REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 32 OF 2017

LAWRENCE KAMAU NGANGA.....APPELLANT

-V E R S U S -

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from the Judgment, conviction and sentence in Mukurweini PM, Cr. Case No. 14/2016 Hon. Chianda, S.R.M)

The appellant **Lawrence Kamau Ng'ang'a** was charged with the offence of defilement contrary to section 8(1)(2) of the sexual offences Act No.3 of 2006. It was alleged that on 29th July 2016 and 2nd August 2016 at1300hrs in Nyeri, he intentionally caused his penis to penetrate the anus of SGM a child aged 9 years.

In the alternative he was charged with the offence if committing an indecent act with a child contrary to section 11(1) of the same Act. That on the same date, time and place he intentionally touched the anus of SGM a child aged 9 years old.

After hearing prosecution witnesses and the appellant and his defence witness, the trial magistrate found that the prosecution had not proved the offence of defilement, but had proved the alternative charge of committing an indecent act with the child. In the judgment delivered on 8th June 2017 he acquitted the appellant of the main charge and convicted and sentenced him to 20 years' imprisonment on the alternative charge.

The appellant was aggrieved by the finding and brought this appeal. It is based on four grounds in which he faulted the trial magistrate for relying on insufficient evidence, relying on uncorroborated evidence, relying on inconclusive medical evidence, and failing to consider the appellant's defence.

Both the appellant and the state relied on written submissions.

As a first appellate court my duty is to review, re assess and reconsider all the evidence before the trial court and draw my own conclusions. In doing so I must be alive to the fact that I neither saw nor heard the witnesses. See **Kiilu and Another V. R (2005) 1 KLR 174** where the Court of appeal stated;

> *"an Appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."*
>
> *It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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."*

The case for the prosecution was that on 29th July 2016 **PW1, CNG** sent her 9-year-old child SGM to the shop to buy milk. The child came back home complaining of headache and stomach pains. The following day was a Saturday. The child refused to get out of bed complaining of pain in the leg. When asked what had happened she told her mother she had hurt her leg in a fall. On Sunday the following day, P.W.1 noticed that the child was dragging one foot while walking. She became concerned. She informed her mother LM on 2nd August 2016 and asked to speak to the child and find out what was wrong.

LM informed CNG that the child had disclosed that she had been defiled. They reported the matter to Mutwewathi AP post, took the child to hospital at Mukurweini where the child was treated and discharged. She was issued with a P3 which was completed by a medical doctor who also filled the PRC. These documents the P3, the treatment notes and PRC were marked as MFI 1, 2 and 3. She identified the appellant as an employee of her neighbour by the name Njeri.

In her testimony **LM the grandmother** of the child who was **P.W.2** t testified that on 2nd August 2016, P.W.1 informed her that SGM was ailing but the child was not divulging what was wrong. She spoke to her grandchild who at first refused to say anything, saying that she was afraid of being strangled. It is only upon pushing, that the child finally told her "Kamau wa Aunty Njeri" had defiled her. She understood this "Kamau wa Aunty Njeri" to mean one Lawrence Kamau. It was after this that they then reported the matter to the police. At the police station the child showed the police where she had been defiled. She was taken to hospital.

In cross examination, she said that the incident happened on a Friday.

P.W. 3 was SGM. The record shows that the trial Magistrate swore her 1st and enquired as to her name, where she lived, and whether the child gave her names, told the court where she lived and that she understood the importance of telling the truth. He then proceeded to record

"Voire dire examination confirms the child understands nature of proceedings"

He proceeded to take her evidence.

She told the court that on 29th July 206 at about 1:00-p.m. Kamau accosted her as she left school, took her – took her to some bush, made her lie down and did her "tabia mbaya" from behind. That in the process he also removed his clothes. That she bled and he wiped her with his T-shirt. That he threatened to strangle her if she told anyone what had happened

She went home and did not tell anyone. Even when her mother noticed she was walking 'badly" and asked her what was wrong she did not tell her because she was afraid. She was taken to hospital and treated initially at Ichamara. She told the doctor what had happened. She later told her grandmother, and the doctor at Mukurweini. She identified the accused in the dock as the Kamau and that he was employed by her uncle.

In cross examination she said he did it to her twice, the 1st time when she was picking milk and the 2nd time when she was coming from school. She said, *"ulinifanyia vile ulikua umenifanyia"*. In re-examination, she told the court *"alinifanyia hivyo"*.

