REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 23 OF 2018

BETWEEN

ELIAS GAKUYA WAITHIEGENI…….....APPELLANTNT

AND

REPUBLIC……...RESPONDENT

(Being an appeal form original conviction and sentence dated 17/7/2018 by Hon. V O Ochanda SPM in Mukurweini SPMCR (SO) No. 6 of 2015)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant was charged with the offence of defilement contrary to ***Section 8 (1)as read with Section 8 (2) of the Sexual Offences Act, No.3 of 2006 (the SOA).*** It was alleged that on the 1st day of May, 2018 at [particulars withheld]village Mweru Location in Mukurwe-ini Sub County within Nyeri County, he intentionally caused his penis to penetrate the vagina of LWI a child aged 6 years. Alternatively he was charged with committing an indecent act with a child Contrary to ***Section 11 (1) of the SOA***. The allegation was that on the same day and in the same place, he intentionally touched the vagina of L.W.I. a child aged 6 years. He denied committing the alleged offences. The prosecution therefore called 6 witnesses.

2. PW1 was L.W.M. (L) mother of the complaint. The complainant testified as PW2 while the Mweru sub location Assistant Chief Samwel Kamau Gatuwa was PW3.Dr Michael Gachera of Mukurweini sub county hospital was PW5. Number 102108 PC (w) Mwikali of Mukurweini Police Station testified as PW5.At the close of the prosecution case the appellant was put on his defence. He gave unsworn evidence and called no witnesses.

Judgment of the trial court

3. Upon careful examination of the evidence on record the learned trial magistrate was certified that the prosecution case on the main change of defilement was proved beyond reasonable doubt. The appellant was thus found guilty as charged convicted and sentenced to life imprisonment as by law prescribed.

The appeal

4. The appellant who felt aggrieved by both conviction and sentence filed this appeal on 25th July, 2018. He set out the following homemade grounds of appeal:-

> ***a) That, the trial magistrate erred in both law and fact while admitting that the evidence of PW2 who was a child of tender age without first enquiring properly whether she was possessing knowledge of what an oath is and the purpose of being sworn in order to oppress and defeat justice.***
>
> ***b) That, the trial magistrate erred in both law and fact in admitting and relying on hearsay evidence of Pw1 and PW3 hence arriving on erroneous decision thus prejudice was occasioned to the appellant.***

c) That, the trial magistrate lost direction while convicting I the appellant on insufficient evidence contradicting and uncorroborated evidence. A miscarriage of justice was occasioned to the appellant.

d) That, the trial magistrate erred in both law and fact by dismissing the appellant's defense without giving a cogent reason for dismissing the same while siding with the prosecution, prejudicing the appellant and compromising the integrity of the court.

5. It is thus the appellant's contention that the conviction was not safe. He prays that the appeal be allowed, conviction quashed and sentence set aside.

The prosecution case

6. Very briefly, the prosecution case is that on the material day, LWI who was born on 6th September, 2012 was carrying her 2½ year old baby brother PM on her back on their way to Ken's home when they met the appellant whom she called Kuya. The appellant asked LWI to put the baby down and then removed her clothes and also removed his clothes. In her own words :-

"He then put his susu in mine (she points at her private parts). He was sleeping on me. He did "tabia" to me. After that he put my clothes back on. He also put his clothes on. He then told me that after he was left I also leave. I was with our baby. He is called PM. He then left and we left later. We went back home. I told my mother and grandmother the next day"

7. On the next day which was 2nd May 2018 L was informed through broken communication by her son PM, that Kuya had put his susu in the soil. Though she did not quite understand what the young boy meant, she waited until LWI returned home from school around 5.00pm so that she could confirm what it was that her baby was talking about. Upon interrogation LWI told L that she had been defiled by the appellant upon the promise that he would buy her cake, though he never bought the cake L took LWI to LWI's grandmother. When the grandmother examined LWI, she confirmed that the girl had been defiled. LWI also told her grandmother that Kuya had defiled her.

