



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 55 OF 2016

BETWEEN

JECONIA MALAWA ANDASI.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C.N.Njalale, RM dated 23rd June 2016 at Senior Resident Magistrate's Court at Winam in Criminal Case No. 1510 of 2014)

JUDGMENT

1. The appellant, **JECONIA MALAWA ANDASI** was charged, tried and convicted on one count of defilement contrary to **section 8(2)** of the **Sexual Offences Act**. It was alleged that on 16th October 2014 at [particulars withheld] Estate, Kisumu County he intentionally and unlawfully caused his genital organ namely his penis to penetrate the vagina of LA, a child aged three and a half years.
2. The appellant was sentenced to life imprisonment and now appeals against conviction and sentence based on petition of appeal and supplementary grounds of appeal. He contends that there was no medical evidence to convict him with the offence. That he was not subjected to a medical examination and that the trial court did not consider that there was a grudge between him and the child's mother.
3. The respondent's counsel supported the conviction and sentence and submitted that the prosecution had proved all the elements of the offence of defilement.
4. As this is a first appeal, the duty of the appellate court is to review all the evidence and reach an independent conclusion as to whether to uphold the conviction and sentence. In doing so, the court must make an allowance for the fact that it did not have or see the witnesses testify to assess their demeanour (see **Okeno v Republic [1972] EA 32**).
5. The trial magistrate established that the child, LA, was three and a half years old and after conducting a *voir dire* examination, she held that the child could not communicate and would accordingly testify through an intermediary. I shall revert on this aspect of the case later in the judgment.
6. The child's mother, PW 1, recalled that on 16th October 2014, at about 4.00 pm, she was in her house while LA was playing with another child (PW5). LA came to the house crying and PW 5 told her not to beat her up as the appellant had called her and LA to give them sweets. At that time, LA was crying and

mentioning the name “Jeky Jeky”. PW 5 explained to her that the appellant called the children and while they were in his house he saw the appellant remove his black thing and put it inside LA's buttocks.

7. PW 5 recalled that when he was outside, LA was called by the appellant. She saw her go into the appellant’s house. She described what happened as follows:

I saw Jacy who went in the house and I followed him to the said house. He placed the said LA on his bed and chased me away. Though I did not go away I tiptoed in the window, he removed his black thing from his pocket and pinched the complainant on the vagina (Witness points at the genital organs) Jacy removed his clothes and pinched LA with the black thing.

8. When LA returned home, PW 1 observed that the child had defecated on herself and she had blood stains on her panties. PW1 knew the appellant as he was a neighbour and she immediately went to call PW 5's mother, PW 2.

9. PW 2 testified that on the material day in the afternoon, she had gone to pick up PW 5 when she saw LA leaning on a wall. When she asked her what was happening, LA started running away. She followed her to PW 1's house where she met PW 1 and told her that the child appeared to be in pain. She noted that the child had blood and a whitish discharge falling on her legs. She also saw faeces from her anus when PW 1 checked. PW 2 called PW 5 who also told her what had transpired. Both PW 1 and PW 2 went to the appellant's house which was nearby and found the appellant. PW 1 later reported the matter and took the child to hospital for examination and treatment.

10. PW 4, the investigating officer, recalled that on 16th October 2014, PW1 came to report that her daughter LA had been defiled. She issued a P3 form. She was also given blood stained panties and a dress which were produced in court as exhibits. She recorded statements and confirmed that the appellant resided about 40-50 metres from PW 1. She caused him to be arrested.

11. PW 4, a doctor at Jaramogi Oginga Odinga Hospital, recalled that he filled the medical report (P3 form) request to examine LA. He examined the child on 21st October 2014 and noted that the child had no external injuries. He noted that although there were no injuries on the genitalia, the hymen was absent. PW 6, the doctor who treated the LA on 17th October 2014, testified that that her genitalia had bruises and had signs of inflammation. He filled the Post Rape Case form and concluded that there was penetration.

12. In his sworn testimony, the appellant stated that on the material day he had left his home and proceeded to his place of work where he works as a painter. He returned home at 6.00 pm. He was arrested on allegations of defilement which he denied.

