REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO.E009 OF 2021

CMM …….....APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(Being an appeal arising from the conviction and sentence of hon. E.M.Nyakundi (RM) delivered on 27.1.21 in sexual offence case No.35 of 2020 Wundanyi SRM's court)

JUDGEMENT

1. The appellant herein was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. He was also charged with an alternative charge of committing an indecent act with a Child contrary to Section 11(1) of the Sexual Offences Act. After the trial, the appellant was convicted and sentenced to 30 years imprisonment.

2. Particulars of the offence were that on 9th day of September, 2020 at around 1800hrs in [Particulars Withheld] Village of Kidaya-Ngerenyi Location within Taita Taveta County intentionally caused his penis to penetrate the vagina of FC, a minor aged (10) years old.

3. On the alternative charge, particulars were that on 9th day of September, 2020 at around 1800hrs in [Particulars Withheld] Village of Kidaya-Ngerenyi Location Within Taita Taveta County intentionally touched the vagina of FC, a child aged (10) years old with his penis.

4. This is a first appeal and as the first appellate court, I am duty bound to re-analyse, re-examine and re-consider a fresh the evidence tendered before the trial court and then arrive at an independent conclusion or determination without losing sight of the fact that the trial court had the advantage of listening to and seeing witnesses to be able to assess their demeanour. See **Okeno v Republic (1972) E.A.32**

Prosecution's evidence before the trial court

5. Prosecution called four witnesses and closed its case. PW1 the complainant herein gave unsworn testimony stating that on the material day, she left home for her grandmother's place to fetch water for her and on going back home, she met with the accused person at a place called Kwa Michael. That accused got hold of her hand and took her to a "*viazi*" selling point on the roadside where he bought her some "viazi" but she threw them away. She further stated that accused took her to a shop nearby and bought her club soda and *kdf*. As she insisted for the accused to let her go home, accused refused and instead took her through a deserted and bushy place from where they used to fetch firewood.

6. She stated that while in the bush, accused removed her panty and sweater but left her dress on. That accused also removed his lower clothes thus exposing the *dudu* that he uses to urinate. She told the court that accused put the said *dudu* at the place she uses to urinate and as a consequence, she felt a lot pain leading to her screaming thus attracting the attention of her aunt whom she did not know her name. That the said aunt confronted the accused by pulling him off on top of her hence giving her an opportunity to pick her clothes and ran away.

7. Later, while at home, she saw her aunt referring to pw2, her cousin Eva, their village elder and the accused person who pleaded not to be beaten. She was taken to Mwatate Police Station and later to Mwatate Sub-County Hospital where she was examined and treated. It was her evidence that she did not know the accused before and that it was the first time he defiled her. That accused has a twin brother whom she knew very well and that they are neighbours although at a distance. She also identified the accused in the dock as the person who sexually assaulted her. On cross examination, accused simply stated that he was found escorting the girl home and that the case was a frame up by the village elder.

8. PW2 LN told the court that she knew the complainant as a child to her neighbour and who calls her aunty. That on 9th September, 2020 at 6pm, she was in her house which also serves as a kiosk when the accused arrived in company of pw1. That accused bought *club soda* and *kdf*

and left with PW1. It was then that her sister in law called DM asked where the accused was going with the child.

9. It was her evidence that as the accused and pw1 headed towards the bush where there was a short cut, she decided to follow but lost track of them. While going back, she met a person called JM a village elder who asked her where she was going. After telling her the story, J promised to join her after delivering her luggage home. Pw2 however went on looking for the accused and the complainant. That certainly, she heard someone crying saying *'naumia'*. She then walked there quietly and found the accused on top of pw1. That accused was naked and had lowered his trouser and boxer.

10. On the other hand, PW1 had no panty nor trouser on but her dress was on. According to her evidence, accused had penetrated pw1 and she was crying. She immediately called and asked accused whether that was the reason for the club soda and *kdf*.

11. Having been confronted, accused allegedly got startled and tried to flee but she grabbed him while screaming for help. She stated that while struggling with the accused, PW1who was so scared managed to pick her clothes and ran away. That it was then the said village elder came with some other people and found her holding the accused. She asked the village elder to take the accused as she went to look for PW1 whom they later took to mwatate police station from where they were referred to mwatate Sub-county hospital for examination and treatment. She stated that the accused is a village mate and also her cousin whom she positively identified and had no grudge with him.

12. PW3 Emiline Chari, a clinical officer at Mwatate Sub –County Hospital told the court that pw1 was in good general condition when she was presented to her. On examination of her genitalia, it was reddened and tender to touch, the hymen was broken and there was mucoid discharge at the vaginal opening. That laboratory tests revealed that the VDRL and HIV test was negative and there were no spermatozoa. That urinalysis test was normal and the medication given was antibiotics and pep. She then produced the treatment notes and p3 form as evidence.

