REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.05 OF 2018

(From PM's Sirisia Cr.No.1210 of 2013 by: Hon. L. Kiniale (SRM)

KENNEDY OKUMU WANYONYI..……..……..……..APPELLANT

V E R S U S

REPUBLIC……..….RESPONDENT

JUDGMENT

Kennedy Okumu Wanyonyi, the appellant, was convicted of the offence of ***defilement Contrary to Section 8(1) & (2) of the Sexual Offences Act.***

The particulars of the charge are that on 21/10/214 at [particulars withheld] Village Machakar Sub-Location in Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of S.W., a child aged 3 years.

In the alternative, the appellant had faced a charge of committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act.

The appellant was found guilty but insane and was ordered to be detained at the President's pleasure. The appellant is aggrieved by the said conviction and sentence which provoked this appeal in which he prays that the conviction be quashed and sentence set aside.

This being a first appeal, it behooves this court to examine all the evidence tendered in the trial court afresh, analyze it and arrive at its own conclusions. However, this court has to bear in mind that it had no opportunity to see or hear the witnesses in order to assess their demeanor. *See* ***Okeno v Republic (1972) EA 32***.

The prosecution called a total of five witnesses in support of their case. The complainant was said to be a minor aged 3 years and unable to testify. The mother, **PW1 P W** testified instead. PW1 told the court that the complainant was born on 26/8/2012, and was then aged 4 years. PW1 was in her house preparing breakfast on 12/10/2014 about 6.00 a.m. when the complainant informed her that she wanted to go for a short call and she went outside the house; that the complainant took long to return and her father M W enquired where the girl was. They went outside and started looking for her and calling her name PW1 heard the complainant crying and ran towards the direction the cries emanated and he saw Kennedy the appellant trying to defile the complainant and she screamed as she ran towards them. On seeing her, the appellant ran as he pulled up his trousers. Members of the public responded to her screams and they went in search of the appellant.

PW1 knew the appellant as the son of a neighbor for about 7 years. The complainant was taken to hospital and on returning home, PW1 found the appellant already arrested. She reported to Lwakhakha Police Station, was issued with P3 form which was filled. PW1 knew that the appellant had a mental problem and used to go for treatment. PW1 said she observed the complainant and that the appellant had already ejaculated on the complainant's thighs. PW1 noticed that the complainant had sustained a bruise on her private parts.

PW2 PC Joseph Kibii of Tulienge Administration Police post received a report of defilement from PW1 on 12/10/2014 about 6.00 a.m. to 7.00 a.m. and the appellant had already been arrested.

PW3 Amons Nukiru, a Clinical Officer at Sirisia Sub-County Hospital examined PW1 and prepared an age assessment report in respect of the complainant. He also examined Kennedy – appellant.

He found some lacerations on the vagina walls, both labia and manora were lacerated with a visible discharge on the genitalia. He produced treatment notes and age assessment and was of the opinion that there was partial penetration of PW1. He said that on examining the appellant, he was coherent and of sound mind.

The investigating officer in this case was Cpl. **Stella Korir PW4;** On 13/10/2014 she was at Lwakhakha Police Station where

Administration Police took the complainant and her mother to station. The child had been taken to hospital on 12/10/2014 and she issued them with a P3 form for the child to be examined and also the appellant to be assessed on his mental status, that the appellant was found fit to plead.

PW5 Fesuts Khamala a Clinical Officer at Sirisia Sub County Hospital was the first to attend to the complainant on 12/10/2014. Upon examination, he found that the complainant had lacerations on the vagina wall, both labia had lacerations and there was discharge on the genitalia and the panty was still wet. The patient was in pain and crying. He said that the findings meant that there was penetration.

When called upon to defend himself, the appellant opted to remain silent which is his right but his father Joseph Wanyonyi testified as DW1. DW1 stated that Kennedy, the appellant is his son who has been mentally ill since 2000. He produced treatment notes; that on 12/10/2014, the appellant would scream, run away and disturb neighbours and they locked him up in his room but he broke the door open and ran away; that on 12/10/2014, he could not talk but was making noises. He said that the appellant would be treated, get well but it would recur.

The grounds upon which the appeal rests are that:

> ***(1) The appellant's rights under Article 49(1)(f) were violated in that he was detained by police for over 24 hours before being taken to court;***
>
> ***(2) That the appellant was not accorded a fair trial under Article 50(2)(h) of the Constitution;***
>
> ***(3) That his rights under Article 53(1)(f)(ii)(ii) were violated;***
>
> ***(4) That the case was not proved;***
>
> ***(5) That the age of the complainant was not proved.***

The appellant also filed written submissions in which he dwelt at length on the fact of his mental status. In the submissions, he also contended that the charge was defective in that the date in the charge is different from what the witness told the court.

Ms. Njeru opposed that appeal. On the allegation that the appellant was held by police for over 24 hours, counsel submitted that no question was put to the police officers when they testified; as regards failure to prove the age of the complainant, counsel said that the birth certificate was produced; counsel denied that the charge sheet was defective; that two medical officers who examined the complainant confirmed that there was penetration of the complainant; that the appellant was known to the child's mother and was caught in the act.

As regards mental illness of the appellant, counsel submitted that the court addressed it and found him guilty but insane.

