REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 31 OF 2017

DMM .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of; Hon. J Gandani- Chief Magistrate,

in Criminal Case Number; 119 of 2015, at the Chief Magistrate's Court; Nairobi)

JUDGMENT

1. The subject of this judgment is an appeal filed by the Appellant on 9th March 2017, seeking for the court to quash the conviction and set aside the sentence against him and in; Criminal Case No. 119 of 2015.

2. The appeal is based on the following grounds reproduced here below;

a) That, the learned trial magistrate erred in law and in facts in holding that the offence charged of sexual offence act was proved against the Appellant beyond reasonable doubt;

b) That the learned trial magistrate erred in law and in facts by failing to find that enough doubt was created to secure his acquittal for the sexual offence act;

c) That the learned trial magistrate erred in law and in facts in basing his conviction on purported identification evidence of a single witness made under strenuous circumstances.

d) That as the Appellant could not remember all that transpired at trial, he intends upon receipt of trial proceedings to adduce supplementary grounds of appeal and be present in person at the hearing of his appeal,

e) *That this Memorandum also be treated as his application to be supplied with a copy of the trial proceedings*.

3. The background facts of the case are that; the Appellant was charged with the offence of; defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006(herein "the Act") in count; 1 and an alternative count of; causing an indecent act contrary to section 11 (1) of the Act. The particulars of the charge read that, on the 30th day of December 2014, at [particulars withheld] Village, in Kajiado North District, within Kajiado County, the Appellant intentionally and unlawfully caused his penis to penetrate the anus of "IJ" a child aged seven (7) years and in the alternative, used his penis to touch the anus of the subject child against his will, which amounts to an indecent act.

4. The Appellant pleaded not guilty to both counts. The case proceeded to a full hearing. The prosecution case was led by the evidence of the complainant; "IJ", who testified that, on the material date, at about 4 pm, he was playing outside their house, when the Appellant called him and told him to accompany him to the shamba.

5. He left the sister he was playing with and accompanied the Appellant. That, the Appellant took him to the back of the shamba, unzipped his trouser and then pulled down the complainant's pair of trousers. He removed his penis and penetrated the complainant's anus. When the complainant returned home, he saw mucus on his trouser and when he went to the toilet, he felt as though he had "messed" on himself.

6. Upon inquiring from the mother, as to what the mucus was all about, her mother sought to know what had happened and he told her the whole story. The following day, the mother took him to the police station and reported the matter. He was then referred for medical

examination and allowed to go back home.

7. In the meantime, the complainant's parents reported the matter to their landlord who was staying with the Appellant. At that time, it is alleged that, the Appellant ran away when he was interrogated by the landlord.

8. However, the complainant was taken to Ngong Sub-District Hospital, for examination. Grace Irukan, a Clinical Officer at Ngong Sub-County District Hospital told the court that, on 30th December 2014, he examined the complainant; "IJ" in an alleged case of; sexual assault. He said he was sodomized and that, it was not the first time. On examination of the body generally, there was semen on his posterior lower. There were no blisters or tears noted. However, his under pant was soiled with semen and his anus was semi-closed. That, the semi closed anus, is an indication of sexual assault through anal canal. He was treated for STI and HIV test done.

9. In the same vein, Dr Joseph Maundu, from the Nairobi Police Surgery Department testified that, on 6th January 2015, he examined "IJ" in a case of defilement. He had no physical injuries on the genitals. However, he had tear or bruises in the anal region. He also had pain when the anal region was touched. He signed and produced the P3 form dated 6th January 2015.

10. No.102025, PC Namusasi Mercy attached to Ngong Police Station, who investigated the case confirmed receipt of the report of alleged defilement and referred the complainant for medical examination. She testified that later, the Appellant was arrested on 5th January 2015; for being idle, and placed in the police cells at Ngong Police Station. However, he was then charged with the offence herein. That, the trouser the complainant was wearing was taken to the Government analyst for examination but was not examined as it had already been exposed to water.

