



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL NO.53 OF 2017**

**SKM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the Chief Magistrate's Court at Kerugoya SO Case No.13 of 2016 delivered by Hon. Y. M. BARASA on 21<sup>st</sup> July 2017.)*

**J U D G E M E N T**

The appellant was charged with defilement contrary to **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act No.3 of 2006**. It was alleged that between 8<sup>th</sup> and 19<sup>th</sup> August 2015 in Kirinyaga West Sub-County within Kirinyaga County the appellant, intentionally and unlawfully cause his penis to penetrate the vagina of **SNM** a child aged nine (9) years. The appellant denied the charge and after a full trial he was convicted and sentenced to life imprisonment.

1. The appellant was dissatisfied with both the conviction and sentence and filed this appeal based on the following grounds:-

- 1. The learned trial magistrate erred in law and fact by holding that the prosecution had proved its case against the Appellant to the required standard of law whereas the evidence on record is not sufficient to make such a finding.***
- 2. The learned magistrate erred in law and fact by hold that, an offence under Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2005 has been established which finding was contrary to evidence adduced in court.***
- 3. The learned magistrate erred in law and fact by holding that medical reports or evidence adduced in court proved an offence under Sexual Offences Act whereas the medical documents produced in court did not corroborate or prove the ingredients of the offence of defilement under Section (8(1) as read with Section 8(2) of the Sexual Offences Act.***
- 4. The learned magistrate erred in law and fact by not finding that the evidence of complainant (minor) was doubtful, uncorroborated and was unsafe to find a conviction under the relevant laws of evidence.***
- 5. The learned magistrate erred in aw and fact by not finding that the evidence of complainant as adduced in court and also the long period or delay in not reporting the incidence in reasonable times raised sufficient doubt as to occurrence of the incident and which doubt should have been resolved in Appellant's favour.***
- 6. The learned Magistrate erred in law and fact by not finding that the complainant's medical complications and duration of treatment could not support a case for defilement.***
- 7. The learned magistrate erred in law and fact by not properly analyzing the evidence adduced in court and hence arrived a wrong finding.***
- 8. The learned magistrate erred in law and fact by passing a conviction and sentence not supported as presented in court and only dismissed it without reasonable grounds.***
- 9. The learned magistrate erred in law and fact by passing a conviction and sentence not supported by proper and sufficient evidence.***

2. The appellant prays that the appeal be allowed, conviction and sentence of the learned magistrate be set aside, and he be set at liberty.

3. The brief facts of the case are that the complainant in this case SN was at the material time aged nine years and in class four (4) in a school (particulars not disclosed to protect her). During the August holidays in the year 2015, the complainant was spending the holidays at her grandmother's home with her sister and her brother. While there on one of the evenings she was sent the shop by her grandmother. The shop belonged to the appellant. When she reached the shop, the appellant told her to go inside the shop so that he could remove things which were on her back. When she entered, the appellant removed her clothes, that is a short and a blouse. The appellant also removed her pant, then made her to lie on the bed on her stomach. The appellant removed his trouser and used his penis to penetrate her vagina. He told her to keep quiet and threatened to cut her head if she told anybody. The complainant put on her clothes and went back to her grandmother's house at night. She went to the toilet and noticed that she was bleeding. She did not tell her grandmother what happened. She told her grandmother that she wanted to go to Nairobi that night. She went to Nairobi but did not tell anybody what happened. Later as she fetched water she remembered what happened and she fainted. She was taken to Kenyatta National Hospital and after being discharged she told her mother what happened. She was taken to Kenyatta Hospital and a HIV test was done. She was admitted in hospital for two weeks. She was referred to a clinic where she was admitted for one week. The complainant and her mother came to Baricho Police Station and the matter was reported. The complainant was issued with a P3 form. The appellant was arrested. The complainant led the police to the house of the appellant and pointed out the bedroom where she was defiled. The complainant was examined by John Ngatia Githaiga a clinical officer at Baricho Health Centre and he filed a P3 form. He testified that he examined the complainant ten months after the defilement. On examination he found that the hymen was not intact. There were no lacerations or cuts. He testified that the evidence of the hymen not being intact was evidence of defilement. He filled a P3 form which he produced as **exhibit 4**.

4. The complainant was also examined by PW6 who is attached at Kenyatta National Hospital. She testified that she examined the complainant on allegation that she had virginal penetration. She had whitish virginal discharge. The hymen was missing. She produced the Post Rape Care Form (P.R.C) as **exhibit 3**.

5. The complainant was also examined by Doctor Makewa of Kenyatta National Hospital. He testified that the complainant had a convulsion disorder. He told the court that stress could have caused the disorder. He produced the medical reports as exhibit 5 a & b.

