REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 24 OF 2016

J W G.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates Court Criminal Case No. 25 of 2015 (Hon. C. Wekesa, SRM) on 5th April, 2016)

JUDGMENT

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 particulars were that on the night of 19th and 20th day of October, 2011 at [particulars withheld] in Nyeri County within the Republic of Kenya he intentionally and unlawfully caused his genital organ, namely penis, to penetrate the genital organ J W N, a child of 11 years old. He also faced the alternative count of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act a**nd here it was alleged that on the night of 19th and 20th day of October 2011 at [particulars withheld] in Nyeri County within the Republic of Kenya, the appellant intentionally and unlawfully caused his genital organ, namely penis, to touch the genital organ, namely, vagina, of J W N a child of 11 years old.

He was convicted of the principal count and sentenced to life imprisonment. He appealed against the decision of the learned magistrate and raised five grounds in his petition which he filed in this Honourable Court on 8th April, 2016. These grounds are as follows:

1. The learned trial magistrate erred in law and in fact in convicting the appellant on the basis that the complainant was aged 11 when yet there was no documentary proof of her age;

2. The learned trial magistrate erred both in law and in fact in convicting the appellant without considering that although the offence was committed in the 2011 it was not reported until the year 2015;

3. The learned trial magistrate erred both in law and in fact in relying on the prosecution evidence that was riddled with contradictions and inconsistencies;

4. The learned trial magistrate erred both in law and in fact in convicting the appellant on a charge that was not proved beyond all reasonable doubt; and,

5. The learned magistrate erred both in law and in fact in rejecting the appellant's sworn defence which was not challenged by the prosecution.

Before considering these grounds in detail and the respective submissions by the appellant and the learned counsel for the state it is necessary to revisit the evidence proffered at the trial. The need for this Court to evaluate the evidence afresh and come to its own conclusions is mandatory because it is the first appellate court and as such, it owes the appellant that obligation to relook into the evidence again. In evaluating the evidence afresh, this court will make its own conclusions that may or may not be consistent with the findings of fact by the trial court; however, even as it may differ with the trial court on factual findings, this Court has to make provision for the reality that the trial court had the advantage of seeing and hearing the witnesses. This legal position was aptly stated in the case of **R versus Okeno 1972 EA32** at page 36 where it was stated:

> ***An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness.***

The circumstances in which the offence for which the appellant was charged occurred are what one may describe as chilling, to say the least. According to the complainant, she and her two siblings together with their mother shared a two-roomed house with the appellant. On the nights of 19th and 20th October, 2011, the appellant pulled her from where she was sleeping with the rest of her siblings into his bedroom where proceeded to defile her. She was quite explicit that the appellant inserted his penis into her vagina and although she felt extreme pains, she couldn't scream because he threatened her with death if she did.

The complainant's mother had not been seen on these two days; the complainant initially thought she had gone to work when she did not turn up on the first day but when she failed to show up again on the second day, she thought that she may have gone to visit their maternal grandmother. For the two days their mother was absent, these children were starved and, perhaps because of the pangs of hunger and anxiety, the complainant decided that they should follow their mother whom they believed was at their grandmother's home. As she was sorting out their clothes which she testified were strewn all over the bedroom the appellant shared with their mother, she stumbled on her mother's body under the bed. She then asked for help from a neighbour whom she named as M. M came and found that indeed the complainant's mother had been strangled with a piece of cloth. She and her siblings then accompanied M to the police station, apparently to report the death of her mother.

Because of the complainant's mother's death, the complainant did not go to hospital immediately for examination or treatment. According to her, the death of her mother left her with nobody to take her to hospital and it was not until 4 years later that she went to Nyeri provincial general hospital for examination. In the meantime, so she testified, she did not have any sexual intercourse with anybody else.

The complainant's grandmother, **J W W M (PW2)** testified that on 22nd November, 2011 she received information that she was required at Mweiga police station. When she went there, she found her grandchildren who included the complainant and her siblings. It is at the station that she was informed that her daughter had been murdered by the appellant. She testified that she knew the appellant and she was aware that her daughter had been living with him for about a year. While at the station the complainant also told her that the appellant had defiled her. The complainant had since been taken in at a children's home.

The P3 form in respect of the complainant was filled on 27th of May, 2015. **Dr. Joseph Njoroge Silas (PW3)** who produced it in court stated that upon examination of the complainant, the hymen was found to broken but the injury had healed; the nature of the injury on her genitals was classified as 'harm'. The doctor explained that since the injury was occasioned in 2011, it had healed by the time the complainant was examined in 2015. He was not able to establish whether there was a vaginal discharge because such a discharge can only be detected within 72 hours of the sexual act.

