



IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 40 OF 2020

BETWEEN

PMW.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon N. M. Kyanya-Nyamori, RM dated 15th October 2018 in Criminal Case No. 12 of 2018 at the Magistrate's Court at Thika)

JUDGMENT

1. The Appellant, **PMW**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8 (1)** as read with **section (2)** of the **Sexual Offences Act** ("the Act"). The particulars of the charges were that on diverse dates and diverse times in Thika Township of Kiambu County he intentionally caused his penis to penetrate the vagina of LNM 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 30th July 2020 and the written submissions filed on 18th November 2020. The thrust of the appellant's appeal is that the prosecution failed to prove the case beyond reasonable doubt. He pointed out that the trial magistrate relied on medical evidence including the P3 form and treatment notes which were not produced by the makers thereof and were therefore inadmissible. That the evidence against him was inconsistent and contradictory and could not sustain a conviction. He submitted that important witnesses were not called to testify. The Appellant also contended that the trial magistrate failed to consider this defence and that the sentence was unconstitutional.

3. 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.

4. 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.

5. LNM (PW 6) gave an unsworn evidence after a *voire dire*. She testified that the Appellant was her step-father and that he would come to the house every day except Friday. She narrated her ordeal as follows:

The first day I was arraigning clothes he covered my eyes and mouth and lay me on the bed of mum. It was dark. The lights were on but he switched them off. I knew it was him. There was no one else who would come to our house. I heard his voice. He told me if I tell mum he would also frame me for other things to mum. He removed my trouser. He took a blanket and covered me. When I wanted to scream, he covered my mouth...He did tabia mbaya. He removed his clothes took his thing for urinating. He put it in my place for urinating. I felt pain and cried. He covered my mouth.

6. PW 6 testified that the Appellant first sexually assaulted her on Tuesday and the next day. On Wednesday, her aunt came home and the appellant told her not to tell her aunt that he was in the house. PW 6 stated that she never informed her mother or aunt. One Wednesday, she went and told her grandmother that the appellant was sexually assaulting her. The grandmother informed her mother, PW 2, but she did not believe it. PW 2 and her aunts took her to hospital where she was examined and found that she had been subjected to penetration. The Appellant was later arrested.

7. The complainant's mother, PW 2, testified that the Appellant used to visit her and that they had a child together. She stated that 18th

December 2017 she noticed that PW 6 was dragging her feet as she walked but she denied there was anything wrong. On 1st February 2018 she met with her sister on the road who informed her that she had found PW 6 showering. That they went back to PW 2's house and she knocked severely before PW 6 opened. PW 2 asked PW 6 whether the Appellant was in the house but she did not respond. When she went to the bedroom where she found the Appellant. Her sister questioned her why he allowed her daughter to take a shower while the Appellant was in the house. On 2nd February 2018 together with her sister she took PW6 to hospital to be examined. The doctor informed the sister that PW 6 had been subjected to penetration several times.

8. PW 1 is the doctor who produced the P3 medical form and the Post Rape Care (PRC) form prepared by the doctor who examined PW 6 on 7th February 2018. The key observation was that the hymen was torn. He also observed epithelial cells but no spermatozoa on the vaginal swab. He concluded that there was penetration.

9. The Investigating Officer, PW 5, confirmed that on 4th February 2018, she recorded witness statements. He issued the P3 form and took the child to the hospital. He also secured the Birth Certificate.

10. In his unsworn statement, the appellant denied the offence. He stated that he had a grudge with PW 2 and her family for not paying dowry. He told the court that the charge was falsified.

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 PW 6. She recalled in detail what took place the first time the Appellant sexually assaulted her and that he sexually assaulted her on different occasions. From her testimony, it is clear that she was subjected to penetration by the Appellant whom she knew. The child's testimony alone is sufficient to support a conviction as **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 consistent, credible and convincing in her testimony and did not appear as a coached witness.*"

13. 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 child's hymen was missing. The appellant submitted that it is possible that the hymen would have been ruptured by any other activity as was held in *PKW v Republic HCCRA NO. 31 of 2008*. However, in this case, there was medical evidence was consistent with her testimony that she had been subjected to an act of penetration by the Appellant.

14. The appellant contested the admission of the medical report. The doctor who examined PW 6 and prepared the P3 form was not called. **Section 77** of the *Evidence Act* allows a person other than the one who prepared a report such as the P3 forms in issue to produce it provided the presumption of authenticity is met. The section provides as follows:

77. (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

15. Once the presumption of authenticity under **section 77(2)** aforesaid is met the document is admissible but the trial court may, on its own motion, or upon request by the accused, call for the maker of such document to appear in court for cross-examination on the form and content of the report. In this case, the prosecution laid the basis for the admission of the P3 medical form. PW 2 confirmed that she took PW 6 for medical examination at the hospital. PW 1 stated that the doctor who prepared the report had left the department and could not attend court. He confirmed that he was familiar with his handwriting and signature of the doctor having worked at the hospital for 5 years. The medical evidence was therefore properly admitted.

16. The Appellant complained that the complainant's grandmother, to whom the incident was reported, was not called as a witness. The question is whether the grandmother was an essential witness. The law is that the prosecution need not call all witnesses to prove a fact but where a witness is necessary, the failure to call a witness may lead to the court making an adverse inference (see *Bukenya v Uganda [1972] EA 562*). In this case, the grandmother did not witness any of the incident but only informed PW 2 what PW 6 told her and therefore she would add nothing to the prosecution case.

17. The appellant's defence was a mere denial. The allegation that he was framed by PW 2 because he did not pay dowry was not borne by the evidence on record. The issue of payment of dowry was an explanation why PW 2 did not consider herself the Appellant's second wife. Furthermore, PW 2 stated in cross-examination that she only came to know of the child's situation when she took the child to the hospital after being informed by her mother that PW 6 had been defiled. All the 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 evidence of the witnesses, which formed a complete picture of happened.

18. The final element of the offence of defilement is the age of the complainants. 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.

19. PW 5 produced the complainant's birth certificate which indicated that PW 6 was born on 14th May 2007 meaning she was 10 years old at the time the offence took place. 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. The offence of defilement was therefore established.

20. As regards the sentence, the mandatory minimum sentence for a child under 11 years under **section 2** of the *Act* is life imprisonment. The Court of Appeal has declared the mandatory minimum sentences under the *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*, *Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR* and in *Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014*).

21. In conclusion, I allow the appeal to the extent that I quash the sentence of life imprisonment and substitute it with a sentence of 20 years' imprisonment on the principal count. The conviction is affirmed and the appeal thereon is dismissed.

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.