REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 47 OF 2017

Arising from the original conviction and sentence by Hon J. IRURA in NKUBU SRMCCRC NO 68 OF 2014 on 5.5.2017

(CORAM: F. GIKONYO J.)

FRANCIS MURANGIRI MBAYA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT.

Defilement

[1] The Appellant Francis Murangiri Mbaya was charged in NKUBU SRMCCRC NO 68 OF 2014 with one count of defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 21st December 2013 at [particulars withheld] location in Imenti South District within Meru County he intentionally caused his penis to penetrate the vagina of CM a child aged 16 years. In the alternative, the Appellant faced a charge of committing an Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The Appellant was tried and at the end was convicted of the main charge of defilement and sentenced to 15 years imprisonment.

[2] The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal on 12th May 2017. He subsequently filed what he called supplementary grounds of appeal setting out the following grounds of appeal;

> ***(a) The Learned Trial Magistrate erred in matters of law and fact by failing to note that the participation of the appellant in this ordeal was doubtful.***
>
> ***(b) That the Learned Trial Magistrate erred in matters of law and fact by failing to note that it was the complainant who deceived the appellant that she was a grown up.***
>
> ***(c) The Learned Magistrate erred in both law and fact by failing to comply with section 169 of the Criminal Procedure Code points of determination.***
>
> ***(d) That Learned Magistrate erred in law and fact by failing to note that the under garments worn by the complainant during the alleged offence of defilement were not produced in court as***

exhibit during the trial to prove that the complainant was actually defiled by the appellant.

(e) The Learned Magistrate erred in law and fact by failing to note that no investigations were conducted in regard to this matter.

(f) The Learned Magistrate erred in law and fact by failing to note that the evidence tendered by the clinical officer was inconclusive.

[3] When the Appeal came up for hearing on 21st September 2017, the Appellant urged the court to consider his written submissions and determine the Appeal. Mr. Namiti for the State opposed the appeal and argued that: (1) the evidence on record especially by Pw1 was overwhelming and penetration had been proved; (2) the Appellant and the complainant were people who knew each other; and (3) in sexual offences DNA is not a mandatory requirement.

Duty of court

[4] This being first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses. See **KIILU & ANOTHER vs. REPUBLIC [2005]1 KLR 174** where the Court of Appeal stated thus;

i. ***An Appellant on a first appeal 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.***

ii. ***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; Only then can it decide whether the Magistrate's findings should 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 witnesses.***

In doing so, I am aware that there is no any particular prescribed method of re-assessing evidence. Nonetheless, merely rehashing of the evidence as was recorded will not pass for a good style. Of great significance, therefore, is for the appellate court to employ a style imbued with judicious emphasis, an eye for symmetry or balance and an ear for subtleties of the evidence so as not to miss the grace and power of the testimony of witnesses and the law applicable thereto. Such style also insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. And ultimately, the court should make its overall impression of the evidence adduced as placed upon the applicable law in absolute clarity and directness. I shall so proceed.

[5] PW1 the complainant in this case testified that the Appellant was his friend and that she did not intend to give any evidence against the Appellant. She further testified that she recorded a statement before the police against her will and that she was forced by her parents to falsely testify against the appellant. She further denied ever having intercourse with the Appellant and that she wished to forgive the Appellant. In addition, she said that her testimony before the previous magistrate was true and correct. In cross examination she stated that she did not have sex with the Appellant.

[6] PW2 Ann Muthoni testified that on 21st December 2013, she left home and went to a wedding ceremony and that upon returning at 8 PM she did not find her eldest daughter and that she returned home the following day and refused to disclose where she had slept but later on after a lot of questioning she admitted that she had slept in the Appellant's house and that they had sex. She later took her to hospital and reported the matter at Nkubu hospital. In cross examination she stated that she took PW1 to hospital 2 days after the incident.

[7] PW3 PC Sylvia Cherono a police officer based at Mitunguu police station testified that on 23rd December 2013, she was at Nkubu police station and upon perusing the OB noted a case of defilement

minuted to her by the OCS. The complainant was one CM aged 16 years who had attended a wedding in the neighbourhood where she meet a friend called Muthomi who introduced her to the Appellant. She went to the Appellant's house who convinced her to sleep in his house. She agreed and was defiled twice. The following day she went home and confessed to her parents where she had been after which the Appellant was arrested and the current charges preferred.

[8] PW4 Saberina Kaimatheri a clinical officer at Kanyakine hospital produced a P3 form in respect of Christine Makena who gave a history of being sexually assaulted. Upon examination of her genitalia, she noted *inter alia* that she had no injuries and her hymen was absent. In absence of the hymen, she opined that the girl was sexually active.

[9 The appellant in his defence stated that he did not commit the offence for which he had been charged and asked for forgiveness.