13. PW4 PC Felistas Tuitoek stationed at Mwatate Police Station and the investigating officer in this case told the court that on 10th September, 2020 at 9am, she was at the station when a case for defilement which had been reported the previous day was assigned to her for investigation. She reiterated the evidence of PW1 and PW2. After interrogating the accused, she preferred the charges before court.

Appellant's evidence before the trial court

14. The appellant in his sworn testimony told the court that on 9th September, 2020, he went for his usual duties at a place called survey in the morning hours. That when he finished, he went to some bar to drink and at around 3 pm he left for his home. On the way, he met some children at a place known for selling *"viazi"*. That after buying "viazi" for himself and the children he found there,Pw1 one of the children followed him requesting to be bought a soda as she was hungry.

15. It was then he asked her whose child she was as he did not know her. Upon introducing herself, he realized that the mother of PW1 was his former classmate. That they went to "a*Kibanda"* where he bought her *kdf* and soda and escorted her up to the main road as the place was not safe. That he was confronted by pw2 a village elder who asked him where he was going with PW1.

16. That despite his explanation that he was escorting her, PW2 called people while claiming that he had defiled PW1. He stated that he was the one who suggested for the child to be taken to the hospital to establish the allegations. He termed the allegation a frame up by pw2 who accused him of being a drunkard who never wore a mask during corona time.

17. Aggrieved by his conviction and sentence to 30yrs imprisonment, he filed this appeal on the following grounds;

a) The Hon.Magistrate erred in both law and fact in convicting the appellant to serve a severe an illegal sentence on evidence that was not collaborated as per the law.

b) The Hon.Magistrate erred in both law and fact in convicting the appellant to serve a sentence on evidence that was not proved beyond reasonable doubt as required by the law.

c) The Hon.Magistrate erred in both law and fact in failing to appreciate that there was material contradiction on the evidence adduced in court.

d) The Hon.Magistrate magistrate erred in both law and fact in shifting the burden of proof to the appellant.

e) That there was no evidence of penetration or partial penetration on the complainant.

f) The Hon.Magistrate erred in both law and fact in relying on mere allegation without documentary evidence.

g) The Hon.Magistrate erred in both law and fact in failing to appreciate the sworn evidence of the appellant.

h) The Hon.Magistrate erred in both law and fact failing to reflect the years the appellant was to serve and the reasons for the sentence in the judgement dated 27th January ,2021

i) The Hon. Magistrate erred in both law and fact to pay a site visit to the place of alleged offence with a view to establish the allegations.

j) The Hon.Magistrate erred in both law and fact in relying on a medical report done on the complainant without evidence

from the part of the appellant.

k) The Hon.Magistrate erred in both law and fact and failed to observe or deal with the state of the complainant/minor as per the medical report.

l) The Hon.Magistrate erred in both law and fact in failing to state the language used when taking plea which if any the appellant understood.

m) The Hon.Magistrate erred in both law and fact in sentencing the appellant without offering the appellant the chance to offer any mitigation on the total findings of Hon.Magistrate before sentencing.

n) The Hon.Magistrate erred in both law and fact in failing to give a chance to the prosecution to state the previous records to the court before judgement.

o) The Hon.Magistrate erred in both law and fact in sentencing the appellant on a defective charge sheet.

18. When the matter came for hearing parties agreed to dispose the appeal by way of written submissions.

Appellant's submissions

19. The appellant through his advocates Gekonde and company filed submissions dated 28th June, 2021 contending that from the analysis of the prosecution's evidence the appellant's conviction to serve 30 years sentence was not proved beyond reasonable doubt as required by law. That the burden of proof in every case lies squarely with the prosecution and that the prosecution was duty bound to prove that the appellant had committed an offence of defilement by penetrating into her genitals and not merely producing medical notes.

20. Counsel asserted that Pw1 being a minor of 10 years old, the act of defilement would have been easily proved by way of vaginal swap which would have indicated whether; there was penetration; the internal parts of the vagina were torn and, whether there were spermatozoa.

21. That failure to establish those ingredients, prosecution failed to discharge its burden of proof that the appellant had committed the alleged offence. In support of this submission, counsel relied on the holding in the case of **Mohamed Omar Mohamed v Republic Garissa High Court cr. Appeal no 2 of 2020** where the court observed that under normal circumstances, where in a defilement offence the hymen is broken, one would expect the vagina to be freshly torn, flow of blood and difficulty in walking. Counsel further opined that the clinical officer did not explain the cause of the redness in the vagina and its tenderness, broken hymen or anything about the discharge.