11. At the close of the prosecution case, the court ruled the Appellant had a case to answer, and placed him on his defence. Upon acknowledgment of the options available under section 211 of the Criminal Procedure Code to offer his defence, the Appellant elected to defend himself by giving unsworn statement. He did not call any witness.

12. He told the court that, he is a student at; [particulars withheld] Secondary School in form two. He is 21 years old. That, on 30th December 2014, he was arrested while on school holiday. He denied committing the offence and stated that, he was arrested while he had gone for a walk at Ngong town. However, he acknowledged that, he knows the complainant, but does not know why the complainant said that, he defiled him.

13. At the conclusion of the case, the learned trial magistrate, arrived at the conclusion that, indeed the complainant "IJ" was defiled or sodomized by the Appellant. She stated as follows: -

> *"I am therefore satisfied that there was no mistake at all as to the identity of the person who defiled the complainant. I also note that, the incident here occurred in broad day light. It is now my conclusion that from the above evidence that the prosecution has proved its case beyond any reasonable doubt on the main charge of defilement. The Accused's defence totally lacks merit. He was not incriminated here for any other reason apart from the fact that the Accused had committed the offence. I therefore convict him under section 252 CPC. He is guilty as charged."*

14. Upon conviction, the prosecution addressed the court as follows;

> *"We welcome the judgment. This is a heinous crime. I pray for a sentence as set out in the Sexual Offences Act. The victim was 7 years old and whose life was affected by the crime here. We however have no previous records of the Accused."*

15. The Appellant then offered his mitigation before sentences as follows.

> *"I'm sorry I have been in custody for over two years. I am an orphan who lives with well-wishers. I request for a none-custodial sentence. I want to continue with my studies. I am 21 years old. My birth certificate is in the file."*

16. The learned Honourable trial Magistrate pronounced the sentence, by stating as follows: -

> *"Mitigation noted but I note that section 8(2) of the Sexual Offences Act provides for a mandatory sentence. I now sentence the Accused to life imprisonment. Right of appeal 14 days explained. Proceedings be typed."*

17. I have considered the appeal, the grounds thereof; and I note that, the Respondent did not file any formal response thereto. Generally, then, the appeal will be deemed as opposed. However, the parties filed submissions on the appeal which I have fully considered in this matter.

18. Be that as it were, its noteworthy that, the mandate and/or duty of the first appellate court is to consider the evidence adduced by the prosecution in the trial court and arrive at its own decision, as to whether the conviction was safe and/or the sentence imposed is proper and lawful. At the same, the court should caution itself that, it did not have the benefit of the demeanour of the witnesses.

19. In that regard, the court stated in the case of; ***Okeno vs. Republic*** **(1972) EA 32;** that: -

> *"An Appellant is entitled to expect the evidence as a whole to be submitted to a 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*

conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

20. Be that as it were, I have considered the appeal and the grounds thereof and I find that, the grounds of appeal can be summed up into one ground as to; whether, the prosecution proved its case beyond reasonable doubt. In that regard, I note that, the Appellant was convicted on the main count of the offence of; defilement contrary to section 8(1) and (2) of the Sexual Offences Act, No. 3 of 2006.

21. The provisions thereof state as follows: -

"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

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

22. The ingredients of the of offence defilement are now settled as follows:

a) That there was penetration;

b) Proof of the age of the child victim; and

c) Positive identification of the perpetrator.

23. However, before I examine proof of these ingredients in the light of the available evidence, I note that, the Appellant has submitted that, section 124 of the Evidence Act (cap 80) Laws of Kenya was amended in recognition of the fact that, child's observation and memory, is less reliable, that a children are prone to live in a make believe world, are egocentric, and due to immaturity are easily influenced by adults.