Analysis and findings

[10 I have carefully considered the evidence that was adduced before the trial court. Firstly, the evidence by PW1 is characterized by strange twists and turns. She referred to her initial testimony before the matter started de novo in which she openly stated that she had sex with the Appellant who was her friend except that the Appellant did not force her to have sex with him. In cross examination, she reiterated that she had sex with the Appellant of her own will and that she was not forced. In her subsequent testimony she stated that she did not have any sexual intercourse with the Appellant and that she had recorded her statements against her will. In conclusion, she once again contradicted herself by stating that her previous statement before the previous magistrate was true and correct and that he wished to forgive the Appellant. Unfortunately, the Learned Trial Magistrate did not consider this subsequent evidence when the matter started *de novo* which could have aided in weighing these twists and turns. The trial magistrate relied only on the initial evidence which was a misdirection.

[10] Be that as it may, I will carry out full re-evaluation of the entire evidence herein in relation to the charge of defilement which the Appellant faced. But before I continue, I have seen many instances where the prosecution commit an embarrassing although venial error of wrongly citing the offence and penalty clauses in sexual offences as if they are a single section like is the case here. This is careless mistake. Sometimes, the error escapes the eye of the trial court and enthusiastic appellants have taken it up as a point of appeal. Although the point scarcely succeeds in light of the provisions of section 382 of the Criminal Procedure Code, it however results into unnecessary waste of precious judicial ink and spending of judicial mind which is needed to resolve substantial legal issues- something that could have been avoided had the charge sheet been properly drafted, say, by citing of the offence section as read with the penalty section. How I wish such embarrassing errors could be avoided in charge sheets on sexual offences. In this case, the accused was charged with defilement contrary to Section 8 (1) (4) of the Sexual Offence Act- repeating this very mistake. But the appellant herein did not take up the point on appeal.

Proof of defilement cases

[11] I now turn to the real issues in this appeal. The appellant was charged with, convicted and sentenced for the offence of defilement contrary to Section 8 (1) as read with section 8(4) of the Sexual Offence Act. Section 8(1) is the offence clause and provides that:-

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

Section 8(4) is the penalty clause and provides as follows:-.

> ***A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

[12] From these sections, the prosecution must establish three things, namely:

1) That the person defiled was a child and state the age thereof;

2)That there was penetration of the child; and

3)That the person who caused penetration with the child is the Appellant.

Whether complainant was a child

[13] The evidence show that complainant was born on 18th April, 1997. PW1, her mother confirmed this date of birth. The complainant also confirmed that at the time of the offence she was 16 years old. Accordingly, she is a child of sixteen years of age to whom section 8(1) & 4 of the Sexual Offences Act apply. I move to the next step.

Was there penetration

[14] According to Section 2 (1) of the Sexual Offences Act penetration:-

> ***"…means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"***

Penetration should be proved by the evidence; in ordinary cases by medical evidence as well as by evidence of other witnesses including but not limited to the complainant. But in this case, one thing is quite startling; the complainant who testified as PW1 was quite wavering in her evidence. During her testimony on 18.82014, she denied ever having had any sexual intercourse with the Appellant. But at the same time she stated that her initial testimony before the matter started *de novo* was true and correct. In that initial testimony, she stated that she had sex with the Appellant who was her friend except that the Appellant did not force her to have sex with him. At this juncture, I am forced to state that a child is presumed in law not to be competent to give any consent to sexual intercourse or penetration. See the statutory presumptions in sections 43-45 of the Sexual offences Act. Except, in appropriate cases, under section 8(5) & (6) of the Sexual Offences Act:-

> ***It is a defence to a charge under this section if -***
>
> > ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
> >
> > ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
> >
> > ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***

[15] In her subsequent testimony on 18.9.2014, she stated that she wished to forgive the Appellant. Unfortunately, the Learned Trial Magistrate did not consider this subsequent evidence when the matter started *de novo* and only relied on the initial evidence. This was misdirection on part of the Learned Trial Magistrate. The record however show that there were twists and turns in the evidence by PW1 but I will weigh them against other evidence herein in order to get the correct perspective thereto.

Peremptory command to protect children

[16] Recapitulation of the foregoing facts bring me to the point where I must address my mind to the peremptory command by the Constitution and International Law that nations should use their legal systems and institutions to protect children in their jurisdiction. The sexual Offences Act is one such piece

of legislation which has provided that a child is incapable of giving consent to sexual intercourse or penetration. Similarly, this is a case of defilement, and despite the deliberate contradictions by the complainant in her evidence, this court still has a duty to re-evaluate all evidence adduced including any contradictory evidence in order to answer to the constitutional direction that child's best interest should always be of paramount importance in a matter involving a child. See article 53 of the Constitution as well as the Children Act. See the decision by the Court of Appeal in the case of **KIILU & ANOTHER (supra)** that;

> iii. ***An Appellant on a first appeal 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.***
>
> iv. ***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; Only then can it decide whether the Magistrate's findings should 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 witnesses.***

[17] Applying the test, PW4, Saberina Kaimatherei a clinical officer at Kanyakine hospital produced the P3 Form on CM. According to the P3 Form, CM gave a history of being sexually assaulted. Upon examination of her genitalia, it is noted in the P3 Form *inter alia* that she had no injuries except she had whitish per vaginal discharge and her hymen was not intact. The fact that the hymen was not intact showed there was penetrative sexual intercourse despite absence of spermatozoa cells in HVS. PW4 also observed presence of epiderreal cells and yeast cells. The former is indicative of erosion of vaginal walls whilst the latter is indicative of presence of fungal infection which is causing the discharge. From, this evidence there was penetration of the complainant. But by whom was the penetration?

