



IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 53 OF 2020

CORAM. D. S. MAJANJA J.

BETWEEN

JAMES WAITA KELI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon G. Omodho, SRM dated 13th May 2019 in Criminal Case (SO) No. 36 of 2016 at the Magistrate's Court at Thika)

JUDGMENT

1. The appellant, **JAMES WAITA KELI**, was charged and convicted on two counts of defilement contrary to **section 8(1) and (2)** of the **Sexual Offence Act** ("the Act"). The particulars of the charges were that on the 14th December 2016 at Githurai 45 estate within Kiambu County he intentionally and unlawfully caused his penis to penetrate the vagina of EW a child aged 9 years and MW, a child aged 8 years. He was sentenced to life imprisonment on each count however the sentence on the second count was held in abeyance.
2. The appellant now appeals against conviction and sentence on the grounds set out in his petition of appeal and the amended grounds of appeal and the written submissions filed on 22nd October 2020 and 10th November 2020 respectively. The thrust of the appellant's appeal is that the prosecution failed to prove the case beyond reasonable doubt and that he was not properly identified. That the evidence against him was inconsistent and contradictory and could not sustain a conviction. The appellant also contended that the prosecution failed to call necessary witnesses and that trial magistrate failed to consider this defence. The respondent supported the conviction and sentence. Counsel for the respondent submitted that the prosecution proved all elements of the offence of defilement in respect of the two counts facing the appellant. He stated that the sentence was within the law and was neither harsh nor excessive.
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. MWM (PW 1) testified on oath after a voire dire. She told the court that on the day of the incident complained of she was playing with EWM (PW 2) when the appellant called them to wash clothes. When they finished washing the clothes, the appellant called them into the house. He removed his trousers and underpants and removed PW2's panty as she was in a dress and inserted his penis in her vagina. When he was finished, the appellant then removed PW 1 clothes asked to climb on the bed and put his penis in her private part. She said that when the appellant had finished he bought them bhajia and they went home. That they told PW 2's mother (PW 3) what had happened. MWM told the court that it was the first time she met the appellant.
5. EWM (PW 2) also testified on oath after a voire dire examination. She informed the court that on 13th December 2016, the Appellant asked them to wash clothes for him. That when they finished, they went into the appellant's house where he removed her trouser and panty. He then gave them a cigarette to smoke before inserting his penis into her vagina. She felt pain and screamed. That the appellant did the same thing to PW1. When the appellant was finished, he bought hem bhajia and they left. When they got home they informed PW3 about the defilement. PW2 told the court that the appellant was a friend that PW3 had introduced him as an uncle.
6. JM (PW 3) was EWM's mother. She told the court that on 13th December 2016 she was selling in the market while PW 1 and PW 2 were playing in the field. At around 5.00pm she noticed that the children were missing and started looking for them. She then informed MWM's aunt (PW 4) PW 4 and they continued to look for them. At around 6.00pm they saw the PW 1 and PW 3 enter the market carrying bhajia while walking with their legs apart. They tried to ask them where they were but they refused to say anything so they beat them until they told them that it was Kasee who had sexually assaulted them. PW 3 stated that they went Kasee's house were PW 1 identified him. That they

confronted him but he denied. That he was later arrested by the police. PW 3 told the court that EWM was born on 22nd September 2006 and that she was 9 years old.

7. MW (PW 4) was PW 1's cousin. She stated that on 13th December 2016 at around 5:30pm PW 3 asked if she had seen the children. As they searched for them they saw them approaching walking with a limp while PW 2 looked shocked. The children told them that they had been sexually assaulted by Kasee who bought them bhajia. She told the court that PW 1 identified the Appellant as Kasee and they confronted him. That a crowd grew so they called the police who came and arrested the appellant and they went to the police station. They later went to a hospital.

8. PW 1's mother, PWM (PW 6), told the court that PW 1 was born in April 2008 and that she was 10 years old.

9. PW 5, a Clinical Officer, who examined PW 1 and PW 2 produced their respective P3 medical reports and treatment notes. She stated that PW 1's private parts were reddish swollen and she had a broken hymen with discharge. She further told the court that PW 2's panty had blood stains on the side and that her private parts were reddish and that the hymen was broken reddish and sore. She had watery discharge.

