REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 54 OF 2018

JKR.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Nyeri Chief Magistrates Court Criminal Case No. 29 of 2015 Hon. Wendy Kagendo, Chief Magistrate, delivered on 27 November 2018)

JUDGMENT

The appellant was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual Offences Act, No. 3 of 2006. According to the particulars of the charge, on 21 May 2015 in Nyeri County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of AM, a child aged five.

He faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act particulars being that on 21 May 2015 in Nyeri County, he intentionally and unlawfully touched the vagina of AM a child aged five with his penis.

He was convicted and sentenced to life imprisonment of the offence of defilement contrary to section 8(1)(2) the learned magistrate having found that owing to the victim's age section 8(1)(3) was inappropriate in the circumstances. Nothing was said of the alternative count supposedly because the appellant had been convicted on the principal count.

Being dissatisfied with the decision of the court, the appellant appealed against both the conviction and sentence; in the petition of appeal filed on 4 December 2018, the appellant raised the following grounds of appeal:

> *1. The learned chief magistrate erred in law and in fact in convicting the appellant under section 186 of the Criminal Procedure Code, cap. 75 without any legal basis particularly after the trial court held the principal charge to be faulty and not making any finding on the alternative charge.*
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> *2. The learned chief magistrate erred in law and in fact in convicting the appellant on insufficient, inconsistent and contradictory evidence and without giving adequate attention to the appellant's defence.*
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> *3. The learned chief magistrate erred in law and in fact in considering extraneous matters hence arriving at a wrong decision.*
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> *4. The learned chief magistrate erred in law and in fact by misconstruing section 124 of the Evidence Act, cap. 80 considering that the complainant testified before a different trial magistrate.*
>
> *5. The learned chief magistrate erred in law and in fact in failing to appreciate that vital witnesses in this case were not called.*

The appeal was opposed by the state.

Before considering the submissions by both the learned counsel for the appellant and the respondent, it is necessary that I interrogate the evidence on record, evaluate it afresh and come to my own factual conclusions that may or may not be consistent with those reached by the learned magistrate; however, I have to bear in mind that it is the lower court that had the advantage of seeing and hearing the witnesses. **(See Okeno vs. Republic [1972] EA 32).**

The prosecution case was hinged on the evidence of four prosecution witnesses the first of whom was the complainant herself.

After conducting a *voire dire*, and satisfying herself that the complainant was intelligent enough to testify and that she understood the nature of an oath, the learned magistrate proceeded to take her evidence on oath.

It was the complainant's evidence that she was aged 7 as at 17 November 2015 when she testified. On 21 May 2015, she was on her way back home from school with 'their child' one DM, when they met one *Baba S*, seated by the roadside. Baba S held her by her hand and took her to his house from where he defiled her. According to her testimony, he removed her clothes including her pants and described graphically how he defiled her. It was a painful experience, so she stated. The pants which she was wearing on the material day and which were stained with blood were produced in court in support of the prosecution case. Once done Baba S dressed her up and escorted her back to the road. She informed her aunt AMM (PW2) what had happened. AMM took her to the hospital in Nyeri where she was examined and treated before they both went to the Giakanja police police station. She identified the appellant in court as the person she referred to as Baba S.

On cross-examination, the complainant testified that her mother stayed at Nairobi and that she lived with her aunt AMM (PW2) and who had her own children, DM and TN with whom the complainant would go to school. Apart from DM she was also with TN who was in class seven then. There were also other children with them. She went to the same school with the appellant's daughter whom she called S. Upon re-examination, she testified that she was not with TN on her way home on the material day.

AMM (PW2) testified that on the material date, she arrived home from work at 5 PM. Her son, DM, whom she testified that he was only aged 3 told her that they had been at S's place. The complainant was sleeping on the verandah. She woke the complainant up and asked her if she was sick; it was not normal for the complainant to sleep whenever she came from school. She testified that the complainant was her sister's daughter and that her mother lived in Nairobi where she attended college. The complainant narrated to her how the appellant had defiled her on a seat in his grandmother's house. He had chased DM and S to go behind the house before he defiled her. When she checked her inner wear, she noticed that it was stained with blood. Her private parts were also bloodied.

Moments later, the appellant came to her house. The appellant, according to her evidence, is a brother to her husband. He came in with his mother or AMM's mother-in-law. The appellant was complaining that he was wrongly being accused of having defiled the complainant. The complainant led them to the place where they had met the appellant, on the road, and then led them to the appellant's home. She led them to the house where she had been defiled and even pointed out the seat where she lied as the appellant defiled her. She identified the P3 form dated 25 May 2015 which she was given at the police station and eventually filled by the doctor in respect of the injuries that the complainant sustained.

The child was not treated the same day they went to hospital but thy were advised to come back the following day. She reported the incident to the police on a Monday of 25 May 2015 though the incident happened on 21 May 2015. It was her evidence that the complainant was aged 6 years at the time of the incident.