6. Finally, the complainant was examined by Dr. Stephen Mutiso a gynecologist at Kenyatta National Hospital. He testified that the complainant was admitted on 11<sup>th</sup> April 2016 and discharged on 20<sup>th</sup> April 2016 with a history of Sexual assault by someone known to her. On examination, the hymen was not intact. The patient was put on counselling. The doctor testified that the patient was anxious, abit withdrawn and was in fear which he associated to the events which had happened before. He produced the treatment notes as exhibit 6. The appellant was then charged with this offence.

7. The appellant gave unsworn defence and stated that his home is next to the road and the complainant comes from 200 metres away at her grandmother's house. He said he does not know why they have grudges against him.

8. The trial magistrate delivered judgment and held that the charge of defilement was proved beyond any reasonable doubts.

9. This appeal was disposed off by way of written submissions. For the appellant, submissions were filed by Kiguru Kahiga & Company Advocates for the Appellant. The respondent filed submissions through F.S. Ashimosi Assistant director of Public Prosecutions for the Director of Public Prosecutions.

10. I have considered the grounds of appeal, the proceedings before the trial magistrate and the submissions. This being a first appeal. This court has a duty to evaluate the evidence, analyse it and come up with its own independent finding while bearing in mind that unlike the trial magistrate this court did not have an opportunity to see the witnesses and leave room for that. This was the holding by the Court of Appeal in the case of **Okeno-v- Republic (1972) E.A 32**.

#### **Analysis and Evaluation of the Evidence:**

The complainant in this case was a minor aged nine years at the time the offence was committed. He age was proved with a birth certificate which was produced in court as exhibit. She was born on 24<sup>th</sup> May 2006. The offence was committed between 8<sup>th</sup> and 19<sup>th</sup> August 2015. It is proved that the complainant was nine years old when the offence was committed. Her testimony was that in 2015 she was in class 4. In August 2015 she came to visit her grandmother. On the material day she was sent to the shop of the appellant. She knew the appellant as his uncle. The appellant told him to go inside the shop so that he could remove something from her back. Instead he removed her clothes, made her to lie on her stomach and defile her. She told the court that the appellant penetrated her vagina with his penis. He told her to keep quiet or he would cut her head. She dressed up and went to her grandmother's home. She went to the toilet and saw that she was bleeding.

11. The complainant did not tell her grandmother what happened but the events that followed show that something went wrong when she went to the shop. She insisted on going to Nairobi that very night. They went to Nairobi the next day.

12. The complainant was the only witness to the fact of defilement. In a charge of defilement, the prosecution is supposed to prove three ingredients which are :-

- 1) Penetration
- 2) Age of the victim
- 3) Identity of the perpetrator

#### **1) Penetration:**

This is defined under **Section 2 of the Sexual Offences Act** to mean, *“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”*

The fact of penetration was proved by the testimony of the complainant. The prove of penetration is proved by evidence. The court has to consider the evidence of the complainant and if it is satisfied that she is truthful and credible, it need not look for medical evidence. The Court of Appeal has held that penetration is proved by evidence. It implies that the charge is proved by the evidence of the complainant/victim who gives testimony that she was defiled. In George Kioji -v- Republic Criminal Appeal No.270/2012 the Court of Appeal held that-

*“ where available, medical evidence arising from examination of an accused linking him to the defilement would be welcome we however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused.”*

This is a progressive decision considering the history of sexual offences in this country which required corroboration of evidence of children in sexual offences. There was an outcry over this requirement as it was hard to get evidence to corroborate. This because no person will defile a child or rape a woman in the open for there to be witnesses instead they are done in hiding and very fast which prompted the Court of Appeal to observe that ‘many times the attacker does not fully complete the sexual act during the commission of the offence’ this is out of fear of being caught. In an endeavour to ensure successful prosecutions, of sexual offences, parliament enacted the sexual offences Act and **Section 124 of the Evidence Act** was amended. This Act defined penetration and the ingredients of defilement. On the other hand **Section 124** removed the requirements of corroboration of the evidence of children who are victims of Sexual offences. **Section 124 of the Evidence Act** provides

*“ Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”*

The trial magistrate at page 44 line 23 of the record stated:-

*“ By virtue of Section 124 Evidence Act, I find that the incident may have taken place much earlier but the victim who was a minor was truthful after undergoing serious traumatic experiences which made her life to be unstable. Her age was tender for her to have any malice against his own relative. This is a case of the accused person taking advantage of family ties to commit the heinous act.”*

The trial magistrate had the chance to see the complainant and observe her demeanor. A first appellate court will not interfere with findings of fact made by the trial magistrate unless they were based on no evidence at all or on a misapprehension of it or the court acted on wrong principle. I find that having found that the complainant was truthful, the trial magistrate properly relied on her evidence to convict the appellant. It was not mandatory in view of the proviso to **Section 124 of the Evidence Act** for the evidence of the complainant to be corroborated. The evidence of the complainant proved that there was penetration and her testimony was corroborated by the medical evidence which confirmed that the hymen was missing in a nine year old girl. The appellant denied that he defiled the complainant but did not dispute the fact that she was defiled.

