REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 129 OF 2015

JOHN KIOKO NTHAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Appeal arising from the conviction and sentence by Hon. L. Simiyu (SRM) in Machakos Chief Magistrates' Court Criminal Case No. 1528 of 2013 on 2nd September, 2015*)

JUDGEMENT

1. The appellant was charged and convicted of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act and thereafter sentenced to life imprisonment. He appeals against the same on grounds that:

> ***a) The learned trial magistrate erred in law and fact by convicting and sentencing the appellant on a defective charge sheet.***
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> ***b) The learned trial magistrate erred in law and in fact by convicting the appellant on contradictory and uncorroborated evidence.***
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> ***c) The learned trial magistrate erred in law in sentencing the appellant and the sentence imposed was excessive in the circumstances and a miscarriage of justice was occasioned.***
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> ***d) The learned trial magistrate erred in law by failing to find that the ingredients of the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, were not proved.***
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> ***e) The learned trial magistrate erred in law and in fact by failing to give weight to the evidence of the defence that there was bad blood between Appellant and victim's parents.***
>
> ***f) The learned trial magistrate erred in law and in fact by failing to give weight to the evidence of the defence witnesses who testified that the genitalia of a minor of $2^1/_2$ years cannot accommodate the penis of a mature man.***
>
> ***g) The learned trial magistrate erred in law and in fact by convicting the appellant with the offence of defilement without any evidence that there was penetration.***
>
> ***h) The learned trial magistrate erred in law by convicting the appellant when clearly the evidence on record did not meet the required standard of proof, viz beyond reasonable doubt.***

2. This court sitting as a first appellant court is under duty to re-evaluate and re-consider the evidence afresh with a view of making its own independent conclusion bearing in mind also that it did not have the opportunity to see the witnesses' demeanor.

3. The prosecution called four witnesses. EM (PW1) who is EN's (the complainant) mother and appellant's wife was on 4th December, 2013 asleep when she heard a child crying. When she went to check, she found the appellant naked and E.N. undressed. The appellant rushed out of bed and when PW1 using a torch examined EN., she found her vagina wet with sperms. She stated that there was blood on a '*leso*' EN slept on. She informed the appellant's mother who stated that she would convene a family meeting but the meeting did not take off. She later informed the appellant's brother but he did not act on the report. Two weeks later, she reported the matter and took EN to Kathiani Hospital. Elijah Mureithi Nyaga (PW2) a clinical officer produced the p3 for EN on behalf of Dr. Okerosi who examined EN He stated that EN was found to have a healing vaginal wall of approximately few weeks and an inference of defilement was made by the Doctor. Vaginal swab was done and it showed pus cells 0-5 pus cells showing active bacterial infection, gram positive was seen and bacterial infection seen. That urinalysis also revealed that she had active infection in the urinary tract system. PW2 stated that there was penetration since EN was 2 ½

years old and her genitalia ought to be normal. That healing vaginal wall shows disturbance or destruction of the vaginal wall. That urinary tract infection could be caused by other things such as a wound. The P3 form was produced as P. Exhibit 2. On cross examination, PW2 stated that if there was penetration for such a child one could see a broken hymen when conducting vaginal swab. That there is no indication that the hymen was broken in the p3 form. That no samples were taken from the appellant for tests to be run. On re-examination, he stated that the hymen could not have been intact at the time of taking the vaginal swab in a 2 ½ years old child. On examination by court, he stated that penetration could be caused by any object. That there can be partial penetration without breaking the hymen. That if vaginal walls were damaged then there was penetration. That the fact that the vaginal wall was healing is an indication that the walls were injured. Police Constable Wycliff Wangila Sikuku (PW3) was on 23rd November, 2013 at Kathiani Police Station when EN together with PW2, the appellant and members of the public went to the police station. PW2 reported that on the material day at around 1.00 am while in their house she was awaken by noise made by EN She went to check and found the appellant defiling EN That she reported and the appellant was arrested by members of the public. He detained the appellant and took EN for age assessment. That EN was aged 21/s years. Kasisi Kennedy (PW4) who is a dentist produced the age assessment report by Dr. Jamal as P. Exhibit 3. He stated that in assessing age, eruption of teeth and roots is done.