13. The main issue for determination in this appeal is whether the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant. In order to prove its case under **section 8(1)** of the **Sexual Offences Act**, the prosecution must show that the appellant did an act that amounted to penetration of 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.*”

14. Having received the evidence, I am satisfied that the testimony of PW 1, PW 2 and PW 5 was sufficient to establish the fact of penetration. PW 5 was direct witness and although he gave unsworn testimony, his testimony was corroborated by PW 1 and PW 2. They were the first people to be informed and they saw the child in a state of distress, her genital area had been injured there was blood and faeces on her body. Besides, the dress and panties LA was wearing on the material day were produced in evidence. In addition to the witness testimony, the evidence of the doctors, PW 4 and PW 6, was sufficient corroboration of the fact of penetration. I therefore find and hold that penetration was proved.

15. The next issue is whether the appellant was the perpetrator. The testimony of PW 1, PW 2 and PW 5 established that the appellant lived in the neighbourhood and was well known to them. PW 5 clearly knew him and when the child was interrogated by her mother she mentioned “Jeky Jeky” in reference to

him. The incident took place in broad daylight hence the chance of mistaken identity was clearly diminished.

16. The appellant's alibi defence when considered alongside the testimony of PW1, PW2 and PW5 could not hold any water. From the record, the witnesses were subjected to searching cross-examination and their testimony was not shaken. It was not suggested to them that there was a grudge. In any case, the appellant, in his sworn defence did not allude to state the nature of the grudge that would cause a three and a half year old to make allegations against him. The totality of the evidence is that the appellant's defence was weak tea and was correctly dismissed.

17. I also dismiss the appellant's contention that he ought to have been subjected to a medical examination. Such evidence from the appellant is not necessary as the totality of the evidence implicated the appellant. The Court of Appeal in **Geoffrey Kioji v Republic, NYR CR. APP. NO. 270 of 2010 (UR)** observed that:

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement.

18. **The trial magistrate** found that the child was vulnerable and could not testify and hence directed that she testifies through her mother, PW 1, as an intermediary. PW 1 proceeded to testify on her own account. It is not apparent from the record that the PW 1 communicated questions to LA and LA responded. The trial magistrate, in my view, misunderstood the role of an intermediary which is to act as a channel of communication between the witness and the court.

19. The role and place of an intermediary was explained by the Court of Appeal in **M. M. v Republic NRB Criminal Appeal No.41 of 2013 [2014]eKLR** as follows:

Is an intermediary the mouth piece of the vulnerable witness or is he or she the witness? According to section 2 of the Sexual Offences Act, an intermediary is defined to mean among other things, a person who gives evidence on behalf of a vulnerable witness.

Section 31(1) provides inter alia that: -

A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

We have seen that in Article 50(7) of the Constitution an intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary. The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross-examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties.

The key word in sub section 7 is emphasized as shown below to demonstrate the place of the intermediary's evidence.

If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may;

a) convey the general purport of any question to the relevant witness.

b) inform the court at any time that the witness is fatigued or stressed; and

c) request the court for a recess. (Emphasis supplied)

The word through is used also in subsection 4(b) in describing the protection of the witness by providing an intermediary through whom his evidence is relayed. It is the witness who gives the evidence which is explained and communicated to the court and the reverse through an intermediary in the manner and style developed between the two.

20. This error in treating PW 1's testimony as that of an intermediary was not fatal to the prosecution case. Although the child did not testify, it is established that this is not necessary particularly where the child is vulnerable and there exists sufficient independent evidence, as I have outlined above, as proof of the fact of penetration. In ***M. M. v Republic (Supra)***, the Court of Appeal observed that, "Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice."

21. The final ingredient of the offence of defilement is the age of the child. Proof of age is a question of fact and there is overwhelming evidence that the child was three and a half years old. For purposes of the offence, there is no doubt that she was below the age of 18 years. Apart from the fact that PW 1 testified as to her age and produced a birth certificate, the *voir dire* confirmed that she was so young that she could not express herself. She was clearly below the age of eleven years which under **section 8(2)** of the ***Sexual Offences Act*** attracts a life sentence.

22. The evidence against the appellant was overwhelming. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 28th day of March 2017.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.