24. *I shall now consider the evidence adduced in the light of these ingredients. The first ingredient is penetration.* **Section 2 (1) of the Sexual Offences Act No. 3 of 2006, state that: -**

"Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

"Genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;

25. In the instant case; the complainant stated that, the Appellant unzipped his trouser, pulled down his pair of trousers, removed his penis and "akanisukuma kwa nyuma" or "penetrated his (complainant's) anus." The question that arises is; was this evidence corroborated?

26. From the oral evidence adduced in the trial court, the complainant was examined at Ngong Sub-County Hospital, immediately after the incident on 30th December, 2014. It was noted that, his anus was "semi-closed." The witness, one Grace Irukan, who produced the medical report explained in evidence that, a semi closed anus is not normal, and ideally it should be tightly closed. That semi closed anus; is an "indication that the complainant had been "sexually assaulted through the anal canal."

27. The complainant was also examined by; Dr Maundu, six (6) days after the event and noted that, although he had no physical injuries to the genitals but had pain when the anal region was touched.

28. The trial court in assessing whether the ingredient of; penetration had been proved stated that: -

"Indeed the complainant was defiled. He was sodomised as spermatozoa was seen on his back, his anus was found unusually open and had pain when touched on the anus. The sodomy must have involved penetration of his anus"

29. Having evaluated the evidence adduced afresh; I find that, the complainant's evidence that, his anal canal was penetrated was corroborated by the medical evidence of the clinical officer who examined him immediately after the incident and found that, the complainant has a "semi closed anus", In addition, Dr Maundu confirmed, the anal region was tender and/or painful on touching the same.

30. Therefore, taking into account the meaning of penetration and/or genital organ as aforesaid, I find that, even partial penetration is sufficient evidence of penetration. I conclude and hold that; the evidence adduced herein was sufficient proof penetration.

31. The next ingredient is proof of the age of the victim. The law is settled on this issue that, the age of the victim ought to be proved. This is informed by the fact that, the sentence(s) for the offence of; defilement is based on the age of the victim. Therefore, without proof of age, it will be impossible to sentence the Accused upon conviction.

32. *In the case of; Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009 (Kisumu), the Court of Appeal Court stated as follows: -*

'In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."

33. In the instant case, the charge sheet indicates the complaint is aged seven (7) years old. The complainant stated that, he was eight (8) years old on the 8th May 2015, when he testified and in class three (3). PW3; RWK, the mother of the complainant stated that, the complainant was nine (9) years on 24th March, 2016, when she testified. That, he was born on 23rd February, 2007. Finally, PC Namusasi who investigated the matter produced the complainant's birth certificate serial number; 460939, in the names of; "IJM" showing date of birth as; 23rd February, 2007.

34. I note that the learned trial magistrate did not consider this issue of age in the judgment. However, I find that, the offence was committed on; 30th day of December 2014, and the birth certificate shows the child was born on; 23rd February, 2007. Therefore, the complainant was aged 7 years and 10 months, when the offence was committed on 30th December, 2014. That is within the age limit stated in the charge sheet. In my considered opinion, the age of the complainant was properly established.

35. On the issue of the identity of the Appellant and/or proof of commission of the offence, the submitted that, the evidence revealed that, the complainant had been defiled on previous occasions, but there was no proof as who did it and/or that it was him. Further, the complainant's "behavior" after the alleged is not consistent with one who had been defiled.

36. Finally, despite evidence of the presence of semen, he was not examined to ascertain whether he was the "secreta" of the said semen. That, the semen was found in the clothes and not the anus. Thus, it was prudent to have conducted DNA on the alleged semen. Further, there was contradictions in the medical reports, on the "condition of the anus of the minor and whether he was indeed defiled".

37. In final, submissions, the Appellant argued that, he was a minor at the time of alleged offence, and only "turned 18 years when he was arrested" and therefore should have been given legal representation. I wish to dispense with this issue at this point, by quickly observing that, the trial court record clearly indicates that, he was examined and found to be an adult, and therefore, this submission is neither here or there.

38. Be that as it were, the Respondent submitted that, the Appellant was positively identified as the complainant knew him as their landlord was a relative of the Accused. Further PW2 saw the Accused leave with the complainant.