I have considered all the evidence on record, the grounds of appeal and the submissions of the parties. The appellant was charged with the offence of defilement Contrary to Section 8(1) of Sexual Offences Act. Defilement is defined as ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

To prove the offence of defilement, the prosecution has to prove beyond any reasonable doubt the following:

> ***(1) The complainant must be a child;***
>
> ***(2) Proof of penetration;***
>
> ***(3) Positive identification of the assailant.***

As par the charge sheet, the complainant was said to be aged 3 years and therefore could not testify due to her age. Instead, her mother testified and told the court that she was born on 17/8/2011. An age assessment was done on the complainant by PW3 who estimated the child's age to be about 3 years. If the child was born 1/8/2011 as stated by the mother, then she was about 4 years as at 12/10/2014, when the offence was allegedly committed; Age is not necessarily proved by production of a birth certificate. The mother of the child must have known the child's age and besides, the fact that she could not testify is itself indicative that she was a child of tender age.

I am satisfied that the age of the child was proved. In the case of ***Francis Omuroni v Uganda Appeal No.2 of 2000***, the Court of Appeal of Uganda said:

> ***"In defilement cases, medical evidence is paramount in determining the age of a victim and the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."***

From a reading of the above decision, it is clear that age can be proved through various ways.

Whether penetration was proved;

PW1 told the court that he found the appellant in the act of defiling the child and on observing the child, her genitalia were bruised. Upon examination of the child by PW5 on the same day i.e. 12/10/2014, she found that the vagina had lacerations, vaginal wall and both labia were

lacerated and the child had a discharge in her genitalia. The lacerations were proof of penetration.

Penetration is defined in Section 2 of the Sexual Offences Act as:

> ***"The partial or complete insertion of the genital organs of a person into the genital organ of another person."***

I am satisfied that there was proof of penetration.

PW1 told the court that she found the appellant in the act of defiling the child in a bush. It was during the day after 6.00 a.m. PW1 knew the appellant as a neighbor and that fact is not controverted. The appellant was arrested the same day. There was no guessing who the culprit was. The appellant was positively identified by PW1.

The appellant complained that the charge was defective. Though he did not point out the defect, he alluded to the differences in the date in the charge sheet i.e. 21/10/2014 and the evidence of the witnesses who stated that the offence took place on 12/10/2014. The alternative charge indicates that the offence took place on 12/10/2014 and so did all the witnesses who testified.

In my view, the date of 21/10/2014 was a trying error and even the trial court did not notice it. The judgment interchangeably referred to 12/10/2014 and 21/10/2014. In my view, the date appearing in the charge sheet on 21/10/2014 is a mere typing error. The offence cannot have occurred on 21/10/2014 and the alternative charge reads that it took place earlier on 12/10/2014. The typing error did not in any way prejudice the defence case as none was alluded to. The appellant never pointed out the defect though it existed at the hearing. In any event, Section 382 Criminal Procedure Code cures such defects. The section states:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice;***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

On the allegation that the appellant was not arraigned before the court within 24 hours of arrest. I do agree with the prosecution counsel that the appellant never raised this issue before trial or with the police officers who arrested him.

The issue of breach of his rights under Article 49(1) (f) of the Constitution cannot be addressed on appeal because police officers cannot be called at this stage. If the appellant still feels aggrieved, he can file a complaint, with the police or file a Constitutional Petition.

The appellant also complained that his rights under Article 50(2)(h) of the Constitution were breached. He did not mention what rights they were. Article 50(2)(h) provides for rights of an accused to have an advocate assigned to him by the State or at the State expense. The appellant was represented by his own counsel in the lower court, since he could afford counsel, there would have been no need to assign him another.

The State is not yet able to avail counsel for every accused person but if the appellant requires one, one could have been availed. That ground is not tenable.

The appellant also complained that his rights Under Article 53(1)(f)(i)(ii) of the Constitution where violated. Again the appellant did not explain how these rights under that Article were violated and by who. The said Article provides:

> ***"53***
>
> ***(i) Every child has the right:-….***
>
> ***(f) Not to be detained, except as a measure of last resort; and when detained, to be held:-***
>
> ***(i) For the shortest appropriate period of time; and***
>
> ***(ii) Separate from adults and in conditions that take account of the child's sex and age."***

The appellant's father (DW1) testified that the appellant was born in 1987. In 2014, the appellant was 24 years and not a child. The appellant's submissions under Article 53(1) is misplaced.

PW1 knew the appellant to be mentally ill. When he was arraigned before the court, the prosecutor brought to the court's attention some documents indicating that the appellant was mentally ill and he was sent for mental assessment.

On examination he was found to be mentally ill and was committed to Mathare Mental Hospital till he was certified mentally stable and able to stand trial.

DW1 said that the appellant had had mental problem since 2000 and had been on treatment and that sometimes he would break down. The court after considering all the evidence of record, the medical report and DW1's evidence, found the accused guilty but insane.

After considering all the grounds raised, I find that there is overwhelming evidence that the child (complainant) was defiled by the appellant who was caught in the act. I am satisfied that the trial court arrived at the correct decision that the appellant is guilty but insane. I uphold that finding.

I therefore order under Section 166 of the Criminal Procedure Code that the appellant be held at the pleasure of the President.

Signed and **Dated** at **Bungoma** this 23rd **day of** *November,* **2018.**

R.P.V. Wendoh

JUDGE

Coram:

Court Assistant: Gladys

Court Prosecutor: Mr. Akello

Appellant: Present