8. That same evening L confronted the appellant about LWI's allegations. The appellant did not deny the same. When L and her daughter went back home L examined her closely and noted a whitish discharge in her private parts. The next morning L made a report to the area Assistant chief who advised her to report the matter to Mukurweini police station L went with LWI to the police station and made the report. They were then escorted to Mukurweini sub county hospital for examination and treatment, after which they went home L produced LSI original birth certificate which confirmed that the child was born on 6th September 2012. The same was marked as P exhibit 4.

9. It was also L testimony that though the appellant was her neighbor she had no grudge with him. She identified the P3 form signed on 17th May, 2018, the PRC form dated 3rd May, 2018 and a bundle of treatment notes. L denied suggestions by the appellant that she bribed the police to fix him.

10. Dr. Michael Gachara examined LWI on 17th May, 2018 and confirmed that the child had earlier on 3rd May, 2018 sought medical attention at the same Mukurwaini sub – county hospital where she had been examined and treated with antibiotics, analgesics and PEP. On vaginal examination the child's labia **majora** and labia **minora** were found inflamed. Though no laceration was noted, the child's hymen was broken. There was no discharge and no blood.

11. During laboratory investigation, it was confirmed that LWI had minor urinary tract infection. Syphilis test was negative. Neither spermatozoa nor any other organism was detected. Dr. Gachara produced the P3 form as Pexhibit 1, the PRC form as Pexhibit 2 while the treatment notes were produced as Pexhibit 3.

12. Number 102108 PC (w) Mwikali of Mukurweini Police Station received the report of the incident on 3rd May, 2018. She escorted L and the child to the hospital. She also interrogated the child who gave her a detailed report on how the appellant enticed LWI to follow him to a nearby shamba stripped her of her clothes removed his own clothes and did "tabia mbaya" to her in the presence of her baby brother PM.

13. PC Mwikali traced the appellant and on 6th May, 2018 the appellant was arrested by assistant chief Samuel Kamau Gatuma (Samuel). PC Mwikali also issued a P3 form to the complainant. She also testified that during interrogation LWI was crying and was distraught. She confirmed the child age through P exhibit 4 which was availed by L.

14. PC Mwikali also testified that after the arrest she obtained a copy of the appellant's national ID which confirmed that the appellant was born on 22nd August 1988. The copy ID was produced as P exhibit 5. She also confirmed that there was no grudge between the two families. She testified that from the interrogation of the witnesses as well as the appellant, she was satisfied that the appellant had defiled LWI, hence the charge.

The defence case

15. The appellant gave unworn evidence. He alleged that the case against him was fabricated by L because of his constant refusal to help her with work on the farm. He testified that on 1st May, 2018 he was at work between 4.00pm and 7.00pm and it was only on his return home that he found a conversation going on that he had defiled LWI. He denied the allegations but was all the same arrested, beaten and taken to the police station.

Hearing of the appeal

16. The appellant canvassed his appeal by way of written submissions in which he contended that the procedure for admitting LWI's

evidence was not proper and for this argument he placed reliance an **Joseph Opondo VS Republic Criminal Appeal No. 91 of 1999 as well as John Muiruri vs Republic (1983)KLR 445.**

17. The appellant also submitted that the learned trial court relied on extraneous evidence in convicting him. He relied on **Okethi Okale and Others Vs Republic (1965) EA 155**. It was also appellant's submission that the medical evidence adduced in court was not conclusive that LWI had been defiled especially at regards the issue of penetration. He urged the court not to presume that the inflammation of the labia majora and labia minora was evidence of penetration. In this regard the appellant placed reliance on **Ben Maina Mwangi Vs Republic (2006) eKLR** and contended that if indeed LWI had been defiled as alleged she could not have managed to go to school next day without her mother knowing that indeed she had been defiled.

18. In response, prosecution Counsel Mrs Owuor submitted that the evidence on record clearly shows was that the evidence on record fully supports the charge against the appellant, starting with the complainant's own testimony complainant's mothers testimony as well as the assistant chief's testimony in addition to the medical evidence and the investigation officers testimony. The prosecution counsel emphasized that the medical evidence adduced by PW4 revealed that the complainant's labia majora were lacerated though there was no bleeding. She explained the absence of blood by saying that the complainant was taken to the doctor some 2 days after the incident.