Sergeant Philip Wachira Muriuki (PW4) testified that he was the duty officer at Othaya police station and that on 12th May, 2015 at around 11 PM a report officer called and informed him that the appellant had surrendered himself to the police because he had killed somebody. The officer called chief inspector Marete and together they interrogated the appellant who confessed that he had murdered the deceased on 19th October, 2013 at Mweiga. Since that time, he had been haunted by this death and he was not at peace with himself. It is for this reason that he had surrendered himself to the police. The officer then called the officer in charge of Mweiga police station (OCS) to inform him of this arrest since the crime was committed in his jurisdiction. The OCS confirmed that a report had been made at his station with regard to the murder. He therefore advised that the appellant be locked up until the following day when his officers would come for him.

Chief inspector **Evans Omuga (PW5)** who was then attached to Mweiga police station testified and confirmed that on 12th May, 2015, he received a call from chief inspector Marete from Othaya police station who told him that the appellant had presented himself at Othaya police station and he had confessed that he had murdered the complainant's mother on around 19th or 20th of October 2011 and that he had also defiled the complainant. This witness picked the appellant from Othaya police station 13th of May, 2015. Upon interrogation, the appellant confirmed that whatever he told the officer in charge of Othaya police station was true. He even led the officer to where he was living with the deceased and her children. However, the house in which they were living had been demolished. The appellant then took the officer to the deceased's parents' home where she had been buried. This was in [particulars withheld] . The officer found the deceased's mother and her sister at the home. The deceased's mother showed him the deceased's grave.

This witness established that at or about the same time the deceased was murdered, the appellant had also defiled the deceased's daughter. Indeed, he tracked the complainant at the school where she had been taken and upon interrogating her she informed him that she had been defiled by the appellant and that she had also stumbled on her mother's body in her bedroom 22nd October, 2011. The officer then took the complainant to hospital for examination; the examination results revealed that she had been defiled. The appellant was also examined and was found to be HIV-positive. The appellant told this officer that he committed the offence because he believed that the deceased had infected him with the decease his defilement of the minor was some sort of revenge.

In order to establish the age of the complainant, the officer made efforts to locate documents in relation to the complainant's age but he could not find any. However, acting on the order of the trial court, he took the complainant for age assessment whose report indicated that she was aged 15 as at 6th of January 2016; this meant that she was 11 years old when the offence was committed.

When the appellant was put on his defence, he opted to give sworn testimony. He testified that on 11th of May 2015 when he was at Chaka town he received information from somebody that he (the appellant) had killed his sister and defiled her daughter. He advised him to go and report the matter to the police station. He then went to Othaya police station on 13th of May 2015 to report that a criminal case had been fabricated against him. However, he was arrested and taken to the cells where he was locked up. He confirmed that he was picked up from Othaya police station by officers from Mweiga police station and that he also went with them to where he used to live and also where the deceased was buried. He denied having defiled the complainant. He admitted, however, that he knew the deceased because they used to work together.

This is the evidence that the trial court was presented with. In ascertaining whether or not the trial court's conclusions should be upheld, it is necessary that the evidence be evaluated in the context of the law on whose basis the appellant was charged; this **section 8(1)(2)** of the **Sexual Offences Act** which provides:

> ***8.(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall***

upon conviction be sentenced to imprisonment for life.

According to this provision of the law, there are two critical elements which must be established before a conviction for the offence of defilement can be sustained; first, there must be penetration and second, the age of the complainant which in this case, was eleven years or less, must be proved.

"Penetration" is defined in **Section 2** of the Act to mean *"the partial or complete insertion of the genital organs of a person into the genital organs of another person"*.

On this question of penetration, the complainant herself testified in vivid and explicit terms how the appellant pulled her from her bedroom into his bedroom, removed her pants and inserted his genital organ into her own genital organ. There is nothing I can find from her testimony or indeed the entire record that suggests that she was not truthful or that she could not be believed. Neither is there anything to suggest that her credibility was impinged in anyway. Her evidence that she lived in the same house with the appellant was not contradicted; as matter of fact, she stated that they had shared that house for a year. This aspect of evidence was corroborated by her grandmother who testified that she knew that her daughter, the complainant's mother, was not only living with the appellant but she also regarded him as her daughter's husband with whom she had co-habited for a year. The appellant was no stranger to both the complainant and her grandmother.