39. I have evaluated the evidence adduced in the trial court, and I note that, the complainant stated in his evidence in chief as follows:

"*I know the Accused he is called DM. He is a family friend I have known him for three years".*

40. PW2, SW, the complainant's sister stated that, she knew the Appellant as the "landlord's grandson" and had known him for over one year. PW3, R, the complainant's mother testified that; the Appellant was staying with "their landlord who lives in the same compound" with them. It also suffices to note that, the Appellant acknowledged that, he was known to the complaint. Therefore, the issue of mistaken identity does not arise, as the parties were known to each other as neighbours.

41. Be that as it were, the next question to consider is whether, there was evidence that it is the Appellant who committed the offence.

As already stated the parties herein were well known to each other. They were staying in the same plot. The evidence further reveals that, the offence was committed in broad day time. Additionally, both the complainant and the sister testified that, they were playing "when the Appellant called the complainant and took him to the shamba.

42. Further, when the complainant returned home after the incident, he was soiled with something that looked as "mucus." The evidence reveals that, his clothes were stained with semen. On being asked as to what had happened, he narrated the incident and named the Appellant as the culprit. It is further in evidence that, when the child's parents went to where the Appellant was staying he ran away. The Appellant did not rebut this evidence and indeed had no reason why the two children would plant the charges on him.

43. The issue of examination of the and DNA does not arise as first and foremost, the Appellant ran away after the incident. Secondly the complainant's clothes could be examined for semen due to interference as stated by the Investigating officer.

However, the question remains; was it the Appellant who defiled complainant.

44. The evidence reveals that, it is the Appellant who took the complaint to the shamba, and shortly thereafter, the complainant returned with clothes stained with semen. Where did the semen come from? Obviously all the evidence points to the Appellant. There is indeed, an old saying that, there is no perfect murder. There is always a guardian angel. In the instant case, PW 2 was the complainant's guardian angel. She saw the Appellant take away the complainant and the complainant resurfaced defiled.

45. I note that, indeed the trial court found that, there was no mistake on the identity of the person who defiled the complaint. I concur with that finding that, at the risk of repeating what is already stated, the incident took place in broad day time, the complainant's evidence that, the Appellant took him to the shamba was corroborated by the sister's evidence and the medical evidence confirmed penetration into the complainant anal canal.

Therefore, I find there is adequate evidence that, the complainant was defiled and by the Appellant. As such the conviction of the Appellant

is safe and sound. I decline to quash the conviction and uphold the same.

46. As regards, the sentence I find that, the Appellant was sentenced to life imprisonment, which was the sentence provided for defilement of a child below eleven (11) years. Therefore, the sentence meted was proper and lawful.

47. However, following the decision in the case of; *Francis Karioko Muruatetu & another v Republic [2017] Eklr*, *Petition 15 & 16 of 2015 (Consolidated)*, the provisions of the law that, provide for mandatory minimum sentences have been declared unconstitutional, on the basis, that they deprive the courts of legitimate jurisdiction to exercise discretion to impose the appropriate sentences. Further, it has effect of making mitigating circumstances in sentencing cosmetic in contravention of the right to fair trial under Article 50 of the Constitution of Kenya, 2010 and denies an Accused person the right to equal treatment under Article 25 of the constitution.

48. In the light of the aforesaid, having taken into account the circumstances of the case and the mitigating factors, alongside that the Appellant was in custody during the trial and balancing the same with the fact that the offence is serious, it has a life time psychological effect on the complainant, I therefore sentence the Appellant to serve ten (10) years imprisonment. The sentence shall run from the date of sentence in the trial court.

49. Those then, are the orders of the court. The Appellant has been explained to his right of appeal within 14 days hereof.

Dated, delivered virtually and signed on this 12th day of April 2021.

GRACE L NZIOKA

JUDGE

In the presence of;

Ms Kimaru for the Respondent

Appellant present in person

Edwin – Court Assistant