REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO 79 OF 2019

SHADRACK MWENDWA MUTISYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment and Sentence of Hon E. H. Keago- SPM dated 9th September, 2019 in Machakos SO Case No. 33 of 2017)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

SHADRACK MWENDWA MUTISYA.....ACCUSED

JUDGEMENT

1. The appellant, **Shadrack Mwendwa Mutisya**, was charged in the **Machakos SO Case No. 33 of 2017** with the offence of defilement contrary to 8(1) as read with section 8(2) of the ***Sexual Offences Act, No. 3 of 2006*** the particulars being that on the 8th day of December, 2017 in Mumbuni location within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of MM, a child aged 6 years.

2. He faced the alternative charge of indecent act with a child contrary to section 11(1) of the same Act the particulars being that on the same day at the same place the appellant intentionally and unlawfully touched the vagina of MM, a child aged 6 years with his penis.

3. In support of its case the prosecution called 4 witnesses. After *voir dire* examination, the court found that due to her age, the complainant could not give evidence on oath. Accordingly, it was directed that she gives unsworn statement.

4. In her statement, the complainant, testifying as PW1, disclosed that she was 11 years of age. She stated that she used to see the appellant at the neighbouring home of one **Ndinda's** grandmother's herding cattle. On the day in question, she had been sent by her grandmother to go and untether the cows from the forest in the evening and while in the forest doing so, the appellant called her and upon her acceding to his request, the appellant lifted her dress, unzipped his trousers, pulled out his 'thing for urinating' into her 'thing for urinating', which she pointed as her pubic area. During the incident, she felt a lot of pain. The appellant then told her not to disclose the incident and because of fear she did not do so but later disclosed the same to her sister, **WM**, PW2 who checked her private parts and inquired what had happened. She was then taken to Machakos Level 5 Hospital and placed on treatment.

5. In cross-examination, PW1 stated that she had met the appellant once but did not know him. In re-examination, she however insisted that she saw the appellant as the person who did bad things to her and that she used to see him feed the cows at **Ndinda's** grandmother's home though she did not know his name.

6. PW2, **WM**, the complainant's elder sister, disclosed that she knew the appellant by appearance but only came to know his name in court. She explained that she used to see the appellant at their neighbour, **David Nzioki's** home where he was herding cattle. It was her evidence that's she had been seeing the appellant there for about 1-2 weeks and that the said **David** had 5 children whose names she could however not recall. According to her, the said **David** was staying there with his wife and 2 children and that the complainant used to go to David's

home and she confirmed that David had a granddaughter, one **Ndinda**.

7. PW2 testified that the complainant used to stay with her during holidays and the complainant had been staying with her from November when schools closed. On 9th December, 2017 at around 11 am she saw the complainant walking with a limp and upon inquiring from her what the problem was, the complainant informed her that she had been knocked by a stone while pointing at her thighs which were a bit wet. Later that day, she again examined the complainant and realised that there was a lot of wetness with dirty discharge from her vagina. Alarmed, she asked the complainant to tell her what had happened at which point the complainant disclosed that the employee of Ndinda's grandmother had removed her clothes, unzipped his trousers and inserted his penis into her vagina and told her not to disclose the same on the promise that he would buy her sweets.

8. PW2 relayed the information to her husband on phone who asked her to confirm if the appellant was at his place of work saying that he would report the incident to the police. According to PW2, her said husband, in the company of police officers arrested the appellant who was taken to Machakos Police Station where the matter was booked. PW2 recorded her statement before proceeding to Machakos Level 5 Hospital where PW1 was examined and put on treatment and the P3 form issued to them by the police filled in. She identified the same, PRC Form, treatment notes as well as her clinical card showing the death of birth of the complainant as 14th January, 2011. It was her evidence that the complainant was by then 7 years and 2 months old.

9. In cross-examination, PW2 stated that she did not know for how long the appellant had been employed by **David**. By 5pm when she went looking for him, the appellant had gone to the market. She however stated that the complainant's panties were not bloodstained and her clothes were not torn. She confirmed that the complainant had been sent by her mother in law to get a calf or heifer around 7pm. She disclosed that the said mother in law had workers but the worker was not there and that the complainant was with her mother in law and not in her house. She stated that the said **David** was her husband's cousin and that they were in good terms.

