REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 70 OF 2013

JOSEPH MWANGI……..……...……...……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An Appeal arising out of the judgment and sentence of S.O. Temu PM in Criminal Case No. 653 of 2012 delivered on 22nd February 2013 at the Principal Magistrate's Court at Kajiado)

JUDGMENT

The Appellant was first arraigned in the trial court on 22nd June 2012 and charged with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the offence were that on the 22nd day of January 2012 in Loitokitok District of the Rift Valley Province, he intentionally caused his penis to penetrate the vagina of S N, a child aged 13 years. He was also charged with a second offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the second offence are that on the 22nd day of January 2012 in Loitokitok District of the Rift Valley Province he intentionally touched the vagina of S N, a child aged 13 years with his penis.

The Appellant was found guilty of the offence of defilement after trial, and sentenced to 20 years imprisonment by the trial court. The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. His grounds of appeal as stated in his petition of appeal filed in Court n 8th April 2013 are that the prosecution case was not proved to the required standard needed in law; the trial magistrate made an error in both law and facts by convicting him in the absence of medical evidence linking him to the offence; he was arrested out of mistaken identity; and that his defence was not properly considered.

The Appellant also availed to the Court supplementary grounds of appeal during the hearing of his appeal, wherein he alleged that his conviction was entered on the basis of a different section other than the one he was charged under; that he was charged on 15/6/2012 yet the offence was committed on 22/1/2012; that his conviction was based on sole identification evidence; that no identification parade was held; and that the medical evidence was unsatisfactory as PW1 was not the one who examined the complainant and section 50 (2) and 77(3) of the Evidence Act was therefore violated.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence 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**).

The key evidence given at the trial is as follows. After a *voire dire*, the complaint (PW 2) testified on oath

that she was 13 years old, and a pupil at ***[particulars withheld]*** Primary school. She stated that on 22nd January 2012 at around 7am, she had taken milk to a shop when a man came and told her to take the milk to his own shop. Further, that the man led the way and they went to his house. PW2 testified that the man then took hold of her neck outside the house, kicked and hit her on the face and that she fainted. She stated that the man then threw her on the ground, tore her clothes and inserted his "thing" into her vagina. Further, that she regained consciousness at 10 am she did not find her clothes and the man had left.

PW2 further testified that she then informed her mother of her ordeal, and the mother took her to hospital at Kimana and Mbirikani Health Centres, and that she later filled a P3 form at Oloitokitok Hospital. PW2 also testified that she and her mother went to look for the man at the place where he used to drink, and that he ran away on seeing them. Further, that he also left the area until June, when she saw him again as she was going to school. She then informed her mother and the Appellant was arrested.

The complainant's mother (PW3) testified that on 22nd January 2012 she had sent the complainant to sell milk and that she delayed in coming back. Further, that when the complainant came back she had injuries on her neck and she told PW3 that she had been defiled. PW3 stated that she took the complainant to hospital at Mbirikani Health Centre and made a report to the police the next day. Further, that the complainant informed PW3 that she could identify the man who had defiled her, and that one day as PW3 and the complainant were passing by a bar, the complainant saw the man who ran away. PW3 testified that they went to the man's home and were informed by his mother that he had gone away. However, that the complainant later informed PW3 that she had seen the man again, and PW3 then informed the police who arrested him.

PW 1, a medical officer at Oloitokitok District Hospital testified that he had the P3 form for the complainant who had earlier been examined at Kimana and Mbirikani Health Centres. He testified that he relied on the medical notes from the health centres which showed that the complainant had soft tissue injuries to the head and left eye, as well as strangulation marks on the neck. Further, that there was no blood on her private parts, but that her hymen had been broken. He produced the medical notes and P3 form as exhibits.

The last witness for the prosecution was PW 4, a police officer attached to Oloitokitok police station at Kimana patrol base. She testified that that on 16th June 2012, PW 2 came to the police station with her parents and made a report concerning the incident of defilement. Further, that she took statements from the parties and referred the complainant to the District hospital for the filling of the P3 forms.

PW4 stated that she got the medical notes from Kimana and Mbirikani health centres and a copy of the complainant's birth certificate which she produced as an exhibit. She also testified that the complainant had stated that she could identify the person who had defiled her by appearance, and that the person was later seen by the complainant who reported it to the Kimana patrol base. PW4 stated that the Appellant was then arrested.

After the close of the prosecution case, the Appellant was put on his defence and made a sworn statement. He stated that on the 22nd January 2012 he undertook activities in his home of feeding his calves, taking a bath and going to pick his daughter from Sunday school. Further, that the complainant met him on 29th April 2012 and pointed him out to her mother as the person who had defiled her, and that she and her mother also came to his home and informed his mother that a boy had defiled the complainant.

The Appellant stated that when he was asked by his mother, he denied defiling the complainant. He stated that he was arrested on 15th June 2012 and taken to court on 20th June 2012, and that that he was implicated for the offence because he did not give the complainant, her mother and the police the money they had demanded from him.

The issues raised in this appeal are firstly, whether the Appellant was convicted under a non-existent law, secondly whether there was positive identification of the Appellant, and lastly whether the Appellants conviction for the offence of defilement was based on sufficient evidence.

On the first issue, the Appellant argued that his conviction was unlawful and manifestly unsafe, in that the same was in respect of an offence of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006, but that the conviction entered was under an Act No. 5 of 2006 which is non-existent. He relied on the decision in **John Cardon Wagner vs Republic, (2010) KLR** where the Court found that the accused was prejudiced when he was convicted under new sections of law that were amended in the course of the trial.

