant had already removed his trousers up to the knees while PW 2 stated that the appellant had removed his trouser and his underwear too. I do not think this issue is material to the main charge that PW 2 found the appellant on top of the child. Counsel also submitted that the PW 1 saw the appellant with a panga while PW 2 said it was a panga. I think this is really a matter of perception and description and does not go to the heart of the charge.

17. Counsel also submitted that the trial court ought to have ordered a DNA test in order to prove either the appellant did or did not commit the felonious act. **Section 36** of the ***Act*** empowers the court to order scientific or other tests and it states:

> *36(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.*

18. Regarding this provision, the Court of Appeal in ***Robert Mutungi Muumbi v Republic***, ***MLD CA CRA No. 52 of 2014*** *explained that*:

> *Section 36(1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.*

19. In this case, the testimony of PW 2 put him in the very act of penetration hence the DNA evidence was not necessary. On this issue, I would do no better than state what the Court of Appeal stated in ***AML v Republic*** **[2012] eKLR** that, *"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."*

20. The final issue for determination is that age of the child. The child's age is a question of fact. PW 1 told the court that the child was born on 3rd May 2011 For purposes of the offence of defilement she was below the age of 18 years. Since she was aged 3 years at the time the offence was committed, the mandatory sentence of life imprisonment under **section 8(2)** of the ***Act*** was lawful.

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

DATED and DELIVERED at MERU this 22nd day of October 2018.

D.S. MAJANJA

JUDGE

Ms Mbaabu instructed by Mbaabu M'Inoti and Company Advocates for the Appellant.

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