REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 191 OF 2019

BONIFACE BASAMI NDIEMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the conviction and sentence by Hon I.G RUHU (SRM) in original KIMILILI Law Courts SRMCR S.O case No. 23/2019 delivered on 29th day of November, 2019]

J U D G E M E N T

The appellant **BONIFACE BASAMI NDIEMA** was charged with offence of defilement contrary to Section 8(1) as read with sub section 8(3) of the Sexual Offences Act NO. 3 of 2006.

Particulars of offence are that on the diverse dates between July, 2018 and 4th January 2019 at [particulars withheld] village, Kimilili sub-county within Bungoma County, unlawfully and intentionally caused his penis to penetrate the vagina of **FN** a child aged 13 years.

He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act NO. 3 of 2006.

BONIFACE BASAMI NDIEMA on the diverse dates between July, 2018 and 4th January 2019 at [particulars withheld] village, Kimilili sub-county within Bungoma County, unlawfully and intentionally did cause his penis to come in contact with the vagina of **FN** a child aged 13 years.

The prosecution case in the magistrate's court was that on 1.7.2018 at about 4 p.m. FNS the complainant was at their home playing with her siblings. While there the accused who is a neighbor called her. He told her to accompany him to his house. Upon entering the house, the appellant closed the door. He then asked her to undress. She undressed. He then removed his clothes and inserted his penis into her vagina. He told her not to scream. After he finished he told her to go out. She went home but did not disclose what had happened to anybody.

After sometime the complainant was going to have a bath when accused followed her there. However, the complainant sister F saw him and he ran away. F went and informed complainant's mother who informed police. She now disclosed what appellant had done to her earlier. She was taken to Kimilili hospital where shew as examined. Appellant was later charged with present offence.

PW2 SN the mother of the complainant testified that the complainant FN was her daughter. She was born on 27.3.2005 but did not have the birth certificate. On 6.2.2019 the other daughter F informed her that she had seen accused go to where the complainant was having bath but when she saw him, accused ran way. On receipt of this information she reported the matter to police. The complaint then disclosed to her how the appellant had defiled her earlier.

PW3 Kipsang Masai the clinical officer examined the complainant on 11.2.2019. She was aged 13 years and had a history of having been defiled. On examination he found the hymen was missing and had a discharge which indicated an infection.

PW4 PC. Hellen Okumu received a report of defilement on 7.2.2019 and commenced investigations. She recorded statements. The complainant positively identified the appellant who was a neighbour.

The Appellant upon being placed on his defence gave unsworn evidence. He testified that he knows complaint who is his neighbour's daughter. They had been neighbours for 2 years. He stated that he was at his home when PW2 SN the mother of complainant started hurling abuses at him. At 11 p.m. he and his wife went to sleep. While asleep police officers came and arrested him. He was interrogated. Police also interrogated F the complainant but she denied that appellant slept with her. He was then released. On 13.2.2019 he was again arrested and taken to police at the instigation of PW2 S the mother of the complainant. He testified that the mother of the complainant and his wife have had a long standing disagreement and that the present charges are a fabrication.

The accused called his wife DW2 Sarah Nasambu who testified that this case against the appellant is because of a land dispute. She stated they bought land from complainant's parents and later learnt that she had sold it. The appellant called DW3 Evans Wafula who testified how the complainant's mother insulted the appellant.

Upon this evidence the appellant was found guilty and convicted on main charge of defilement contrary to section 8(1) as read with Section 8(3) of Sexual Offences Act and sentenced to serve twenty (20) years imprisonment.

Aggrieved by the conviction and sentence he filed this appeal on the following grounds:

> ***1. The learned trial magistrate erred in law and in fact in failing to find that the prosecution failed to prove the age of the compliant.***
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> ***2. The learned trial magistrate erred in law and in fact in failing to find that the prosecution had failed to prove its case against the Appellant beyond reasonable doubt.***
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> ***3. The learned trial magistrate erred in law and in fact when he failed to find that the prosecution failed to call crucial witnesses namely BRITHON, FREDRICK who were eye witnesses to the allegedly luring of the Complainant by the Appellant and F who saw the Appellant approach the Complaint while she was bathing.***
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> ***4. The learned trial magistrate erred in not finding the P3 form produced as prosecution exhibit 1 was not proof that the complaint was defiled by the Appellant between July 2018 and January 2019.***
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> ***5. The learned trial magistrate erred in law and in fact when she believed the uncorroborated evidence of the complainant without assigning any reasons why he believed she was saying the truth***
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> ***6. The learned trial magistrate erred in law and infact in dismissing and/or disbelieving the appellant defense yet it was credible.***
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> ***7. The learned trial magistrate erred in law and in fact in meting out a sentence that was harsh and excessive in the circumstances.***
>
> ***8. The learned trial magistrate erred in law and in fact in not finding that failure to examine the Appellant was fatal to the prosecution case in view of the fact that the complainant had an infection.***

The appeal proceeded by way of written submissions. Both parties filed their respective submissions. Mr. Were counsel for appellant submitted that age of the complainant was not proved; as no birth certificate or age assessment report or even baptismal card was produced.