4. The appellant was put on his defence where he gave sworn evidence. Grace Katunge Nthama (DW1) denied that the appellant committed that act and stated that EN used to sleep at her house since her parents' house is a small one roomed house. That on the material day, EN was taken to sleep at around 9.00 pm. Wilson Mafungo Nthama (DW2) who is the appellant's step-brother denied that any report was made to him by PW2. That he has only seen PW2 once and cannot recognize her. Dr. John Mutunga (DW3) gave evidence in regard to his analysis of the P3 form. He stated that in his opinion, the finding was not normal. That there was confusion in describing the injuries sustained. He stated that vaginal wall as parts of external genitalia cannot be normal while at the same time have a healing wound assuming there was a wound because of healing. That healing of a wound takes about 7 days starting from the date of injury and at 14 days, a wound must have completely healed. That part 2B of section c of the P.3 form the examination showed discharge and what is captured is no vaginal discharge. That the patient did not have HIV. That HVS – 0-5 pus cells is a normal finding in external female genitalia. That gram positive rodes seen constitute to normal vagina flora. That urinalysis 10.20 pus cells/ high power field is also normal and cannot show infection and is a normal finding in female vagina. That it should be noted that specimen could be contaminated with organisms on the slide and so pus cells is normally broadly relied on in making a finding. His general finding is that if there is penetration in a $2^1/_2$ year old, the hymen must be broken and that is what he can term as defilement but if hymen is intact then it is an attempt. He stated that if there is penetration external genital must be injured. That the genitalia of a minor of $2^1/_2$ years cannot accommodate the penis of a mature man. On cross examination, he admitted that human beings have different tissue which heal at different rates but that a child could heal fast due to faster replacement of cells. He stated that there could be exceptions to the general rule for example if the wound is not well taken care of. Davis Mbuvi (DW4) denied that he was informed of the ordeal by PW2. The appellant (DW.5) stated that he on the material day returned home at around 9.00 pm and found E.N. already in bed. PW2 with baby W who is 8 months old. He stated that M and EN used to sleep at DW1's house. That PW2 left home from 3rd December, 2013 for two weeks since there was a dispute between them over PW2's alcohol and Khat consumption. That he was arrested by drunk policemen on 23rd December, 2013 without being given a reason. He stated that earlier there had been a quarrel with his wife at his house concerning money.

5. It was the appellant's Counsel's submission that the charge sheet was defective because the evidence given at the trial contradicts what is stated in the charge sheet and the said charge sheet also gives a misdescription of the offence. That the evidence did not support the particulars in the charge sheet. In support thereof he relied on **Jason Akumu Yongo v. Republic [1983] eKLR**. That from PW1's evidence that there was a dispute at around 9.30 pm and thereafter the appellant was arrested confirms that there was bad blood between the two. It was contended that PW3's evidence did not corroborate PW1's evidence and that DW3 who is an expert witness differed with PW2's evidence and that the defence witnesses' evidence was consistent. It was submitted that if EN bled as was suggested by PW2, then PW2 should have explained the steps she took to have her examined and treated. It was further argued that the appellant was not positively identified since PW2 did not see him commit the offence.

6. The Counsel for the respondent on the other hand submitted that the charge sheet on the two counts was not defective since it disclosed sufficient information that enabled the appellant to understand the charge he was facing so that he could defend himself. That the allegation of existence of material contradictions in the prosecution evidence allegedly not reconciled by the trial court are centered on the appellant's date, time and manner of arrest as testified by PW3. That the said contradiction is curable under section 382 of the Criminal Procedure Code. On sentence, it was submitted that the sentence meted on the appellant was not excessive. That under section 8 (2) of the Sexual Offences Act, the legal sentence provided on conviction for defilement, the offence that the appellant is facing is imprisonment for life therefore within the law and the respondent relied on **Arthur Muya Mauriuki v. Republic [2015] eKLR**. It was submitted that a person who commits an offence with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life while section 2 of the same Act defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person. That PW1's evidence that she checked the child and found her vagina wet with sperms and blood on the *leso* was corroborated by the evidence of PW2 thereby penetration was proved. That the lower court's proceedings at page 58 at line 26 the learned magistrate stated that she perused all the evidence on record and made the findings. That at page 60 she stated that she has perused the evidence by Dr. Mutunga who stated that the genitalia of a child of two years cannot accommodate a penis of an adult. That it follows therefore that she analyzed the evidence and considered the appellant's defence. It was submitted that PW1's evidence was corroborated by that of PW2 and PW4 thereby the case was proved beyond reasonable doubt.