Apart from the complainant's evidence, there was also medical proof that indeed her hymen had been broken. According to the doctor's evidence, the injury that would result from the perforation of the hymen had long healed and this was understandable because the complainant was examined four years after the event. The complainant herself testified that she had never had sexual intercourse with any other person after the appellant defiled her.

The appellant made most of the time lapse between the time the complainant was defiled and the time she was examined. I would agree that in any other ordinary case a delay of four years before a medical examination for any injury, let alone a sexual assault, was inordinate. However, the immediate events that followed her defilement appear to have influenced the direction the complainant's life and every aspect of it took. Consider this. Here is an eleven-year-old child who is subjected to a brutal and beastly act by a person she would ordinarily regard as her father (her grandmother testified that the deceased's children used to refer to the appellant as "daddy"). It is logical to imagine that after such terrifying experience, she is anxious to see her mother back and perhaps she would be relieved to pour out to her what she has gone through. Instead, she stumbles on the body of her mother, strangled and hidden under the bed. How much more could she bear?

In these circumstances, I would not be prepared to condemn the complainant for failure to seek medical attention at the earliest opportunity possible. I reckon that the loss of her mother in the circumstances she did was such a painful experience that even an adult would have been forgiven for being weighed down by the loss of one's mother rather seeking a timely medical attention for the kind of injury that the complainant had sustained. It has to be remembered that that the complainant herself was honest and candid that she could not go to hospital because the person who could have taken her there was that very person who had been murdered. She was then taken in at children's home where she was located four years later.

It could be that there was some lapse on the part of the police when this incident was reported to them because there is evidence that the they were informed of the complainant's predicament when the report of the deceased's murder was made but for some reason they didn't refer her to hospital for examination immediately. In fact, looking at the facts generally, one is bound to question the diligence and seriousness of the police at Mweiga police station where this incident was reported. They simply never took any action even after they were informed that the complainant's mother had been murdered. All they did was to take the body from where it had been hidden and dumb it at the mortuary; they even allowed the deceased's mother to bury it without conducting any post-mortem to establish the cause of the deceased's death. From what I gather it had to take the appellant himself, four years later, to tell the police what he had done for them to prefer the charge for which he was subsequently convicted. It is also

quite evident that the appellant effectively confessed to having murdered the deceased and defiled her daughter but even then, the police never took any step to have that confession formally recorded and prefer appropriate charges against the appellant. In my humble estimation, what the police did was no different from what an accomplice to offences committed against the complainant and her mother would do. I would recommend the Director of Public Prosecutions to take appropriate steps to, perhaps, study the trial record together with police file and satisfy himself that indeed there is no evidence to mount a prosecution for the murder of the complainant's mother before this issue can be left to rest.

Be that as it may, even in face of the police lethargy and their lackadaisical approach to this case, there was uncontroverted medical evidence that the complainant was defiled. I am satisfied with the explanation given for the delay in her taking a medical examination. That being the case, I agree with the learned magistrate that the first limb of the offence was proved beyond reasonable doubt.

As for the question of age, the complainant was taken for age assessment when it emerged that there was no other documentary evidence to prove her age. According to the age assessment report the complainant was eleven years old at the time she was defiled and therefore the appellant was properly charged and sentenced under **section 8(1)(2)** of the **Criminal Procedure Code**.

Turning to the appellant's defence, he admitted that he presented himself to the police; however, contrary to what the investigations officer said that he presented himself to admit that he murdered the deceased and defiled her daughter, his case was that he went to report that somebody *"who did not have a name"* had accused him of committing these offences.

The appellant's defence does not appeal to me to be viable and here again I agree with the learned magistrate in dismissing it. His defence was unsustainable because while he presented a picture of having gone to lodge a complaint at the police, he could not possibly be believed when he alleged that the person against whom he was making the complaint had no identity. I tend to believe the investigations officer that the appellant surrendered because, according to the appellant himself, he was haunted by the deceased's death. It has to be remembered that the deceased is a person he knew and he admitted that they used to work together. As a matter of fact, he led the investigations officer to where he lived with the deceased and even to her parents' home.

For the foregoing reasons, I do not find any merit in any of the grounds of appeal. Accordingly, the appellant's appeal is hereby dismissed.

Signed, dated and delivered this 22nd September, 2017

Ngaah Jairus

JUDGE