IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 29 OF 2020

CORAM. D. S. MAJANJA J.

BETWEEN

JOSEPH NTHIGA MUNYI.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal against the original conviction and sentence dated 11th December 2019 by Hon. C. N. Mugo, SRM in Criminal Case No.4 of 2019 at the Magistrate's Court at Gatundu)

JUDGMENT

1. The appellant, **JOSEPH NTHIGA MUNYI**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to**section 8(1)** and **(2)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars of the charges were that on 22nd January 2019 at [Particulars Withheld] village in Gatundu North Sub-County within Kiambu County he intentionally caused his penis to penetrate the vagina of GWK a child aged 8 years.

2. The appellant now appeals against conviction and sentence on the grounds set out in his petition of appeal filed on 4th June 2020 and the written submissions filed on 23rd September 2020. The thrust of the appellant's appeal is that the prosecution failed to prove the case beyond reasonable doubt and that he was not identified. That the evidence against him was inconsistent and contradictory and could not sustain a conviction. He also pointed out that important witnesses were not called to testify. The respondent filed written submissions. It supported the conviction on the grounds that the prosecution proved all the ingredients of the offence of defilement and that the sentence was within the law.

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** and ***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. GWK (PW 1) gave a sworn evidence after a *voire dire*. She testified that on the day of the incident, she was at LK's home when at around 8pm LKW (PW 2) escorted her to the nearby Church. As she proceeded home, she met with the Appellant who told her he would take her home. The Appellant took her to a house and removed her panty and put his penis in her vagina. He threatened to kill her if she told anyone what had happened. She stated that she knew the Appellant as he used to work for their neighbour. She recalled that she was sure it was the Appellant who sexually assaulted here as the house had electricity. In the morning she went to her grandmother's place and informed her what had happened. She was taken to the Hospital where she was treated.

5. LKW (PW 2) stated that on the day of the offence she had escorted PW 1 upto the nearby Church and them went home. She recalled that on the following morning, the complainant's mother (PW 4) came to their home looking for PW 1.

6. The complainant's mother, PW 4, recalled that on 22nd January 2019, PW 1 came home changed and left. As PW 1 did not return home, she together with her husband, looked for her until 1:00am. On the following morning, as she was on the way to PW 1's school, her husband was informed that PW 1 had been seen near a Chemist shop. They proceeded there and found PW 1 crying. PW 1 informed her and her grandmother, PW 5, that *Nthiga* had defiled her. They took PW 1 to the hospital where she was examined and treated. She also testified that PW 1 took her and PW 5 to the house she had been defiled. PW 4 informed the court that the she used to see the Appellant and that it was her husband who arrested him on the road and took him to the police station.

7. The complainant's grandmother, PW 5, testified that at around 8:00pm on 22nd January 2019, PW 4 called her and informed her that PW1

was missing. On the next morning she met with PW 4 and they proceeded to look for PW 1. She was with PW 4 when they found PW 1 at the Chemist shop. She recalled that PW 1 took them to the house where she was defiled.

8. PW 6 was the arresting officer. He told the court that at about 7:30pm on 23rd January 2019 members of the public and boda boda operators stormed the AP Camp alleging that the Appellant had defiled PW 1. With the assistance of other officers, he rearrested the Appellant and escorted him to the Police Station.

9. The Investigating Officer, PW 7, told the court that he took witness statements. He visited the scene but found the house locked and he was unable to trace the owner.

10. The Clinical Officer, PW 3, who examined PW 1 on 24th January 2019 produced the P3 medical form and outpatient form. The key observation was that the hymen was partially broken. He also noted the vaginal orifice was painful and red. The laboratory examination revealed pus cells but not spermatozoa were seen on the vaginal swab. PW 3 concluded that there was penetration.

11. In his sworn defence statement, the Appellant denied the offence. He stated that on 22nd January 2019 he was working for Daniel and he slept there as he also lived there. He denied knowing the complainant and stated that he had seen her only once in November. He further denied meeting Joe on the day of the offence. DW 2 testified that he knew the Appellant who used to work for his sister. He denied giving the appellant keys to his house where PW 1 was defiled.

12. 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."*

13. The evidence against the appellant was the direct testimony of the complainant PW 6. She recalled in detail what took place the night the appellant defiled 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 evidence of the child was unshaken in cross-examination and clear and that the child was without guile.

14. There was also 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 partially broken and the vaginal orifice was tender and reddened. When viewed with the other evidence, I find that there was sufficient evidence that she had been subjected to an act of penetration.

15. As to whether the appellant was the assailant, informed the court that she had seen him before as he used to work for a neighbour. That he was not a stranger is confirmed by the testimony of PW 4 that she used to see him in the area. Since the incident took place at night, the circumstances that call for caution in order to avoid a case of mistaken identity. In ***Wamunga v Republic*** **[1989] KLR 424**, the Court of Appeal observed that:

> It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction

16. The fact that the assailant was not a stranger does not lessen the need for caution in order to avoid a case of mistaken identity. In this respect, PW 1 testified that though it was at night, the house had electricity and she was able to see the assailant. The incident took quite some time as she spent the whole night in the house and the parties were in close proximity. All these facts taken together provide circumstances which I find were favourable for positive identification. In addition, PW 1 gave the appellant's name to PW 4 and PW 5 and took them to the house where the incident took place. Although the investigating officer testified that he found the house locked and could not trace the owner. This does not detract from the clear evidence of PW 1 where she was sexually assaulted. While DW 2 denied that he gave the keys to his house to the Appellant, the fact is that he knew the Appellant and there was no reason for PW 1 to accuse the appellant and make a story for about the incident.

17. The final element of the offence of defilement is the age of the complainant. The age of a child is a question of fact (see ***Mwalongo Chichoro Mwajembe v Republic*** **MSA Cr. App. No. 24 of 2015 (UR)**). In this case, PW 1 and her mother testified that she was 8 years old. This is consistent with the birth certificate which showed that hse was born on 5th August 2009 confirming that she was 8 years old when 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.

18. 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).**

19. Consequently, I allow the only to the extent that the sentence of life imprisonment is quashed and substituted with a sentence of 20 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 FEBRAURY 2021.

M. KASANGO

JUDGE

Appellant in person.

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