10. PW3, **Dr John Matunga**, examined the complainant on 14th December, 2017. Upon examination, he found that the external genitalia was tender on touch and her hymen was broken or missing. She had a foul smell and whitish discharge from her vagina. However, no spermatozoa was seen and the HIV and syphilis tests were negative. Though the pus cells were normal, there were leucocytes under microscopy showing infection. In his view, the complainant had suffered grievous harm and based on the broken hymen and the infection formed the opinion that she had been defiled. He produced the p3 form which he had filled. He also produced a Post Rape Care form which revealed that the complainant had been seen on 9th December, 2017 by his colleague whose handwriting he was well versed with. He also produced the lab test request form.

11. PW4, **Sgt Jane Ewaton** , was on 10th December, 2017 at Machakos Police Station when the incident was reported at 5pm. The incident was reported by the complainant accompanied by PW2. She recorded their statements and issued them with the P3 form which was filled in at Machakos Level 5 Hospital. She produced both PW1's Health Card and Birth Certificate which showed that PW1 was born on 14th January, 2011. She also recorded statements from witnesses and charged the appellant with the offence. In her evidence, PW1, in her statements disclosed that it was the appellant who had defiled her.

12. Upon being placed on his defence, the appellant testified that he was a casual labourer and that on 9th December, 2017, he was looking for employment and got some work at Mururoni Village. He had only worked there for two days when it was alleged that he had defiled some child. According to him, his employer informed him that he had employed other youths who had disappeared leaving his dairy.

13. The appellant testified that he was assaulted by a crowd though he never committed the alleged offence. He was treated and later charged with the offence.

14. In cross-examination, he admitted that on 8th December, 2017, he was in the village where the offence allegedly occurred.

15. In his judgement, the learned trial magistrate found that PW1 was candid and her testimony truthful as regards the fact of penetration and by whom. He further found that the victim was a child of tender age and had no malice to implicate the appellant in such serious offence. He therefore proceeded to find that the ingredients of the offence of defilement had been proved. He howevr found that the ingredients of the alternative count had not been proved and proceded to dismiss the same.

16. The trial court proceeded to sentence the appellant to 10 years imprisonment.

17. In this appeal it is submitted that the appellant was not positively identified as PW1 initially did not disclose the fact of the incident to PW2. It was contended that the incident occurred at night and PW1 had only seen the appellant once. The Court was further invited to consider the circumstances of the appellant being new in the area and whether in those circumstances, he could have been bold enough to commit the offence. According to him, the evidence in question was merely circumstantial but did not meet the threshold for a conviction based on circumstantial evidence.

18. The appellant further submitted that the prosecution failed to prove its case beyond reasonable doubt and that his defence was not considered.

19. The appeal was opposed by the Respondent who submitted that all the ingredients of the offence of defilement were proved. It was contended that there were no contradictions in the prosecution's case. According to the Respondent, the evidence placed the appellant at the scene of the incident and his defence did not dispel the overwhelming evidence against him.

Determination

20. I have considered the grounds of appeal, the submissions made by the parties and evidence on record as I am duty bound to do. See

Okeno vs. Republic [1972] EA 32 and **Kiilu & Another vs. Republic [2005]1 KLR 174.** I have also considered the submissions made by the parties herein.

21. In this case the prosecution's case was that PW1, aged 11 years of age had been sent by her grandmother to go and untether the cows from the forest in the evening and while in the forest doing so, the appellant, who was employed at the neighbouring home, called her, lifted her dress, unzipped his trousers, pulled out his penis and inserted it in her vagina. The appellant then told her not to disclose the incident. Upon her return home, PW2, PW's elder sister with whom PW1 was staying, saw PW1 the following day limping and upon inquiring from PW1 what was wrong with her, PW1 who initially declined to disclose the fact of the incident, eventually did so upon her examination by PW2 who realised that there was a lot of wetness with dirty discharge from her vagina.

22. According to PW2, she knew the appellant by appearance as she had been seeing him at their neighbour's home for a period of 2 weeks.