Was penetration by the Appellant?

[18] Before I I determine whether the penetration was by the Appellant or not, one ground of appeal to the effect that PW1 had deceived her that she was a grown up commends itself for priority. It seems the Appellant is taking up the defence in section 8(5) & (6) of the Sexual Offences Act which provides that:-

> ***It is a defence to a charge under this section if -***
>
> ***(c) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(d) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***

This can only be a mere afterthought as the Appellant did not raise it during the trial. In any event and as was rightly stated by Mr. Namiti for the State, the Appellant has not shown that:

> ***(a) the child deceived the accused person into believing that she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(b) the accused reasonably believed that the child was over the age of eighteen years after taking such steps to ascertain the age of the complainant.***

The Appellant in this case did not strive at all to show that he made any attempt to ascertain the age of the complainant. Consequently, nothing turns on this point. The defence is rejected.

[19] Turning to the question whether the penetration was by the Appellant; the testimony of PW2 Ann Muthoni was that on 21st December 2013, she left home and went to a wedding ceremony and that upon returning at 8 PM she did not find her eldest daughter who returned home the following day. She refused to disclose where she had slept but later on after a lot of questioning she admitted that she had slept in the Appellant's house and that they had sex. She later took her to hospital and reported the matter at Nkubu hospital. In cross examination she stated that she took PW1 to hospital 2 days after the incident. PW3 PC Sylvia Cherono a police officer based at Mitunguu police station testified that on 23rd December 2013, she was at Nkubu police station and upon perusing the OB noted a case of defilement had been referred to her by the OCS. The complainant was one CM aged 16 years who had attended a wedding in the neighbourhood where she meet a friend called Muthomi who introduced her to the Appellant. She went to the Appellant's house who convinced her to sleep in his house and agreed whereupon she was defiled twice. The following day she went home and confessed to her parents where she had been. Consequently, the Appellant was arrested and the current charges preferred.

[20] The evidence above show that the complainant and the Appellant met upon introduction by a lady called Muthomi. They became friends. The evidence by PW4 show that there was penetrative sexual intercourse with the complainant. But the complainant has at one point admitted that she had sex with the Appellant while at other times she denied that fact. She even went further to state that she was forced to testify falsely against the Appellant. She however stated that she intends to forgive the appellant. For what? I note that she stated that her earlier testimony was true and correct. By that reference, there is proximate connexion between both accounts, thus, the earlier testimony becomes useful and relevant in these proceedings. I stated earlier that the law and the Constitution protest children from all forms of abuse including sexual exploitation. That is a peremptory command from which this court may not depart. Whereas this case presents a kind of a squirm, but the twists and turns introduced by the complainant are merely aimed at ensuring the Appellant is free. She only knows the reason why she did so. Needless to say that such dilemmas are not unknown in defilement cases. That notwithstanding, defilement is not an offence which can be compromised at the whims of any party including the complainant. But deference to the law is the best guide. You will note that even plea bargain does not apply to sexual offences. I should think, therefore, that as a matter of law, where defilement has been proved to have been committed, the offender must be punished in accordance with the law notwithstanding the wishes or desires of the child victim. I may be wrong on this proposition; but it is one I honestly believe in. Therefore, despite the contradictions by the complainant, there is sufficient evidence as it emerges from the analysis of the evidence which prove beyond reasonable doubt that the appellant defiled the complainant herein. More particularly, the evidence of PW3 and PW4 remained uncontroverted throughout the trial as the Appellant stated nothing in cross examination. PW4's evidence was that upon examination of PW1's genitalia, there were no injuries, her hymen was absent and she therefore opined that in the absence of hymen, there was penetrative sexual intercourse with the girl.

[21] Meanwhile, the appellant raised the ground of non-compliance with Section 169 of the Criminal Procedure Code. Section 169 deals with contents of the judgment. It provides that the judgment should be written under the direction of the presiding officer in a language of the court and shall contain points of determination and decision thereon. I have perused the judgment by the learned trial magistrate. It has been written in English language and the Learned Trial Magistrate in her analysis gave the reasons why she arrived at the decision that she did.

[22] Taking all factors into account, the trial magistrate was right in convicting and sentencing the appellant as she did. Accordingly, the appeal is dismissed. It is so ordered.

Dated, signed and delivered in open court at Meru this 13th day of

December, 2017

F. GIKONYO

JUDGE

In the presence of:

Appellant in person

Murage advocate for respondent

F. GIKONYO

JUDGE