19. As regards age, counsel submitted that he birth certificate produced as Pexhibit 4 confirmed and proved, the complainant's age beyond any doubt; that in the circumstances appellant's allegations that the complainant's age was not proved was baseless. Counsel also submitted that the identification of the appellant as the assailant was not in doubt and urged the court to dismiss the appeal.

Issues, analysis and determination

20. This is a case which involved defilement of a child of 6 years. The prosecution was thus under a duty to prove the age of the complainant, the fact that there was penetration and finally it had to prove that it was the appellant and no one else who defiled the complainant.

21. Regarding the age to the complainant, I do find that on this issue there is no doubt in my mind that the prosecution discharged it burden of proof. There is on record documentary evidence showing that the complainant LWI was a child of tender years within the meaning of the Sexual Offences Act having been born on 6th September, 2012; and by the time of the alleged offence LWI was 6 years old. I therefore agree with prosecution counsel that the appellant's allegations that the age of the complainant was not proved are baseless.

22. The second issue for determination is whether where was penetration. LWI described in some detail how the appellant removed her clothes and put his penis into her private parts after he had also removed his clothes.

23. "***Section 2 of the Sexual Offences Act*** defines Penetration as the

> ***"Partial or complete insertion of the genital organ of a person into the organ of another".***

24. The above definition in my considered view was given for good reason because it has been observed over time that some perpetrators of sexual crimes are generally in a hurry to get over with the crime and get away before they are caught.

25. In the instant case, the doctor who examined LWI told the court that he noticed inflamation on both the labia majora and labia minora. He also testified that LWI had a urinary tract infection, though no deep penetration seems to have taken place. In addition to the above the doctor also testified that LWI's hymen was broken. I am of course aware of the fact that sexual intercourse is not the only reason for broken hymen but in the instant case the sum total of the doctor's findings coupled with the complainant's own testimony strongly suggest that there was penetration and so I find.

26. The final issue for determination is whether it was the appellant who committed the alleged offence against the complainant LWI. When LWI was questioned by her mother, she gave the name of Kuya as the culprit which was the short form of the appellant's name. The child also pointed at and identified the appellant during the hearing as Kuya. The trial court noted that after LWI had identified the appellant as she testified, she broke down and cried uncontrollably. Despite her young age LWI was not intimidated by the appellants questions during cross examination. According to the mother, once the mentioned the name Kuya as the assailant the mother knew at once who LWI meant. Although the appellant alleged that LWI's mother L had bribed the police in order to have him arrested and charged, I find such a suggestion preposterous and dismiss it altogether. LWI testified during cross examination that what she had told the court was the truth. Though I did not see or hear, I am satisfied with the trial court's finding evidence that LWI gave credible and truthful evidence, which was not in any way shaken by the appellant's defence.

27. I am thus satisfied that the identity of the appellant as the person who lured LWI with the promise of buying her a cake but eventually defiled her was properly and positively identified as the culprit who defiled LWI had no hesitation in recognizing him in court, a sight that seems to have brought back painful memories to her that made her break down and sob uncontrollably.

28. With all the evidence adduced by the prosecution, I find the appellants alibi defence so be a mere afterthought and I accordingly dismiss the same in the same way the trial court dismissed it.

29. The appellant raised one other complaint about the judgment. That he should have been taken for DNA test to determine whether or not he was the one who had defiled LWI. In this regard, I concur with the trial courts findings that a DNA test is not a prerequisite for proof of defilement. Such a test would be required where paternity is an issue. There was no such issue in this case. The prosecution adduced sufficient evidence during the trial that pinned the appellant to the scene of crime and to the commission of the crime. For the above proposition, see **AML vs Republic (2012) eKLR** relied upon by the trial court.

Conclusion

30. For all the above reasons, I find that this appeal on both conviction and sentence lacks merit. The same is accordingly dismissed. Right of appeal to Court of Appeal within 14 days.

31. It is so ordered.

RUTH N SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Nyeri on 20th day of December, 2018

HON. A. MSHILA

JUDGE.

In the Presence of

Gicheha for the state

Accused present in person

Kinyua – Court Assistant