Police Constable Paul Kebenei (PW3) confirmed in his evidence that on 24 May 2015, the complainant and her aunt made a report of sexual assault at Giakanja Police Post, where he was stationed. The complainant informed him that she had been defiled by the appellant as she came from school on 21 May 2015. She also informed him that she was in the company of her cousin and the appellant's daughter called S.

The appellant presented himself to at Giakanja police station on 4 June 2015.

The police officer produced the complainant's birth certificate showing that she was born on 31 December 2009 and the P3 form with which he issued the complainant's aunt when he booked their report.

Dr. Gathua Beatrice (PW4) testified that the complainant was examined and treated at Nyeri Provincial General Hospital on 25 May 2015 at 8 AM. She was examined by Dr. Muriu who was said to be away on studies at the University of Nairobi. According to the P3 form, the state of the complainant's clothing was not established. The approximate age of the injuries was also not recorded. There were blood stains on the outer genitalia. However, there were no sperm stains. The hymen was broken.

When put to his defence, the appellant gave a sworn statement and testified that he was away from home the entire day on 21 May 2015 and that it is only at about 7 PM that his mother called him. He lived with her in the same compound. While on the way home, he met his neighbours, one Njoki and one Wanjiru who told him that it was being alleged that he had defiled the complainant. He proceeded to the complainant's house together his friend Maina. They found the appellant's mother, the complainant and her parents. The appellant told them that he had heard about the allegations of having defiled the complainant. He insisted that they all proceed to hospital that night but that they declined. They later went to Wamagana Hospital where they were referred to Nyeri Provincial General Hospital. He was examined in that hospital. He admitted that he is called Baba S and that the complainant schooled with his daughter c.

The appellant's witness, James Maina (DW1), testified that he had been with the appellant most of the afternoon and that while they were at a hotel taking tea, at about 6 PM, on the material day, the appellant received a call from his mother. He accompanied the appellant to his home. They found the complainant's aunt and the appellant's wife, among other people that were at the home. The appellant's mother told him that it was alleged that he had defiled the complainant. The appellant asked then to accompany him to the home of the complainant. They went and found the aunt. They then went to Wagana Hospital; that is the appellant, the complainant, her aunt and Maina. They were told that it was late and that they return the following day. The appellant paid for the taxi in which all of them travelled to Nyeri Provincial Hospital where the appellant and the complainant were examined.

In his arguments for the appellant, the latter's learned counsel submitted that the trial magistrate did not state why she held the principal count to be faulty yet no mention was made on the alternative charge. He also urged that the learned magistrate fell into error in invoking section 186 of the Criminal Procedure Code, cap. 75 which provides that when a person is charged with defilement of a girl under the age of 14 years under any other Act but for which the court is of the opinion that he is not guilty, he may still be held to liable for the same offence under the Sexual Offences Act. According to the learned counsel, where the accused is charged under any Act other than the Sexual Offences Act, then section 186 of the Criminal Procedure Code may be invoked. To this end the learned counsel relied on sections 179 to 190 of the Criminal Procedure Code which provide that an accused may be convicted of a lesser offence though not charged with it.

The appellant was charged under section 8(3) of the Sexual Offences Act which attracts a sentence of at least 20 years' imprisonment while section 8(3) under which he was convicted attracts a life sentence. The learned counsel's argument was that since this was by no means a

lesser sentence than that which would have been meted had the appellant been convicted under section 8(3) of the Act, the learned magistrate erred in invoking section 186 of the Criminal Procedure Code.

As far as the prosecution evidence is concerned, the learned counsel urged that the complainant's evidence contradicted that of her aunt; while the complainant stated that she was with TN, DM, S and other children on their way home, the complainant's aunt stated that she was with DM only. The aunt also talked of her mother and brother- in- law being present yet none of them testified.

Counsel also urged that the appellant could not possibly have dragged the complainant to his house in full view of the other children and would certainly not have defiled her in the presence of his wife.

On her part, Ms. Ndungu, the learned counsel for the respondent submitted that error on the charge sheet was that the accused was charged under section 8 (3) of the Sexual Offences Act when he ought to have been charged under section 8(2) of the same Act in view of the fact that the complainant was under the age of 11 years. Accordingly, section 186 of the Criminal Procedure Code applied.

As far as the evidence of the complainant was concerned, the learned counsel for the state submitted that the court properly relied on her evidence in accordance with section 124 of the Evidence Act, cap. 80. The complainant, according to the learned counsel, stood out as an honest witness.