I have perused the judgment in the original record of the trial court and note that the trial magistrate clearly stated that the Appellant was convicted under section 8(1) 3 of the Sexual Offences Act No 3 of 2006, while though judgment in the typed proceedings show the that he was convicted under section 8(1) 3 of the Sexual Offences Act No 5 of 2006 . I find that there is absolutely no prejudice caused to the Appellant by this typographical error as he was informed of, and pleaded to the offences in the charge sheet namely the offences of defilement and committing an indecent act with a child contrary sections 8(1)(3) and section 11(1) of the Sexual Offences Act No 3 of 2006, and the said offences contained all the necessary particulars in accordance with section 134 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya**)**. Furthermore, these offences exist in law, they were never amended during the trial, and the Appellant defended himself against the said offences.

Lastly, any typographical error in the typed proceedings of the trial court did not apply to or affect the charge sheet and was not fatal, as it has been shown that the Appellant was not prejudiced nor was there a failure of justice occasioned by the said error. Such an error is thus curable under section 382 of the Criminal Procedure Code which provides;

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
>
> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

As regards the second issue of identification, the Appellant submitted that that the identification evidence in this case was unsatisfactory, and that the trial magistrate made an error in both law and facts by failing to observe that there was no evidence adduced as regards to how long PW2 observed the alleged person who defiled her, or the time spent with him. Further, that the trial magistrate's sentiments that the complainant had spent time with the Appellant before being defiled contained a crucial misdirection, as there was no evidence on record to support these sentiments.

The Appellant also contended that the complainant never gave the description of whoever attacked her in spite of her assertions in court that she had seen the way his mouth looked like, however that this descriptive evidence was not given to her mother or to police upon report. The Appellant relied on various court decisions in this regard, including the decision in **Charles O. Maitanyi v Republic CRA No. 6 of 1986 C.A**.

Mr. Mamba for the State submitted on this issue that the Appellant was positively identified and was therefore properly convicted and sentenced.

This Court is guided on this issue by the law on identification as stated in **Mwaura v Republic [1987] KLR 645**, where the Court of Appeal held, *inter alia*, that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

In addition it has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

The law on identification is also replete with warnings on the need for caution before sustaining the conviction on the basis of identification of a single witness in difficult circumstances. This was explained in **Maitanyi –Vs- Republic [1986] KLR 198 at 200** as follows:

> **"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".**

In the present appeal, the complainant testified that she was defiled during the morning hours between 7 am and 10 am, and she also testified that she walked with the Appellant to his house and that she was able to see the Appellant well as it was during the day. Therefore no difficult circumstances were present as to cloud the complainant's memory, as she spent time with the Appellant during broad daylight before the defilement, and when she was in her normal state of mind. This Court can accordingly rely on her sole evidence of identification.

The complainant was also able to recognize the Appellant on several occasions after the defilement, once at a bar when he ran away and also on her way from school, when she informed her mother and he was arrested. There was thus no need for the description of the Appellant or for an identification parade. The act of the Appellant of running away upon seeing the complainant and her mother is also corroborating evidence of his guilt. This Court therefore finds that the Appellant was properly and positively identified

On the last issue as to whether the conviction of the Appellant was based on satisfactory evidence and particularly regarding the proof of penetration, the Appellant has disputed the medical evidence on the ground that PW1 did not personally examine the complainant and that he relied on treatment notes from Kimana and Mbirikani health centres. Mr. Mamba for the State submitted on this issue that a birth certificate was produced as exhibit 4 to show that the minor was born on 27th October 1997 and that a P3 form was filled showing the medical status of the complainant were enough to convict the appellant.

This Court in determining this issue is mindful of the ingredients of defilement which 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."**

This Court has already found that the Appellant was positively identified. The age of the complainant was also proved by production of her birth certificate in the lower court as evidence, that showed that she was born on 27th October 1997, and was therefore 14 years old at the time of defilement. It is in this regard provided under section 8(1)(3) of the Sexual Offences Act that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

As regards the requirement of penetration, section 8 (1) of the Sexual Offences Act states that:-

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

"Penetration" under section 2 of the Act is defined to mean "the partial or complete insertion of the

genital organs of a person into the genital organs of another person."

The complainant in this regard clearly testified that the Appellant inserted his "thing" which is the colloquial commonly used for a man's penis, into her vagina, and it is my view that this testimony leaves no doubt that there was penetration. Her testimony was clear, consistent and remained unshaken on cross-examination. The learned trial magistrate was satisfied that the witness was consistent and I find no basis to depart from this finding.

The medical evidence by PW1 merely corroborated the fact that PW 2 was defiled, and even if it was to be excluded under section 50 of the Evidence Act on account that there was no proof that PW1 was acquainted with the handwriting on the notes, the proviso to section 124 of the Evidence Act provides that no corroboration is required in cases where the court believes that the complainant it telling the truth. I am also in this regard guided by the holding of the Court of Appeal in **Geoffrey Kioji v Republic**, **NYR Crim. App. No. 270 of 2010 (Nyeri)** where it was stated that;

> "**Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."**

The complainant's testimony has in this respect been found to be credible and truthful, and I find that the prosecution proved that there was penetration. This Court in this respect also notes that it is upon the discretion of a Court to call the maker of a medical report in criminal proceedings under section 77(3) of the Evidence Act for purposes of examination, and it is not mandatory that such maker produces the report.

The prosecution therefore proved all the elements of the offence of defilement and I find that the Appellant's conviction was safe and on the basis of sufficient evidence.

I accordingly uphold and affirm the conviction of the Appellant for the charge of defilement contrary to section 8(1)(3) of the Sexual Offences Act, Act No. 3 of 2006, and the sentence for this conviction is legal and is also affirmed.

It is so ordered.

DATED AT MACHAKOS THIS 21ST DAY OF JULY 2015.

P. NYAMWEYA

JUDGE