REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 96 OF 2014

JOSEPH NJUGUNA GACHARA…APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Appeal against conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 30 of 2013 (Hon. P. Wambua, Principal Magistrate) delivered on 2nd December, 2014)

JUDGMENT

The appellant was charged with the offence of defilement of a child 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 29th day of September, 2013 at in Nyeri County within the Republic of Kenya, the appellant did intentionally and unlawfully cause his genital organ, namely, penis, to penetrate the genital organ namely, vagina, of J M W a child aged 8.

In the alternative, the appellant was charged with the offence of an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act.** According to the particulars of this alternative charge, on the 29th day of September, 2013 at in Nyeri County within the Republic of Kenya, the appellant did intentionally and unlawfully cause his genital organ namely, penis, to touch the genital organ namely, vagina, of J M W a child aged 8.

He was convicted on the principal count and sentenced to life imprisonment. This appeal is against the sentence and conviction and the appellant has raised four grounds in his amended grounds of appeal which he filed in this Court on 14th January, 2015. As far as I understand them, these grounds are as follows:-

1. The trial magistrate erred in law and in fact in convicting the appellant based on the evidence of the complainant without considering whether there was penetration;

2. The trial magistrate erred in law and in fact in convicting the appellant based on the evidence of Pw1, Pw2, Pw3 and Pw6 without considering that the evidence was contradictory and inconsistent;

3. The trial magistrate erred in law in admitting the evidence of Pw6 contrary to **section 77** and **section 34B (2)(a**) of the **Evidence Act, (Cap. 80);** and,

4. The trial magistrate erred in law and in fact in relying on the evidence of Pw1 without warning himself of the danger of relying on the evidence a single witness; he also erred in rejecting the unchallenged alibi of the appellant contrary to **section 212** of the **Criminal Procedure Code, cap.**

75.

It is necessary at this stage to consider the evidence against the appellant and evaluate it afresh if not for anything else, for this Court to satisfy itself that the learned magistrate made the correct findings and ultimately arrived at the correct decision. I am not bound by those findings but I am conscious that the learned magistrate was better placed to appreciate the evidence presented before him because he saw and heard the witness as they testified. **(See Okeno versus Republic (1972) EA 32).**

The complainant **(Pw1)** testified on oath after the learned magistrate examined her and was satisfied she understood the nature of an oath and the importance of telling the truth. She said that on 29th September, 2013, the appellant took her to his house where he undressed her. At first she said that the appellant did not do anything to her but later she followed her statement with the following words:

"He took oil. He put his thing into my thing. The one I use to urinate. He told me to wash."

Her grandmother came and beat her and later took her to hospital where she was treated. They did not go to the police and she did not tell any other person about this incident. She testified that it was her first time to go through that experience and that she felt pain and cried. She said that she washed her eyes and her private parts.

During cross-examination and even at her re-examination the complainant repeated that the appellant did not do anything to her; she, however, testified that he had warned her that if she ever told her grandmother what happened, he was going to beat her.

The complainant's grandmother, **E W (Pw2)** testified that she lived with the complainant. Her evidence was that on the 29th September, 2013 she went to the appellant's house where she found the complainant bathing. The complainant told her that she had been told to bath and that the appellant had done 'bad manners' to her. The appellant himself was in his shamba harvesting potatoes at the time.

She took the complainant home and informed her husband (Pw3) what had happened to their granddaughter. He asked her to examine the complainant; she noticed that the complainant's private parts were red and tender. She then took the complainant to hospital and later went to report to the police at Kiawara.

J N W (Pw3), was Pw2's husband and the complainant's grandfather; his evidence was that on 29th September, 2013, he came back home from the forest and found the complainant sitting outside. He noticed that she was not sitting well and therefore he asked **W (Pw2)** to check her. She took the complainant to the house and checked her; according to this witness, she noticed that the complainant was not well and therefore he asked her to take the complainant to hospital. The witness did not talk with the complainant and his wife had not told him anything about the complainant before he asked her to check the child out.

Police constable **Peter Ngichu (Pw4)** who was then based at Mweiga police station received the appellant at the station when he was brought there by the administration police officers from Embaringo camp on 3rd October, 2013. The officer testified that he interrogated the appellant who confessed having committed the offence and that he sought reconciliation with the complainant's grandmother; he however, stated in cross-examination that he believed the appellant committed the offence because the doctor's report confirmed that the complainant had been defiled.

The administration police officer who arrested the appellant was **Hezron Wachira (Pw5).** He testified that he received a call from an assistant chief on 3rd October, 2013 asking him to arrest the appellant on the allegations that he had defiled the complainant.

Dr Mwanahamisi Mbutu (Pw6) produced the P3 form on behalf of his colleague Dr Karanja who apparently examined the complainant and filled it; he testified that he was conversant with Dr Karanja's

signature since he had worked with him for two years and that Dr Karanja himself was not available because he was on leave. According to this witness, the appellant had, for a long time induced the complainant with money and molested her. Upon examination he established that the complainant had scratches on her neck, her hymen was broken and the urethra was swollen. There was no discharge or blood and neither was there urinal infection.

The appellant was put to his defence; he opted to give unsworn statement and denied committing the offence. On the material day, he was away at the market. He was arrested by police officers on the 4th day of a month he did not indicate on allegations that he was amongst a group of people who had burned the governor's house; however, when he reached the police station he was informed that he had defiled the complainant.

With this evidence the learned magistrate held that the state had proved its case beyond reasonable doubt and convicted the appellant accordingly.