The offence of defilement is defined in Section 8(1) of the Sexual Offences Act; it reads as follows:

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***

The word 'penetration' is defined in Section 2 of the Act as follows:

> ***"Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;***

Subsections (2), (3) and (4) of section 8 mete out the penalties for the offence of defilement. According to subsection (2), where the victim is eleven years or less, the mandatory sentence is life imprisonment. Under subsection (3), where the victim is aged between twelve and fifteen years, the perpetrator is liable to imprisonment for a term of not less than twenty years. And according to subsection (4) if the victim is aged between sixteen and eighteen the perpetrator is liable upon conviction to imprisonment for a term of not less than fifteen years.

Thus, key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the accused was the perpetrator of the offence.

The complainant's age was not in dispute. A birth certificate was produced showing that she was born on 31 December 2009 meaning that she was five years old when the offence is alleged to have been committed on 21 May 2015.

As to whether there was penetration, the complainant testified that indeed the appellant inserted his penis into her vagina as a result of which she not only felt pain but she was injured as well. The medical evidence was to the effect that there were blood stains on the outer genitalia and in the perineum (the area between the anus and the vulva). The posterior vaginal commissure was torn and torn too was the hymen.

This medical evidence was not controverted and neither has it been disputed at the appellate stage; no doubt, the evidence did leave a strong impression in the mind of the trial court that the complainant was defiled.

On the question whether the appellant perpetrated this crime, the learned magistrate relied solely on the evidence of the complainant to convict the appellant. Owing to the importance attached to that evidence in the conviction, it is necessary that it is interrogated further in this appeal. In her evidence in chief the complainant stated of the appellant as follows:

> ***"I remember on 21/5/15 I went to school on that day and on my way back, I was holding our child he is called DM he is in junior class. He is called DM. We were from school heading home then I found Baba S besides the road.***
>
> ***He was seated beside the road. This was far from school as we were heading home. He was seated beside the road. He then pulled me by the hand. He took me to their home. He then removed my school uniform then removed my inner pants. Then he inserted his penis inside my vagina. He inserted it inside my private parts (the child demonstrates) and I felt pain. He inserted his thing in my thing which I used to pee. I felt so much pain. When he was doing this to me we were at their home. There are houses there. He made me enter the house and did what he did to me in that house.***
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> ***Baba S then dressed me up. He also dressed me in my panty. Then he escorted me on to the road. DM was not in the house."***

In answer to questions put to her during cross-examination, the complainant testified as follows:

> ***"I stay with my aunt. She is called AMM. She has two children. We usually go to school together. They are called DM and TN. TN is in class seven (7). I was with TN on my way home in the company of DM. We were in company of several other children. I know the accused as Baba S. We go to the same school with S when we were going home. Baba S is our neighbour his house and ours boarder each other. When Baba S pulled me the rest of the children also witnessed. We reached at his house, there are several other houses within the compound. I saw several other people in that compound. I saw mama S."***

While the learned magistrate was entitled, under the proviso to section 124 of the Evidence Act, to convict as she did, on the evidence of the complainant alone, the fact that there were other people whom the complainant mentioned as people who may have possibly seen the appellant leading the complainant to his home and eventually to his house called for some investigation.

The excerpts of the complainant's testimony reproduced above show that apart from DM who, perhaps because of his age, may not have been disposed to testify, there were other children who witnessed the appellant lead the complainant to his home and his house. In the complainant's own words, there were other people in the compound (where the appellant's house was) and among these people was the appellant's own wife who must have seen the appellant lead the complainant to his house or whichever house he is alleged to have defiled the complainant from.

There is no evidence that this aspect of the prosecution case was investigated, if not for anything else, to remove any doubt that the appellant was in the company of the complainant on the material time. There was no evidence that the investigations officer made any efforts to establish who the other children in the company of the complainant and the people in the appellant's compound were and, where possible, take their statements on the appellant's conduct at the material time.

Needless to say, considering the severity of the sentence upon conviction of the offence with which the appellant was charged, there was no room to entertain any doubt in the prosecution case.

I must hasten to state that the omission on the investigation officer's part does not necessarily discredit the complainant's evidence that she was defiled and, most probably she may have been defiled by the appellant, but it leaves the impression in one's mind that that had any of the other potential witnesses who were mentioned by the complainant been called to testify, their evidence would have contradicted or weakened the prosecution case.

In a nutshell, it was not proved beyond all reasonable doubt that the appellant is the person who perpetrated what, no doubt, was a barbaric physical assault on the young innocent minor.

Having held as I have, that probably the appellant may not have been behind the defilement of the complainant, it is needless to venture into the question whether the trial court was in order in convicting the appellant for an offence committed under section 8 (2) of the Sexual Offences Act and whether this was prejudicial to appellant considering that the charge sheet read that that he had been charged under section 8(3) of the Sexual Offences Act.

In the final analysis, I allow the appeal; the conviction is thus quashed and sentence set aside. The appellant is set at liberty unless he is lawfully held.

SIGNED, DATED AND DELIVERED ON 7TH JUNE 2021.

Ngaah Jairus

JUDGE