No.93052478 AP Sgt. David Loloki was at Mutwewathi AP camp on 7th August 2016 at 11:30a.m. when he received the defilement report. In the company of APC Ann Gatitu they went and arrested the appellant and took him to the station. In cross examination he said at the time of arrest the appellant had an injury on the head.

P.W.5 Dr. Paul Kinuthia was based at Mukurweini Hospital at the material time. He produced the medical evidence on behalf of his colleague Dr. Gacheru. According to the documents he had the minor was alleged to have been defiled on 6th of August 2016 around 1300hrs, also on 29th July2016, and 2nd August 2016. That the child reported the incident 5 days later and medical assistance was sought on 7th August 2016. The offence complained about was sodomy/defilement. The examination revealed that the child's vulva was intact, there were no lacerations, no injuries, no evidence of penetration of the anus, no blood or discharge, mild tenderness on per rectal examination. He produced the medical documents, the P3, PRC and treatment notes as PEX. 1,2 and 3.

P.W.6 No. 107568 PCW Freshiah Wamaitha Muhindi testified that she received the report on 7th August 2016 / of the alleged defilement of the minor was leaving school on 29th July and 2nd August 2016. while.

She escorted the minor to hospital, recorded statements, issued P3 which was completed by Dr. Gacheru. The suspect was arrested, brought to station and charged. She said she was not given any clothing with relation to the offence but that the doctor's evidence showed that the child had been defiled.

In his defence the appellant denied the offence. He called his employer one Mercy Njeri Chiera as his witness. She –who confirmed that the appellant was her employee. That on 7th August 2016 one Muchiri attacked the appellant at her home claiming that he had defiled his daughter. He sustained some injuries and she and her husband gave him first aid.

The appellant closed his defence.

The trial magistrate having considered all the evidence, acquitted the appellant of the main charge of defilement. He found him guilty, convicted and sentence him on the alternative charge of committing an indecent act with a child.

It is against this finding that the appellant brings this appeal.

In his submissions he pointed out that there was no evidence to prove he had committed either the two offences he was charged with, that there was no evidence of bodily contact between him and the child and neither was there any evidence that the child had been defiled or sodomised. He also submitted that the evidence of P.W.1, P.W.2 and P.W.3 was inconsistent, contradictory and did not corroborate each other.

The appellant also submitted that it was prosecution's burden to prove its case against him and in any case he had testified to where he was, which evidence was corroborated by his witness. That his defence had not been challenged by the prosecution.

The state through Mr. Gitonga submitted that the medical evidence was sufficient proof of defilement, and that the appellant had failed to explain his whereabouts on the days of the alleged offence.

Defilement is provided for under section 8 of the Sexual Offences Act no 3 of 2006 under section 8(1) as read with section 8(2)

> *(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.*

The offence of indecent act with a child is provided for under section 11(1).

> *(1) 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*.

From the outset what the trial magistrate did cannot be described as a *voire dire* examination. The purpose of the *voire dire* examination is to satisfy the trial court that the child has an understanding of what is before it, to enable the receiving of the child's evidence.

The Court of Appeal in **Johnson Muiruri v. R.** (1983) KLR 445 held as follows:

> *"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which [case] his sworn evidence may be received. If the court is not so satisfied, his* ***unsworn evidence*** *may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him."*

In this case the child was first sworn and then the trial magistrate conducted what he termed as a the voire dire examination. Clearly he was required to first form the opinion as to whether the child could or could not give sworn testimony.

Nevertheless, although the trial magistrate failed to follow the proper procedure in conducting the voire dire examination, he did form and express the opinion that the child understood the nature of the proceedings and could proceed on with the sworn testimony. As the victim, she proceeded to narrate what had transpired. The appellant was not prejudiced as he was given the opportunity to cross examine her. The trial magistrate's failure ought not to be held against her.

The child made very clear pronouncements in her testimony on how the accused accosted her, took her behind a bush and did *tabia mbaya* in her anus. The Court of Appeal has acknowledged that this is an acceptable description of defilement especially where penetration is established. This is because courts in Kenya have adopted the term as what is generally used by children, and even adults to describe sexual acts.