Section 8(1) and **(2)** of the Sexual Offences Act under which the appellant was charged reads as follows:-

> **8. Defilement**
>
> *(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.*

"Penetration" as a term of art is defined under **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"*.

The medical evidence suggested that the complainant had sustained injury to her genital organ; her urethra was inflamed and the hymen was broken. In the face of these injuries, the only question that the trial court ought to have asked itself is whether these injuries were caused by *"the partial or complete insertion of the genital organs"* or organ of the appellant as to amount to penetration and hence defilement as understood in **section 8(1)** of the Act. I say so because, the Act is specific that the penetration which amounts to defilement must be by a genital organ; it then follows that, strictly speaking, if the injuries are caused by any organ other than a genital organ then an offence of defilement cannot be said to have been committed. I suppose this is the reason why the particulars of offence were specific that the appellant "caused his genital organ namely "penis" to penetrate the complainant's genital organ; accordingly, it behoved the prosecution to prove beyond all reasonable doubt that it was the appellant's genital organ which caused the injury, at the very minimum, to support the particulars of the offence but more importantly, to prove that the offence of defilement was committed. This then leads us to the evidence at the trial; all that the complainant said in this regard was as follows:-

> ***"He took oil. He put his thing into my thing. The one I use to urinate. He told me to wash."***

The complainant did not mention the appellant's penis in her evidence; she only made reference to the "appellant's thing" without describing what this thing was or how it was inserted into her genital organ. As noted, not anything that is inserted into a complainant's genital organ either partially or completely can be said to give rise to the offence of defilement; it has to be a genital organ and must be proved to be such an organ.

In concluding that the "appellant's thing" that the complainant must have been referring to was the appellant's penis when there is no such suggestion from her evidence, the learned magistrate was simply speculative and proceeded to act on a presumption rather than on proof; in so doing, he misdirected himself on the evidence. With this misdirection, he arrived at the wrong conclusion that the appellant defiled the complainant. In my own assessment of the evidence there was no proof of the offence of defilement against the appellant and his conviction was in my view not supported by sufficient evidence.

The appellant also raised the issue of inconsistent and contradictory evidence by the prosecution witnesses; I find some merit in this ground. First, the complainant's own evidence was to some degree self-contradictory. She testified, on at least three occasions, that the appellant did not do anything to her. The learned magistrate appreciated this contradiction in his judgment but concluded that the complainant must have misunderstood the question put to her. It may well be that the complainant misunderstood the question put to her as suggested by the learned magistrate but I doubt that the complainant could have misunderstood the question to the extent of repeating the same answer during the examination in chief, cross-examination and even in re-examination when any sort of misunderstanding that may have arisen from the answers given before could have been clarified. In my humble view, having examined the complainant and concluded that she was fit to testify, and more so under oath, the learned magistrate was bound to consider whether there was any probative value in the complainant's testimony in the face of this apparent inconsistency. I would respectfully disagree with the learned magistrate that the inconsistency in the complainant's testimony is something that could be ignored merely as a culmination of answers given to misunderstood questions. Considering the gravity of the allegations against the appellant and taking into account that he faced life imprisonment upon conviction, there was no place for any lingering doubts, in the mind of the court, whether or not the appellant committed the offence; if he was to be convicted, as indeed he was, the conviction had to be based on evidence without any reasonable doubt that the appellant perpetrated the heinous crime.

The evidence of the complainant's grandparents also left a lot to be desired. He grandmother (Pw2) testified that she went and found the complainant bathing outside the appellant's house; the appellant himself, according to her evidence, was harvesting potatoes in the shamba. The complainant told her that the appellant "had done bad manners" to her. She took her home and informed her husband (Pw3) who then told her to check the complainant and take her to hospital.

The complainant's grandfather (Pw3), on the other hand, testified that it is when he came from the forest and noticed that the complainant "was not sitting well" that he asked her grandmother (Pw2) to check her out. He did not suggest in his evidence that he had been told by his wife (Pw2) that the complainant had been assaulted. It is clearly evident here that the evidence of the complainant's grandparents was contradictory in its material respects.

One other thing I have noted from the record is that the first time the complainant was taken to hospital was on 3rd October, 2013; if the offence was committed on 29th September, 2013 as alleged, no explanation was given for the delay of four days before the complainant was attended to. Considering that there was no medical evidence to attach the commission of the offence to any particular date, it is possible that anything could have happened to the complainant between the 29th September, 2013 and 3rd October, 2013. Simply, put the delay in taking the complainant to hospital created doubt as to whether she could possibly have been assaulted on any day other than that of 29th September, 2013 and probably by a person other than the appellant; this possibility created doubt which, in my view, ought to have been resolved in the appellant's favour.

Again, though the appellant was charged on 7th October, 2013, the P3 form, upon whose findings the charges against the appellant are presumed to have been based, was filled and signed by the doctor who examined the complainant on 11th October, 2013. This simply implies that the appellant was charged before it was established that the offence with which he was charged had been committed either as alleged or at all. If the medical evidence comprising the duly filled P3 form was the foundation upon which the charges against the appellant were based (and this is what I understood the investigations officer, Pw4, to say), then I find it curious that the appellant could have been charged before it was medically established that the complainant had been sexually assaulted as alleged in the charge sheet.

With all these inconsistencies and contradictions, I find that the evidence against the appellant was not full proof and fell short of the mandatory threshold of proof beyond reasonable doubt. I agree with the appellant that his conviction was unsafe and therefore I do hereby hold that his appeal is merited. I hereby allow it and quash the conviction and set aside the sentence. He is set at liberty unless lawfully held.

Dated, signed and delivered in open court this 19th August, 2016

Ngaah Jairus

JUDGE