10. PW 7 the investigating officer told the court that on 13th December 2016 at about 6.00pm, he was informed that a man accused of defiling two children was at a local clinic. Together with another officer, he proceeded there and re-arrested the Appellant. He recorded the complainants and witness statements. He referred the complainants to Hospital for examination and treatment. PW 7 produced the birth certificate for PW 1 and the birth notification for PW 2.

11. In his sworn defence, the appellant denied the charges. He told the court that on 13th December 2016 he was returning from work when he met PW 3 and PW 4 beating the PW 1 and PW 2 asking them who Kasee was. One of the children pointed at him whereupon PW 3 and PW 4 started shouting that he had defiled them. He ran to a nearby clinic for his own safety. He stated that he did not know the children and that this was a case of mistaken identity.

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 PW 1 and PW 2 who gave similar and consistent testimony of how the Appellant sexually assaulted them in his home after washing clothes for him. Their testimony was straightforward and unshaken on cross-examination. The complainants' evidence alone was capable of supporting a conviction as the proviso to **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 did not rely on this provision but found that the children's testimony was corroborated by other evidence. The testimony of PW 5 and the medical evidence including the P3 medical forms and the treatment notes, were consistent with an act of penetration.

14. In his defence, the appellant claimed that this was a case of mistaken identity. PW 3 and PW 4 told the court that it was PW 1 who identified the Appellant while on the road. PW 1 told the court that the day of the incident was the first time that she met the Appellant and was therefore a stranger. PW 2 on the other hand told the court that she knew the Appellant as her mother, PW 3, had introduced him to her previously as an uncle though they were not related. PW 3, on the other hand, stated that she came to know the Appellant due to the defilement. PW 1 and PW 2 both stated that they knew the appellant as Kasee. The prosecution did not lead any other evidence other than that of PW 1 and PW 1 that the appellant was known as Kasee.

15. The contradictions as to whether the Appellant was indeed positively identified cannot be wished away as they go into the root of the matter. The Court of Appeal in ***John Mutua Munyoki v Republic* NRB CA CRA No. 11 of 2016 [2017] eKLR** observed as follows:

How about inconsistencies and contradictions? There were quite a number though the respondent dismissed them as inconsequential. In cases where the court has to prefer the evidence of one person against the other, for instance between the accused and the complainant and that is the only evidence, the court must approach such evidence with a degree of circumspection, particularly in sexual offences that are normally committed in secrecy with hardly any eye witness. Contradictions and inconsistencies therefore matter in deciding who to believe. The contradictions have to be considered and weighed carefully.

16. I have considered the contradictions but I do not find them material on the issue of identification. The important fact is that the appellant lured the children to his house and sexually assaulted them. All this took place in the early evening. This was sufficient time for the children to be familiar with him and then point him out when they were asked to do so shortly thereafter. I have considered the questions put to the children in cross-examination by the appellant and nowhere was it suggested to them that they were forced to identify a random stranger. I reject this line of defence and find that the appellant is the person who subjected PW 1 and PW 2 to acts of penetration.

17. The final ingredient of the offence of defilement is proof that PW 1 and PW 2 were children. That they were children was not contested. PW 1's actual age was proved by production of the birth certificate which showed she was born on 5th April 2008 and that of PW 2 was proved by the birth notification showing she was born on 31st August 2006. Both children were aged below 11 years old.

18. The appellant was sentenced to life imprisonment. The mandatory minimum sentence for a child under 11 years under **section 8(2)** of the *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. The conviction on Count I and II on for the offence of defilement is affirmed. I allow the appeal only to the extent that the sentence of

life imprisonment is quashed and substituted with a sentence of 20 years' imprisonment on each count. Both sentences which shall run concurrently from the date of arraignment, that is, 15th December 2016.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT KIAMBU THIS 9TH DAY OF MARCH 2021

M. KASANGO

JUDGE

Appellant in person.

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