## **2) Age of the complainant: -**

This was proved with the production of the birth certificate which showed that she was nine years old when the offence was committed. The appellant was charged under **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act**. It provides:-

*“ 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.”*

The offence is committed if the child is below the age of twelve (12) years. The complainant was nine years. The prosecution discharged the burden to prove the age of the victim.

## **13. (3) Identity of the perpetrator**

I need not belabour the point, the appellant was known to the complainant. She took the police to the scene. The appellant was identified by the complainant who knew him. PW2 the child’s grandmother confirmed that the appellant’s home is 200 metres from her home and he operates a shop which is connected to this home. She confirmed that it is the shop where they buy goods and she is related to him by marriage. The trial magistrate found that the complainant was truthful. There is no doubt that the appellant was the perpetrator. The prosecution produced medical evidence which proved that she was defiled and suffered psychological trauma.

14. The appellant has raised various grounds in his submissions. To start with he submits that the charge was not proved beyond any reasonable doubts. The appellant states that the PW2 said that the complainant had told her she had pain in her genitalia but she took no action. From the record it is not clear who the complainant told she had pain in her genitalia. PW2 did not adduce any evidence that the complainant had pain in her genitalia.

15. There was overwhelming evidence that the complainant and her siblings had visited her grandmother and they went back to Nairobi unceremoniously when the complainant insisted she had to go to her mother's house. The inconsistency on who took her to Nairobi is immaterial and does not raise doubt in the prosecution case.

16 The appellant takes issue with the fact that the complainant did not inform her mother. This to me does not cast doubt on the testimony of the complainant. She was a minor aged nine years and she was threatened with death after she was defiled. The fear of the threat and the trauma prevented her from informing her mother. This is a classic case of what victim of defilement and other sexual offences under go. It is a good case study without disclosing the minor on what victims go through. Some suffer in silence. Her failure to report cannot be taken against her. The complainant was treated by various doctors who gave evidence. One of them was PW8, Doctor Stephen Mutiso a gynecologist testified that the complainant was admitted at Kenyatta National Hospital from 11<sup>th</sup> April 2016 upto 20<sup>th</sup> April 2016. She gave history of sexual assault by somebody known to her about nine months earlier. The hymen was not intact. The patient was recommended to go for counseling. He stated that the sexual assault was of profound effect which may affect future relationships. The patient was withdrawn and in fear because of the past event. PW6 Mandip Surat of Kenyatta Hospital filled Post Rape Care Form and told the court that the complainant said there was penetration in her vagina. She had convulsions. PW7 testified that the complainant had convulsion disorder and had suffered seizures. He said the seizures were caused by stress. All these medical evidence show that this child suffered stress and psychological trauma. She must have been embarrassed to tell anybody what happened until after she was treated and came to terms with her ordeal and was able to talk about it. There is no time frame for reporting the offence. Of course it is good to report the offence immediately so that evidence is available. However in this case the delay did not affect the case as medical evidence found a hymen which was not intact. Nothing negative can be attributed to the conduct of PW1.

17 .The appellant submits that the evidence was marred with inconsistencies. The minor contradictions pointed out are not on material particulars. They do not cast doubts on the prosecution case. The Court of Appeal in the case of ***Willis Ochieng Oderi –v- Republic 2006 eKLR*** stated that minor contradictions are not grounds for quashing a conviction. The court stated, ***“as for contradictions in prosecution evidence it may be true that such contradictions particularly with the date indicated in the P3 form as the date of the offence is different. But that per se is not a ground for quashing the conviction in view of Section 382 of the Criminal Procedure Code.”***

The court will ignore the minor contradiction which are not deliberate and are not intended to mislead the court.

I find that the finding is in line with the evidence tendered. Medical evidence corroborated the evidence and furthermore even in the absence of medical evidence the court can convict based on the oral evidence of the victim.

18 .The medical complications which the complainant suffered were direct result of the offence. She was a normal child who was interacting and playing with other children and only started having the complications after the ordeal.

Finally, it is clear from the Judgment of the trial magistrate that the defence of the appellant was considered and rejected. I have also evaluated the defence and it is my finding that it was a mere denial.

19 . The appellant did not challenge the evidence of the complainant. It remained intact and was reliable. The sentence impose was lawful as it is the sentence provided under **Section 8(1) (2) of the Sexual Offences Act** under which the appellant was charged.

The Section provides:-

***“ (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.”***

20 . The court when passing sentence gave reason that the applicant was not remorseful. The sentencing is the discretion of the trial magistrate. The discretion was exercised judicially in the circumstances of this case. I find no reasons to interfere with the sentence.

In conclusion I find that the prosecution proved its case beyond any reasonable doubts. This appeal is without merits and is dismissed.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF APRIL 2021.**

**L. W.GITARI**

**JUDGE**