REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 231 OF 2014

FRANCIS KENNEDY OWINO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. L.A. Mumassabba RM delivered on 26th September 2014 in Sexual Offences. Case No. 17 of 2013 in the Principal Magistrate's Court at Mavoko)

JUDGMENT

The Appellant was convicted of, and sentenced to serve life imprisonment for the offence of defilement of a child, contrary to section 8(1) (2) of the Sexual Offences Act. The particulars of the offence were that on the 25th day of October 2013 in Athi River District within Machakos County, the Appellant intentionally and unlawfuly caused his penis to penetrate the vagina of B M a child aged 4 years. He had also been charged with the alternative offence of committing an indecent Act with a child contrary to section 11(1) of the Sexual Offences Act .

The Appellant has filed an appeal against his conviction and sentence. He in this respect filed a petition and grounds of appeal on 13th October 2014, and on 27th January 2015 filed supplementary grounds of appeal dated 12th January 2015 through his legal counsel, Karanja Otunga & Associates. The said legal counsel also filed written submissions dated 9th August 2016.

The Appellant contended that firstly, the Trial magistrate erred in law and in fact by convicting him on the charge of defilement without proof of the alleged penetration. It was submitted in this regard that the evidence of the complainant did not show any defilement, and that although the evidence of PW5 was that the complainant's hymen was broken, she testified that she did not know when it was broken, and the evidence showed that there were no bruises on the complainant's genitalia

Secondly, the Appellant also argued that the trial magistrate erred in law and facts by taking the evidence of the alleged victim but failed to state in the proceedings whether or not she was satisfied that the child was telling the truth and the reasons why, which is mandatory under the proviso to section 124 of the Evidence Act, but nevertheless proceeded to convict and sentence the Appellant.

Thirdly, that the learned trial magistrate misdirected herself when she convicted and sentenced the Appellant when there was no medical evidence connecting the Appellant to the offence and despite the Prosecution not producing crucial evidence connecting the Appellant and the offence. It was contended in this respect that the investigation officer did not recover any items from the scene of the alleged crime or take blood samples from the Appellant and complainant, or conduct any investigations to connect the Appellant to the offence.

Ms Rita Rono, the learned prosecution counsel, filed written submissions in response dated 15th November 2016, wherein she urged that the charges against the Appellant were proved beyond reasonable doubt, and proceeded to analyse the evidence of the complainant and other witnesses in light of the ingredients for the offence of defilement. It was submitted that the complainant gave an account of how she was defiled by the Appellant and positively identified the Appellant, and that PW5 confirmed that the complainant's hymen was broken and produced an age assessment report that proved that the complainant was 5 years of age.

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

In this regard after going through the grounds of appeal and the arguments made thereon, I note that the main issue raised by the Appellant is whether he was convicted for the offence of defilement on the basis of sufficient and satisfactory evidence.

The ingredients of defilement were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

> "**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

The prosecution called five witnesses to prove their case against the Appellant. PW1, C W K, was the complainant's mother, and she testified that on 25th October 2013 the Appellant brought the complainant to her house. .After inquiry, the complainant told her that she was feeling pain between her legs and upon examining the private parts of the complainant she found sperms on the private parts, and reported the incident to the village elder who caused the Appellant to be arrested.

PW2 who was Wycliffee Wayele Kisongochi also testified to seeing the Appellant with the complainant on that date. PW3 was the complainant, who testified as to what happened on that day, while PW4 was PC Ntabo, the Investigating Officer, who testified that she visited the scene of crime where the complainant showed her the house where the Appellant had allegedly defiled her. She testified that the Appellant was arrested by members of the public.

The last witness (PW5) was Maureen Martha, a clinical officer at Athi River health centre who examined the complainant on 28th October 2013 and filled a P3 form which she produced as an exhibit. She also produced the complainant's age assessment certificate as an exhibit.

The Appellant has argued that from the evidence adduced, the element of penetration was not proved beyond reasonable doubt. The relevant evidence adduced in the trial Court as to penetration was that of the complainant, who was PW3, and who told the trial court that the Appellant "*aliniumiza hapa*" ("hurt me here") pointing at her vagina, and she further testified that the Appellant removed her trouser and "*akaniumiza* ("and hurt me"). The trial court noted the complainant was tensed. The complainant positively identified, the Appellant having known him from before and therefore this was a case of recognition. In addition PW1 and PW2 corroborated the complainant's evidence that she was with the Appellant on the material date.

No evidence was adduced as to PW3's credibility as a witness, and her evidence was consistent under cross-examination, whereupon she confirmed that the Appellant removed her clothes.; Therefore PW3's evidence was sufficient on its own and did not require to be corroborated under section 124 of the Evidence Act.

Section 124 of the Evidence Act in this regard provides as follows:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act,**

where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

The evidence of Pw5 also confirmed that the complainant's hymen of the complainant was broken, although there were no fresh injuries on the complainant's genitalia, and she also produced an age assessment report showing that the complainant's age was assessed on 15th July 2014 and she was found to be 5 years of age.

The Appellant has in this regard submitted that it's unlikely the act of penetration took place in light of absence of bruises and tears on the genitalia and no evidence of discharge on the same . It is my view in this regard that the evidence by PW3 and PW5 did indeed raise doubts as whether there was penetration or not. Section 2 of the Sexual Offences Act defines penetration as follows:

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

The evidence of PW3 was not specific as to how the Appellant hurt her at the vagina, and in particular whether he inserted his genital organ into her vagina. In addition given that the were no fresh injuries on the complainant's genitalia, it is not evident whether her hymen was torn on the date it is alleged the Appellant defiled her, which was on 25th October 2013, three days before her medical examination by PW5 It is thus my finding for these reasons that the prosecution did not prove penration beyond reasonable doubt.

However the evidence on record did in my view prove that the offence of committing an indecent act with a child was committed, contrary to section 11(1) of the Sexual Offences Act which provides as follows:

Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

An indecent act is defined in section 2 of the said Act as an unlawful intentional act which causes—

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

(b) exposure or display of any pornographic material to any person against his or her will;

The provisions of **section 179** of the *Criminal Procedure Code in this regard empower a* court to convict an accused person for an offence which he was not charged but which is proved and was a lesser offence than that charged. The said section provides as follows:

"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

It was explained by Asike-Makhandia J. (as he then was) in ***Kyalo Mwendwa v Republic*** **[2012] eKLR that** the *jurisdiction of the Court is to impose a substituted conviction for a minor cognate offence only. The* offence of committing an indecent child contrary to section 11(1) of the Sexual Offences Act, is a lesser cognate offence as it carried a lesser sentence that of defilement contrary to section 8(1) and (2) of the Sexual Offences Act.

I hereby therefore quash the conviction of the Appellant of the offence of defilement of a child contrary to section 8 (1) and (2) of the Sexual Offences Act, and substitute it with the conviction of the Appellant for the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, pursuant to the provisions of section 179(2) of the *Criminal Procedure Code*.

I also substitute the sentence of life imprisonment with a sentence of ten (10) years imprisonment for committing an indecent act with a child, which sentence is to run from the date of the Appellant's conviction by the trial Court.

It is so ordered.

DATED AT MACHAKOS THIS 11th DAY OF APRIL 2017.

P. NYAMWEYA

JUDGE