REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: R. Wendoh, J.]

CRIMINAL APPEAL NO. 4 OF 2020

EMMANUEL SIKUKU NDISIO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. R. Odenyo, SPM, in the Chief Magistrate's Court at Migori CMCR No. 18 of 2018 delivered on 13th November, 2018)

JUDGMENT

The appellant, **Emmanuel Sikuku Ndisio** was charged with the offence of defilement contrary to Section 8(1), (2) of the Sexual Offences Act.

The particulars of the charge are that on 18/5/2018 in Migori County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of ETG a child aged nine years. After a full trial, the appellant was convicted of the main charge of defilement contrary to Section 8(1) and 2 of the Sexual Offences Act and sentenced to thirty (30) years in jail.

Being dissatisfied with the said judgment, the appellant preferred the instant appeal against the whole judgment on nine grounds of appeal which can be summarized as follows:-

1)That the Magistrate erred in law and fact in basing the conviction on evidence that was below the standard of proof;

2)The trial court failed to consider the appellant's defence;

3)That there was no medical evidence in support of charge;

4)That the court failed to consider the fact that a grudge existed between the complainant's parents and the appellant.

5)That the sentence of thirty years was manifestly oppressive.

The appellant therefore prays that the conviction be quashed, sentence set aside.

The court gave directions that the appeal be canvassed by way of written submissions in the appellant filed his undated, submissions.

Mr. Kimanthi, the learned counsel for the State opposed the appeal and also filed submissions on 8/12/2020.

This being a first appeal, this court has a duty to re-examine all the evidence adduced before the trial court afresh, analyse it and arrive at its own conclusions but always bear in mind that this court did not see or hear the witnesses testifying and therefore make allowance for it. The court is guided by the decision of the court of Appeal in **Kiilu & Another =vs= Republic [2005]1KLR 174**, where the court said:-

"An Appellant on first appeal is entitled to expect the evidence as a whole submitted to fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.

It is not the function of the first appellate Court to merely scrutinize the evidence to see if there was some evidence to support the

lower court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses.

See also **Okeno v Republic (1972) E.A. 32**

Briefly, the evidence that was tendered before the trial court is as herein below.

PW1, ETG, recalled that on a date she could not recall, she went to look for firewood in the thicket where she met Emmanuel, who called and told her that he would give her some firewood. Emmanuel led her to the home where he worked through a barbed fence. He took her by the hand to the house, then to the bed, removed her skirt and blouse. He then inserted his thing for urinating in her private parts. After he finished, he took a cloth, wiped her thighs and warned her not to tell anybody or she would be beaten by her parents. When she reached home, her father enquired where she had been and she informed her mother what the appellant did to her. She was later taken to hospital.

PW2 Tobias Ochola Ochuodho, father to PW1 recalled 18/5/2018 when returning home about 5 – 6:00 pm, saw PW1 come out of the appellants' door; pass through the barbed wire to go home. PW1 knew the appellant as worked as a servant for a neighbour. On reaching home, PW2 asked the wife for the whereabouts of the children and she said she had sent PW1 for firewood. He told the wife to enquire from PW1 where she had been. He left briefly and the wife followed to inform him that PW1 had been defiled by the appellant. PW21 rushed to go and look for the appellant, did not find him at his house but later found him at the market at the stage and told him to go to his house where PW1 narrated in front of the appellant what he had done to her. PW2 caused the appellant to be arrested and charged.

On 19/5/2018 **PW3 Kosuri Dala,** a clinical officer examined PW1 who had a history of defilement. He found the child had minor lacerations on both labias and he formed the opinion that it was attempted defilement.

PW4 Jemima Nzioka of Uriri police station re-arrested the appellant on 19/5/2018 and took both PW1 and the appellant for medical examination and sent PW1 for age assessment.

When called upon to defend himself, the appellant gave unsworn evidence and stated that he was on his way home from Ahedo about 7:00p.m when some men stopped and detained him on allegation of committing an offence and was later taken to police station. He denied committing the offence but that he had a grudge with PW2 for whom he had worked but he had failed to pay him; that PW2 had earlier accused him of having an affair with his wife and that PW2 borrowed money from him and had not repaid.

The appellant filed submissions on three issues;

1)inconsistencies in the prosecution evidence;

2)Lack of medical evidence;

3)That the investigations were showdy;

4)That the sentence is harsh and excessive.

He submitted that PW2's evidence was based on suspicion; that the child never raised alarm; that he was not properly identified by PW1 and PW2, and when he met PW2, his conduct was not that of a suspect because he never ran away.

On medical evidence, the appellant stated that it was inconclusive and did not support the charge of defilement; that there was no evidence that the hymen was freshly broken.

On sentence, it was the appellant's contention that 30 years sentence is excessive, him being a first offender. He also urged that the case was not properly investigated and no independent evidence was adduced, to support PW1 and PW2's evidence.