23. PW3, who examined PW1 found that her external genitalia was tender on touch and her hymen was broken or missing. She had a foul smell and whitish discharge from her vagina. However, no spermatozoa was seen and the HIV and syphilis tests were negative. Though the pus cells were normal, there were leucocytes under microscopy showing infection. In his view, the complainant had suffered grievous harm and based on the broken hymen and the infection formed the opinion that she had been defiled.

24. In his evidence, the appellant admitted that he was present in the area at the time of the incident though he was newly employed therein. He alluded to the fact that he had been informed by his employer that prior to his employment, his employer's former employees had disappeared suddenly. He denied the commission of the offence.

25. Section 8 of the ***Sexual Offences Act*** provides as follows:

> ***8. (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.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***
>
> ***(5) It is a defence to a charge under this section if -***
>
> > ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
> >
> > ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***
>
> ***(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.***
>
> ***(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.***

26. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** where it was stated that:

> **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

27. It was contended that there was no evidence tendered to prove the age of the complainant. In this case the evidence on record both oral and evidentiary placed the age of the complainant between 9 and 12 years at the time of the commission of the offence. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence."**

28. Closer home in the case of **Kaingu Elias Kasomo vs. Republic in Malindi the Court of Appeal in criminal appeal No. 504 of 2010** stated as follows:

"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

29. The Court quoted with approval its own decision in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said: -

"In its wisdom, Parliament chose to categorise 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)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."

30. However, in **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

"Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

31. The emphasis is therefore that the onus of proving the age of the Complainant lies on the prosecution and that while, in the absence of any other evidence, medical evidence is paramount in determining the age of the victim, where there is credible evidence other than medical evidence, the conviction will not be overturned simply because of lack of medical evidence. In fact, according to the above authorities age may well be proved by age assessment report, birth certificate, the victim's parents or guardian and by observation and common sense. In other words, in assessing age a holistic approach must be undertaken, taking into account a wide range of information, including not just medical opinion but a variety of other information and circumstances. See **Aroni, J** in **Kevin Kiprotich Amos alias Rotich vs. Republic** - Criminal Appeal No. 89 of 2016.

32. In this case there is evidence both oral and documentary that the complainant was aged 7 years at the time of the offence. Regarding penetration, the evidence of PW3 was clear that the act of penetration had been committed as PW1's hymen was broken.

33. That the appellant's main ground was that he had not been properly identified since he was new in the area and the incident occurred in the evening.

34. From PW1's evidence, she had seen the appellant once at the neighbor's home where she used to go and play with her friends. She was able to identify him in Court. After the incident, she identified the appellant as the person who had defiled her.

35. In his evidence, the appellant admitted that he was employed in the area. Though he stated he had been employed there for only two days, PW2 stated that she had seen him there for about 1-2 weeks. In light of the evidence of PW2, the appellant's evidence that he had only been employed for 2 days hence he could not have been properly identified could not displace the evidence by the prosecution.

36. Having considered the evidence presented before the trial court it is my view and finding that the appellant was properly convicted on the offence of defilement. The evidence presented was sound and his defence did not shake the prosecution evidence which was watertight. In the presence I find no reason to disturb the findings on conviction.

37. As regards the sentence, the offence in question carried up to life imprisonment. The appellant was however sentenced to serve 10 years. I find the said sentence commensurate with the offence with which the appellant was charged.

38. In the premises, there is no reason warranting interference with both conviction and the sentence. However, as the appellant was arrested on 12th December, 2017 and was admitted to bail on 30th January, 2018, the said period will be taken into account in computing his sentence as required under section 333(2) of the ***Criminal Procedure Code***.

39. Before penning off, I note that the learned trial magistrate dismissed the alternative charge. The law is clear that the Court only considers the alternative charge/count if the conviction on the principal/main count cannot stand. As was held in **I E vs. Republic [2016] eKLR**;

"The trial magistrate having found him guilty of the offences in the main count should not have made a finding in respect of the alternative counts. Alternative counts stand in only when the main count fails."

40. However, in light of my finding hereinabove, nothing turns on that misdirection.

41. The appeal fails and is dismissed.

READ, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT MACHAKOS THIS 3RD DAY OF JUNE, 2021.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Mr Ngetich for the Respondent

CA Geoffrey