22. Counsel submitted that the appellant was not given a chance for mitigation as the prosecution did not provide any of his previous records despite of the sentence being mandatory.

Submissions by the respondent

23. The ODPP through its prosecution counsel Mr. Chirchir, filed written submissions dated 6th July, 2021 submitting on 5 issues.

24. Regarding the issue of corroboration, counsel submitted that the offence took place during broad daylight and that even though the complainant did not know the appellant before, she interacted with him when he bought her a *club soda* and *viazi*. That being found with the minor in a compromising situation is a clear indication that he had defiled her. He contended that PW2 caught the appellant red handed while lying on the complainant thus corroborating the evidence of the complainant.

25. That further corroborating evidence is derived from the medical examination of Pw1 by PW3 who found that; her genitalia was reddened and tender to touch, the hymen was broken and there was mucus discharge at the vagina thus implying that there was penetration.

26. On identification, counsel submitted that the appellant was positively identified by pw2. On the issue of sentence, Mr.Chircir submitted that the appellant contradicted himself by indicating in his ground 2 of appeal that he was convicted and sentenced to serve for 30 years ,whereas on ground 9 he stated that the trial court failed to indicate the number of years to be served. That the appellant should read the entire proceedings in totality including the original record.

27. Concerning the age of the victim, counsel submitted that the victim was a minor at the time of the alleged defilement as evidenced by her birth certificate which confirmed that she was born on 25th January, 2010. In conclusion, learned counsel urged the court to dismiss the appeal and uphold the decision of the trial court.

28. I have considered the record of appeal and rival submissions by both counsel. I will condense the 16 grounds of appeal to six as hereunder;

a) Whether the prosecution discharged its burden of proof

b) Whether the evidence was corroborated

c) Whether there was penetration

d) Whether the appellant/accused was positively identified

e) Whether the learned magistrate considered the evidence of the appellant/accused

f) Whether the sentence is harsh and illegal

29. On whether the prosecution discharged its burden of proof, the appellant submitted that his conviction to serve a life sentence was done based on the evidence of pw1 and pw2 which was not proved beyond reasonable doubt as required by the law. That the burden of proof in every case lies squarely with the prosecution and that the prosecution was duty bound to prove that indeed the appellant had committed the offence of defilement.

30. It is trite law that, in the criminal justice system, the burden of proof always lies with the prosecution and that it does not shift. See **Okethi v Okale v Republic (1965) E.A.555**. It is incumbent upon the prosecution to discharge that responsibility to the required degree by establishing the allegations levelled against an accused person. In the case of **Republic v Davis Muriuki Kinyua [2021] e KLR the court had this to say;**

> **"…It is a cardinal principle of Criminal Law that one who claims must prove, every allegation due to that accusations to convince the Court that the claims are true. These findings were in consonant with the guidelines set out in R. T. Bhatt v R {1957} EA 332; with a rider that,**
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> ***"a primafacie case does not mean a case proved beyond any reasonable doubt since at this stage, the Court has not heard the evidence for the defence."* (See Uganda v Mulwo Aramathan CR Case No. 103 of 2008).**

31. The court further stated that;

> **"…The court is cognizant of the fact that the burden of proof in criminal cases lies with the prosecution. The standard of prove is beyond reasonable doubt. The phrase and burden of proof of beyond reasonable doubt was explicitly captured in the case of Miller –VS- Minister of Pensions (1947) 2ALL ER 372-373 by none other than Lord Denning who stated as follows:-**
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> ***"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. If the evidence is so strong against a man as to leave only a remorse possibility in his favour which can be dismissed with the sentence of course it is possible the case is proved beyond reasonable doubt, but nothing of short of that will suffice."***

32.The appellant contended that prosecution failed to adduce sufficient evidence to corroborate the testimony of pw1. He contended that there was no proof of penetration which is a major ingredient in establishing the offence of defilement. The appellant was charged with the offence of defilement contrary to section8(1) of the sexual offences Act which provides that;

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"**
>
> **Sub-section 2-aperson who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

33. It was upon the prosecution to prove that, the child (pw1) was aged below 11yrs and that there was penetration by the accused. Regarding the age of the complainant, a birth certificate was produced by pw4 marked as exhb 3 reflecting the date of birth as 25th January 2010. With this evidence, the child was below 11 years at the material time.