In opposing the appeal **Mr. Kimanthi, Learned Counsel** for the State urged that PW1 narrated in detail how the appellant defiled her, counsel also submitted that PW2's testimony corroborated PW1's evidence that he saw her leave the appellants house and PW3 who examined PW1 found the child to have minor lacerations on both labia which was proof of penetration.

Counsel relied on **Section 124 of the Evidence Act** which does not require corroboration in a sexual offences. Counsel dismissed the defence as an afterthought. On sentence, it was counsel's submission that under Section 8(2) of the Sexual Offences Act, the appellant should have been sentenced to life imprisonment but the court exercised its discretion to sentence him to 30 years imprisonment which is sufficient.

The appellant faced a charge of defilement contrary to Section 8 (1) as read with Section 8(2) of the Sexual Offence Act. The section reads as follows:-

i) A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement;

ii) A person who commits an offence of defilement with a child aged eleven years or less upon conviction be sentenced to life imprisonment."

The Court of Appeal in **CRA 32 OF 2017 G.O.A vs Republic (2018**) stated what elements are required to be proved in a charge of

defilement when it said,

> **"The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence."**

As regards the age of PW1, PW3 produced in evidence an age assessment report prepared by Dr. Otieno who found the child to be nine (9) years old at the time the offence was committed. PW1 told the court as much and the court did appreciate that PW1 was a child, took her through *voire dire* examination before she was affirmed. No doubt PW1 was a minor of tender age.

Whether there was penetration. Penetration is defined in Section 2 of the Sexual Offence Act 'S'2 means **the partial or complete insertion of the genital organs of a person into the genital organ of another person."**

PW1 was alone when the incident occurred. She narrated in detail how the appellant lured her into his house on the promise of giving her firewood. She narrated how the appellant removed her inner pants, her skirt, then removed **"his thing for passing urine and put it in my private parts."** She went on to say that the appellant even wiped her after he finished and threatened her not to tell her parents: Section 143 of the Evidence Act provides that a fact can be proved by the evidence of one person except in cases where a specific law provides otherwise.

I am also satisfied that PW3's evidence did corroborate PW1's evidence. PW3 found that PW1's labias had lacerations. It does not matter whether there was broken hymen or not because the penetration need not have been deep or complete. Section 2 states that penetration can be partial or complete. The Court of Appeal in **CRA 295 of 2012 Mark Oiruri Mose =vs Republic [2013] eKLR** stated as follows: -

> **"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."**

In **CRA 5 of 2013 Erick Onyango Odeng' vs. Republic** the court also stated:

> ***"We agreed with the first appellate court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence."***

In law there is no requirement that there must be presence of spermatozoa to prove penetration. The Court of Appeal affirmed this position in **Mark Oiruri case (supra)** when it said:

> ***"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."***

I am satisfied that these was overwhelming proof of the fact of penetration.

On the identity of the perpetrator; PW1 knew the appellant very well even by name Emmanuel. PW2 corroborated PW1's evidence that the appellant works and lives in the neighbours' compound. The appellant is well known to PW2. PW2 said they had even exchanged numbers. PW1 also told the court that in fact that was not the first time that the appellant defiled her. It was the second. Had PW2 not seen PW1 leave the appellant's house, the secret between PW1 and the appellant may never have been found out then as she had been sworn to secrecy or face the wrath of her parents.

The appellant alleged that there was a grudge between him and PW2. During cross examination of PW2 he denied there being my bad blood between him and the appellant. Though, the appellant seemed to be alleging a grudge, the appellant never disclosed the nature of the grudge till his unsworn defence where he made several allegations against PW2, first that he had worked for PW2 who had failed to pay him, that PW2 had alleged that he had an affair with his wife; that PW2 wanted his job and lastly that PW2 had borrowed money from him and had failed to pay. All these accusations, were never raised during cross examination of PW3. I am satisfied that these accusations and the alleged grudge is an afterthought and unbelievable. I dismiss the said defence as untrue.

After a careful analysis of all the evidence and submissions, I agree with the findings of the trial court that it is the appellant who defiled PW1. The conviction is sound and I affirm it.

Whether the sentence is harsh and excessive; Under Section 8(2) of the Sexual Offences Act, where the victim is less than eleven years, like PW1 was, upon conviction, one is liable to be sentenced to life imprisonment. The court considered the appellant's mitigation and gave him only thirty (30) years imprisonment which is a lawful sentence. Having considered all the circumstances of this case and in the exercise of this court's discretion and considering the fact that the offence is very serious, I hereby set aside the said sentence. Instead I Sentence the appellant to twenty-five (25) years imprisonment. The appeal succeeds to that extent.

Dated, Signed and Delivered at Migori this 4th day of March, 2021.

R. WENDOH

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Kimanthi. State Counsel

Ms. Josephine Court Assistant

Appellant present in person