Counsel submitted that prosecution failed to call 3 crucial witnesses Brighton, Fredrick who were siblings of the complainant and F who allegedly saw the appellant approaching the complainant. Counsel faulted the trial magistrate on relying on the P3 form produced in absence of treatment notes and that there was no evidence of defilement on diverse dates as stated in the charge sheet. He submitted that the trial magistrate accepted the uncorroborated evidence of the complainant without assigning any reasons. Finally counsel submitted that the trial magistrate dismissed the appellant defence yet it was credible.

Mr. Thuo for the state opposed the appeal. He submitted that the age of the complainant was proved; as both the complainant and her mother stated that she was 13 years old. He submitted that the penetration was proved by evidence of the compliant, the P3 form produced was admissive and prosecution called relevant witnesses who testified. Finally, he submits that the appellant defence was unsustained and therefore the conviction and sentence was legal.

The ingredients of the offence of defilement contrary to Section 8 (1) of the Sexual Offences Act which the prosecution must prove are well known. They are:

a. The age of the complainant

b. Penetration

c. That it is accused who committed the act of penetration.

In this appeal the complaint testified that at time of offence she was 13 years old. The mother PW2 SN testified that the complainant was born on 27.3.2005. the Clinical officer who examined the complainant and filled the P3 form indicated that she was 13 years old. Mr. Were for the appellant submits that in the absence of birth certificate or age assessment report or baptismal card age was not proved. I do not think so. The evidence adduced sufficiently proved the age and who can do this better than the mother of the complainant who gave birth to her. I am therefore satisfied that the age of the complainant was sufficiently proved.

Was there evidence of penetration? The evidence which must be tendered to prove and that is relied by court is primarily the evidence of the complaint and supported by the medical evidence of the doctor. The provision to Section 124 of the Evidence Act does not make it necessary for corroboration evidence. Section 124 provides.

> ***124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, 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 General estoppel. Estoppel of tenant or licensee. Estoppel of acceptor of a bill of exchange. Estoppel of a bailee, licensee or agent. Corroboration required in criminal cases. Cap. 15. 5 of 2003, 3 of 2006, 2nd Sch. Rev. 2010] Evidence CAP. 80 47 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.

Under the provision, corroboration is not mandatory but the trial magistrate must be satisfied:

a. That the alleged victim is saying the truth.

b. The reasons for believing him/her to be recorded.

In respect to the complainant, the trial magistrate in his judgment stated:

"In this case, the sexual ordeal was laid bare by the complainant, PW1. She articulately described how the accused asked her to accompany him to his house when she as playing with her siblings. She was calm and composed when she narrated that upon entering the accused's house, the accused ordered her to undress and thereafter inserted his penis into her vagina without sing any protection. She was resounding and explicit that she told the accused that it was painful but the accused ordered her to shut up.

She further testified that she eventually disclosed other parents what the accused had done to her and subsequently taken to the hospital and the matter reported to Kimilili police station.

During cross examination the accused failed to raise any material evidence that could disprove, confute or rebut the testimony by the complainant as regards the ingredient of penetration. Further more, PW3 a clinical officer testified that she examined PW1 and established hat her hymen was missing and that PW1 had indeed been defiled. PW3 also produced the Medical Examination Report (P3 Form) a P3 Form he filled as Prosecution Exhibit Number 1."

Upon evaluating the evidence I am satisfied that the complainant was consistent and clear on what the appellant did to her and how he inserted his penis into her genital organ. I am satisfied that on the evidences penetration was proved.

On whether the appellant was positively identified as the perpetrator, the complainant stated that she knew the appellant as a neighbor. This is admitted by the appellant in his defence. The complainant knows accused and has home and she even plays with appellant children. There would therefore be no mistaken identity in this case.

Mr. Were raised the issue of prosecution witnesses who were not called to testify and argued the court to make an adverse inference. The prosecution can only call witnesses they find not only relevant but also useful. Once they have called witnesses to prove their case, it is not open to defence to claim that they should have called more witnesses. I find not merit in that submission.

After considering the appeal and submissions, and the evidence before the trial court, I am satisfied that the conviction was premised on credible evidence. I therefore dismiss the appeal on conviction.

On sentence, counsel or the appellant submits that the sentence of 20 years imprisonment was excessive. Though the offence is serious, I note that accused is a first offender. I hereby set aside the sentence of twenty (20) years imprisonment imposed and substitute thereof with a sentence of ten (10) years imprisonment from date of sentence on 29.11.2019.

DATED and DELIVERED on this 3rd day of June, 2021.

S.N RIECHI

JUDGE