



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 56 OF 2020

CORAM. D. S. MAJANJA J.

BETWEEN

ALLAN ONAKUTA ORICODI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 23rd December 2019

by Hon. A. M. Maina, SPM in Criminal Case No. 21 of 2019 at the Magistrate's Court at Thika)

JUDGMENT

1. The appellant, **ALLAN ONAKUTA ORICODI**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1)** as read with **sub-section (2)** of the *Sexual Offences Act* ("the Act"). The particulars of the charges were that on 3rd and 4th February 2019 at [Particulars withheld] area within Kiambu County, he wilfully and unlawfully caused his penis to penetrate the vagina of TN a child aged 10 years.

2. The appellant now appeals against conviction and sentence on the grounds set out in his petition of appeal filed on 22nd October 2020 and the written submissions filed on 10th November 2020. The thrust of the appellant's appeal is that his rights to a fair trial were infringed. He stated that he was a minor at the time of the offence and that he was not afforded an advocate. He submitted that the prosecution failed to prove the case beyond reasonable doubt and that the evidence against him was inconsistent and contradictory and could not sustain a conviction. The appellant also contended that the trial magistrate failed to consider this defence. The respondent filed written submissions. It supported the conviction on the grounds that the prosecution proved all the ingredients of the offence of defilement.

3. As this is a first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see *Okeno v Republic [1972] EA 32, Kiilu and Another v Republic [2005] 1 KLR 174*). In order to proceed with this task, it is necessary to outline the evidence emerging before the trial court.

4. TN (PW2) gave a sworn testimony after a *voire dire*. She recalled that on 3rd February 2019 her brother had gone to the tailor when the appellant came and asked her if she wanted to do bad manners. She refused and ran to the bedroom. She narrated her ordeal as follows:

I had ran away to my bedroom and Allan followed me and held my hand and pulled me back to the sitting room. He lay me on the sofa set, removed my inner pant and removed his thing which he inserted into my private parts. He put his thing he uses to urinate into the part I used to urinate with. He did that act to me many times that day. He then wiped his private part which he used to urinate using a cloth we use to wipe shoes with. He then stood at the door and threatened to hand me if I told anyone what had happened. The following day 4.2.19, Allan came to our house and found me bathing. He pushed the door, pulled me out and took me to the sitting room. He lay me on the sofa set removed his under pant and inserted his thing used to urinate into my thing that I use to urinate with. He did the bad thing to me for long then wiped his thing using the cloth used to wipe shoes. He then threatened to strangle me if I told anyone what had happened. He told me to go back to the bathroom and shower again and to go out and play,

5. PW 2 testified on the next day in school, she informed the head teacher that she would not go back to school as she felt itchy on her private parts. The head teacher informed her mother, PW 1. PW 2 informed her mother what had transpired.

6. The complainant's mother, PW 1, told the court that the Appellant was a son to her friend and that the Appellant would visit them. She testified that on 15th February 2019 she received a call from PW 2's head teacher who informed her that PW 2 was not feeling well. She called PW 2 who informed her that she had been sexually assaulted by the appellant. PW 1 went to the Appellant's house and confronted him and his mother about the incident. She stated that the Appellant pleaded for forgiveness. Together with the Appellant's mother they went to the Police Station then proceeded to hospital where the doctor confirmed to her PW 2 had been subjected to an act of penetration. PW1 testified that PW 2 was 11 years old having been born on 12th July 2007.

7. PW 3, the doctor who examined the PW 2 on 18th February 2019, produced the P3 medical form, treatment notes and the Post Rape Care (PRC) form. She confirmed that PW 2's external genitalia was normal. The hymen was missing and she had a whitish discharge in her vagina. There was infection in her urine. She concluded that there was penetration.

8. The Investigating Officer, PW 4, confirmed that she recorded the witness statements. She escorted the child to hospital where she was examined and her P3 form was filled. She also secured the Birth Certificate of the complainant and confirmed she was born 12th July 2007.

9. The Appellant denied the offence in his unsworn statement. He stated that on 14th February 2019 he had disagreed with the complainant's brother over a stolen calculator and that the brother had beaten him. He stated that the same evening, PW 2's brother claimed that he had defiled PW 2. That at 2.00am PW 1 came to his home threatened to kill with knife him for defiling PW 2. He told the court that PW 1 was disarmed by members of the public came before they proceeded to the police station where he was detained.