34. Concerning penetration, counsel for the appellant contended that the fact that there was vaginal discharge, broken hymen and reddish vagina which was tender to touch was not enough proof that penetration had taken place. Further, that there was no vaginal swap done to ascertain the presence of spermatozoa. It is trite that penetration does not strictly entail proof of discharge of spermatozoa into the victim's vagina. It is possible that a perpetrator can be caught before releasing any sperms into the victim's vagina after having penetrated hence the absence of sperms does not rule out penetration.

35. In fact, penetration can happen on the service and not necessarily deep inside the vagina implying that one doesn't have to bleed. The fact that there was a broken hymen does not mean that the appellant was responsible. The hymen may have been broken long time ago and therefore not automatic that the complainant had to bleed. Equally, nobody said that the discharge was associated with the alleged sexual assault. However, the redness and tenderness of the vagina could have been as a result of many factors including sexual assault.

36. In the case of **Alex Chemwotei Sakong v Republic [2108] eKLR** the court went to a great extent in expressing what penetration entails in a sexual offence as follows;

> **"Penetration is defined under section 2 of the Sexual Offences Act to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJ A) in the case of Mark Oiruri vs. Republic Criminal Appeal 295 of 2012 [2013] eKLR in which they opined thus:**

"…and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ…"

37. From the medical evidence adduced, there was evidence of redness and tenderness of the vagina which serves as proof that an act of sexual assault may have taken place subject to proof by other corroborative evidence. In any event, penetration can be proved circumstantially taking into account circumstances under which the act was committed. In the case of **Kassim Ali v Republic(2021)e KLR** the court of appeal stated that;

"So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence"

38. According to the evidence of pw1, it was the appellant who defiled her. Prior to the commission of the offence, the complainant had interacted with the appellant who bought her soda and kdf. The two were then seen walking together into the bush where there was a short cut going to pw1's home a fact the appellant confirmed stating that he had offered to escort her as it was not safe.

39. Pw1 whom the trial court found to be truthful, consistently gave a detailed testimony on the chain of events preceding the act and on how the appellant their neighbour undressed and had sex with her causing her to scream out for help due to pain. This evidence is further corroborated by pw2 who confirmed that the appellant indeed had bought pw1 a soda and kdf in her kiosk but she became suspicious when she saw the appellant leading the complainant into the forest. It was pw2's evidence that she caught the appellant in the act with his pants down after responding to pw1's screams.

40. Why would the complainant and pw2 frame up the appellant? There was no bad blood between them and the appellant. The claim in his defence that there was a grudge between him and pw2 is an afterthought as no such question was put to her (pw2) on cross examination. It is my conviction that, the evidence of pw1 is well corroborated by the evidence of pw2 and the medical evidence which reveals the redness and tenderness of the vagina as proof of sexual assault. Even in the absence of medical proof, asexual offence can be established depending on the victim's evidence and other circumstances surrounding the commission of the offence.

41. From the evidence of the victim, pw2 and medical report, I have no doubt that the appellant was properly identified as the offence was committed during the day around six in the evening and that he was found by pw2 while on top of pw1.

42. I do not find any inconsistence in evidence to discredit prosecution's evidence. The appellant did not produce any medical evidence to counter what was produced by the prosecution. See **H.O Vs Republic (2020) e KLR** where the court stated that the only way to counter medical evidence is by way of procuring another medical evidence.

43. In view of my findings above, I am satisfied that the trial court properly addressed its mind on the applicable law and evidence available and therefore correctly convicted the appellant for the offence of defilement.

44. The other issue raised by the appellant is that he was not given an opportunity to mitigate. However, the record shows that on the same day judgment was delivered on 27th January 2021, the prosecutor confirmed that the appellant was a first offender. Again on the same day the appellant mitigated stating that he had a child whose mother he had separated with. On the same day, asocial inquiry report was ordered for and mention fixed for 2nd February2021.

45. On the 2nd February 2021, a probation officer presented an unfavourable report reflecting on the appellant as a person not wanted by the community. It was on the same day that he was sentenced. It is therefore not true to say the he was denied an opportunity to mitigate.

46. As to the allegation that sentence was excessive, the appellant should appreciate that he was lucky to have escaped life imprisonment which is the sentence provided for in respect of that offence. In any event, sentencing is at the discretion of the court to which an appellate court can only interfere with if it is excessive or arrived at based on wrong principles of the law by considering irrelevant factors. See **Ahamad Abolfathi Mohammed & another v Republic [2018] e KLR** where the court of appeal stated**;**

"As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive."

47. Having held as above, it is my finding that, the appeal herein lacks merit and the same is therefore dismissed. The conviction and sentence is hereby upheld and confirmed

Right of appeal 14days.

Dated signed delivered virtually at Mombasa this 15th day of February 2022

J.N.ONYIEGO

JUDGE