7. I have considered this appeal. The issues for determination are:

a) Whether or not the charge sheet was defective.

b) Whether or not the contradictions alleged are material.

c) Whether or not the prosecution proved its case beyond reasonable doubt.

d) Whether or not the sentence was excessive.

8. The East African Court of Appeal discussed what constitutes a defective charge sheet in **Yosefu and Another v. Uganda [1960] E.A. 236**. The Court held as follows:

> ***"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."***

In **Sigilani v. Republic (2004) 2 KLR, 480**, it was held as follows:

> ***"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 he can understand. It will also enable the accused to prepare his defence."***

Section 134 of the Criminal Procedure Code provides the ingredients of a charge sheet 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."***

9. Applying the test above, the offence the appellant was charged with was set out in the charge sheet as defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars was that the appellant on the 4th day of December, 2013 within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of ENK a girl of 2 and half years. He faced an alternative charged of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. Particulars being that the appellant on the 4th day of December, 2013 within Machakos County intentionally touched the vagina of ENK using his penis. It follows therefore that the appellant knew the charge he was facing together with its particulars. Further, he participated in the trial in a manner to suggest that he understood the charge he was facing and was able to cross examine the prosecution witnesses. In the circumstances thereof, it cannot be said that the charge sheet was defective. That ground fails.

10. On contradiction, the appellant lamented that PW3's testimony that she was informed that the act occurred at 1.00 am did not corroborate PW1's evidence. It is to be noted that no two witnesses recall exactly the same thing therefore some discrepancies are to be expected. What the court should concern itself with is whether or not such inconsistencies affect the material substance of the case. See **Ajode v. Republic [1972] EA 32**. The inconsistencies complained of herein do not affect the material substance of the case as the same is in regard to time of the commission of the offence. That ground fails.

11. On the third issue, for a conviction on defilement to stand, the prosecution must prove beyond reasonable doubt that the victim was a child, that there was penetration and that the appellant was positively identified as the perpetrator. It is not in dispute that EN was a child of $2^1/_2$ years and I shall not delve into proof of age as same was established by the age assessment produced as exhibit 3. PW 2 stated that upon examination, EN was found to have a healing vaginal wall of approximately few weeks and an inference of defilement was made by the Doctor. The appellant and Dr. Mutunga were on the other hand of a different opinion. That the genitalia of a child of $2^1/_2$ years could not accommodate a penis of an adult without breaking of the hymen. There is no doubt in my mind considering the evidence on record that EN's vaginal wall had been injured bearing in mind the finding that E.N's vaginal wall was found to be healing. I further note that the Doctor who prepared the P3 form had the benefit of examining EN unlike Dr. Mutunga who merely relied on the p3 form. I therefore find the examining Doctor's evidence to be believable compared to that of Dr. Mutunga's. According to PW1, she heard EN's cries and on checking found the appellant had undressed EN and he had no trouser on. She further found semen on her genitalia. This evidence is corroborated by that of PW2. It is to be noted in view of section 2 of the Sexual Offences Act, that there can be penetration even without going past the hymen and this is exactly what happened. The defence raised by the appellant that EN used to sleep at DW1's house in my view did not cast any doubt to the prosecution case. I therefore find that the offence of defilement was proved beyond reasonable doubt. Further PW.1 who was wife to appellant caught him in the act and raised alarm. Indeed the Appellant was found by PW.1 in flagrant delicto. Appellant was positively indetified and recognized. Further it is highly unlikely for PW.1 to use her own young child to be a victim of sexual assault so as to settle scores with her husband. The Appellant's claim of a frame up is farfetched and unbelievable.

12. On the issue of sentence, defilement under section 8 (1) of the Sexual Offences Act attract life imprisonment upon conviction. It follows therefore that the sentences meted on the appellant is lawful.

13. In the end, this appeal has no merit and is dismissed. The trial court's conviction and sentence is hereby upheld.

Orders accordingly.

Dated and delivered at Machakos this 28th day of November, 2018.

D.K. KEMEI

JUDGE