10. The appellant's mother (DW 2) recalled that on 15th February 2019 she was awoken at 2:00am by PW 1 shouting that the Appellant had defiled her daughter. That PW 1 was armed with a knife and that she tried to stab the appellant but a neighbour disarmed her. They proceeded to the Police Station where the Appellant was arrested.

11. The issue in this appeal is whether the prosecution proved all the elements of the offence of defilement. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. "*Penetration*" under **section 2** of the *Act* means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

12. The evidence against the Appellant was the direct testimony of the complainant, PW 2. She explained lucidly how the Appellant sexually assaulted her. **Section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* dispenses with corroboration if the trial magistrate, for reasons to be recorded, believes the child to be telling the truth. The trial magistrate in this case the trial magistrate held that the child was an honest and credible witness. In addition, there was corroborative evidence to support the prosecution's case. The medical evidence being the P3 forms and the treatment notes indicated that the complainant's hymen was missing and the whitish discharge in the vagina. There was sufficient evidence that she had been subjected to an act of penetration by the appellant.

13. The Appellant's defence was a mere denial. The allegation was that he had a disagreement with the complainant's brother over a lost calculator did not account for the defilement on the 3rd and 4th February 2019. The testimony of DW 2 also was centred around the circumstances of his arrest. All the prosecution evidence displaces the appellant's defence, which in reality, was a mere denial. Additionally, the contention that the prosecution's evidence was contradictory lacks merit is not borne out by the totality and consistency of the testimony of the witnesses which formed a complete picture of what took place.

14. The final element of the offence of defilement is the age of the complainant. The age of a child is a question of fact. In the case of *Mwalongo Chichoro Mwajembe v Republic MSA Cr. App. No. 24 of 2015 (UR)*, the Court of Appeal stated as follows concerning proof of age:

[T]he question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense.

15. Neither PW 1 nor PW 5 produced the birth certificate. There was sufficient evidence to show that PW 2 was 11 years old. She was in class 4 and knew her age. PW 1 testified that she was 11 years old having been born on 12th July 2007. I therefore find that PW 2 was aged 11 years old at the time the offence was committed. Based on the totality of the evidence I find that the prosecution proved each element of the offence of defilement. I therefore affirm the conviction.

16. On the issue of whether the Appellant was a minor at the time of the offence the trial magistrate relied on a birth certificate that indicated the appellant was born on 19th October 2000 making him 18 years at the time of the offence. The Appellant's birth certificate was not produced. In the absence of the birth certificate, the court is entitled to rely on medical evidence of a doctor or on the testimony of the parents. The Appellant's mother, DW 2, did not deal with the issue of the Appellant's age. The age assessment report ordered by the trial court showed that the Appellant was below 18 years old at the time of the offence. I therefore give the Appellant the benefit of doubt on this issue.

17. As regards the sentence, the mandatory minimum sentence for a child under 11 years under **section 8(2)** of the *Sexual Offences Act* is life imprisonment. The Court of Appeal has declared the mandatory minimum sentences under the *Sexual Offences Act* unconstitutional and in similar cases has reduced the life sentence (see *BW v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR* and *Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014*).

18. Taking into consideration that the appellant was a minor at the time of the offence, he should have been sentenced in accordance with **section 191(1)(i)** of the *Children Act* as held by the Court of Appeal in *R v Dennis Kirui Cheruiyot [2014] eKLR* and *JKK v Republic [2013] eKLR*. These provisions do not exclude the imprisonment particularly where the child is on the cusp of adulthood and the offence is

serious. In this case, the appellant took advantage of the young child and repeatedly defiled her. I therefore quash the sentence of life imprisonment and substitute it with a sentence of 4 years' imprisonment.

19. The appeal is allowed only to the extent that the sentence of life imprisonment is quashed and substituted with a sentence of 4 years' imprisonment which shall run from the date of arraignment, that is, 19th February 2019.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KIAMBU this 4th day of FEBRUARY 2021.

M. KASANGO

JUDGE

Appellant in person.

Mr Kasyoka instructed by the Office of the Director of Public Prosecutions for the Respondent.