The Court of Appeal in acknowledging the use of euphemisms by children when describing acts of sexual intercourse in **Muganga Chilejo Saha v Republic [2017] eKLR** had this to say

> *Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like,* ***"alinifanyia tabia mbaya"****,* **(IE V R, Kapenguria H.C Cr. Case No. 11 of 2016***),* ***"he pricked me with a thorn from the front part of this body."****,* (**Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015**)*,* ***"he used his thing for peeing",*** (**David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015**)*, "he inserted his "****dudu****" into my "****mapaja****",* **(Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016),** ***"he used his munyunyu"****,* (**Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011**)*, as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See* **A M V R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015***, among several others. Trial courts should record as nearly as possible what the child says happened to him or her. (emphasis added)*

Hence after saying that the appellant had done ***tabia mbaya*** to her it can be seen from her testimony that she did not wish to even say the words again. ***'Ulinifanyia vile ulikuwa umenifanyia' 'alinifanyia hivyo'.*** However, it would have been of great help if the prosecution had made the effort to get descriptions as is seen in the Court appeal decision above. That did not happen and the same cannot be held against the child.

The trial magistrate also found that that the failure by the child to report the incident could have emanated from fear caused by threats from the appellant to strangle her if she told. He found that the child's testimony was not corroborated by the medical evidence and penetration was not proved.

The child told her mother she was dragging her leg because she had fallen down. She became suspicious, and more concerned when the child's the pain in the leg was now accompanied by the refusal to get out of bed. That is when she consulted her own mother.

According to LM the grandmother, she was told by the child's mother that the child was ailing. The child simply told her she had been defiled. Although no details are recorded, what the child told the grandmother was enough for her to take the child to the police and hospital. It is the grandmother's evidence that it is when they went to the police station that the child divulged details of the defilement. These details, the trial magistrate found, were not corroborated by the medical evidence, but that the account of the defilement was corroborated by both the mother and grandmother.

He said in his judgment:

> *'The complainant gave a clear account of the defilement. Her account was corroborated by her mother who noticed …unusual pained gait and her grandmother who eventually cajoled the complainant to divulge what had transpired.*
>
> *A case of this nature relies heavily on medical evidence. The P3 and PRC form P. Exhibit 1 and 2' were inconclusive regarding penetration. This may be attributable to the fact that the minor was examined 5 days after the incident…the court finds the evidence insufficient to convict the accused on the main charge of defilement. He is however convicted on the alternative charge of committing indecent assault with a child'.*

On the alternative charge section 11(1) of the Sexual Offences Act

> *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.*

Under section 2 "of the Sexual Offences Act "indecent act" means 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) ……..*

The prosecution was expected to prove that there was contact between the 'genital organ' of the appellant and the anus of the complainant.

Although the trial magistrate did not take the time to analyse the evidence with regard to the alternative charge, it is clear from the record that it was based first on the account given by the child on what transpired, and the medical notes from Mukurweini District Hospital which showed that the child's anal canal was hyper pigmented and there was anal tenderness during examination.

The child's evidence on this is 'He removed my clothes and did for me tabia mbaya from behind' "alinifanyia tabia mbaya huku nyuma'. The medical evidence though inconclusive of penetration demonstrated that an act which the child described as tabia mbaya and which is accepted in our jurisprudence to mean sexual intercourse had been done to her 'from behind'. She said the appellant removed his clothes. After he finished, he wiped her with his T shirt. This evidence does demonstrate that there was indeed contact between the appellant's genital organ and the child's anus.

In the **Muganga Chilejo Saha** case above the court appeal noted that '**tabia mbaya'** was used ed by child complainants to infer sexual intercourse. The child in this case could only describe what was done to her as tabia mbaya. The medical evidence demonstrates that there was no anal penetration but there was tenderness in the area. This supported by the complainant's description of what happened, confirmed that there contact between the 'genital organ' of the appellant had and the complainant's anus.

I find therefor that the magistrate was properly persuaded that the alternative offence of indecent act with a child as described by law was proved against the appellant.

As to whether the trial court considered the appellant's defence, the judgment does not show that the magistrate made any finding with regard to the appellant's statement of defence. I have considered what the appellant said. He denied committing the offence and called his employer who testified that the appellant had indeed been assaulted by father of the complainant on allegations of having defiled his child, and she and her husband gave the appellant 1st aid.

However, the appellant's defence did not challenge the child's testimony, and the medical evidence as to what had happened. She knew him physically and by name and gave his name to her grandmother. Hence despite the fact the trial magistrate had not made a finding on the defence, I do find that it does not challenge the case for the prosecution.

I find therefor that the appellant was properly convicted for the offence of committing an indecent (not assault as recorded by the magistrate) act with a child contrary to section 11(1) of the Sexual Offences Act no 3 of 2006.

I find no reason to disturb the conviction and sentence.

The appeal fails.

Dated, delivered and signed in open court at Nyeri, this 13th December 2017

TERESIA MATHEKA

Judge

In the presence of;

Court Assistant Hariet

Gitonga for state

Appellant present.