



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO. 16 OF 2020**

**JAG.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the same being that on diverse dates of 21<sup>st</sup> and 24<sup>th</sup> August, 2018 at [particulars withheld] Village, Ugweri sub-location within Embu County, intentionally and unlawfully caused his penis to penetrate the vagina of JKN a child aged 15 years old.

2. He also faced 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 the particulars being that; on the diverse dates of 21<sup>st</sup> and 24<sup>th</sup> August 2018 at night at [particulars withheld] village Ugweri sub-location within Embu County, intentionally allowed his genital organ namely penis to touch the vagina of SKN, a child aged 15 years.

3. At the hearing, the prosecution called six (6) witnesses in support of the charge and in a judgment delivered on the 20<sup>th</sup> day of May 2020. The learned trial magistrate convicted the appellant of the offence of defilement and sentenced him to serve 15 years imprisonment.

4. The appellant being dissatisfied with the conviction and the sentence, has appealed to this court and has listed nine (9) grounds of appeal, in the amended petition of appeal dated the 5<sup>th</sup> day of October, 2020. The following are the grounds of appeal as set out in the amended petition of appeal;

*1) That the learned trial magistrate erred in law and fact when she convicted the appellant by relying on the evidence of the complainant who was not a credible witness.*

*2) That the learned trial magistrate erred in law and fact when she convicted the appellant despite the medical evidence showing that there had been no defilement.*

*3) That the learned trial magistrate erred in law and fact when she convicted the appellant on inconsistent and contradictory evidence.*

*4) That the learned trial magistrate erred in law and fact when she failed to consider the fact that the prosecution had not discharged their burden of proving the offence of defilement against the accused beyond reasonable doubt.*

*5) That the learned trial magistrate erred in law and fact when she convicted the appellant on a defective charge sheet.*

*6) That the learned trial magistrate erred in law and fact when she convicted the appellant solely in reliance on the evidence of the complainant without giving any reasons for believing the said evidence.*

*7) That the learned trial magistrate erred in law and fact when she failed to consider the appellant's evidence and his defence of alibi.*

*8) That the decision by the trial magistrate was against the weight of the evidence on record.*

*9) That the sentence by the trial magistrate was excessive in the circumstances.*

5. When the appeal came up for hearing the court gave directions on filing of submissions which directions the parties complied with. In his submissions, the appellant submitted that the victim was arrested together with the appellant and detained for two days before she was released which shows that the witness might have played to the tunes of the police of being scared due to her arrest.

6. Reliance was made on the case of **David Chege Wahinya Vs Republic [2016] EKLR** where the court stated;

***“... The complainant for her part only admitted to have been defiled after arrest and examination at the hospital.***

7. That according to the appellant, pressure was piled on the complainant by PW3 and PW4 the latter who, in her evidence stated that she interrogated the complainant. Further that, PW1 gave contradictory evidence for example that she was not clear as to who between the appellant and her sister had called her to the appellant's home.

8. The appellant further submitted that the medical evidence produced vide P3 and PRC forms showed no evidence of penetration and/or sexual assault on the victim. That though medical evidence is not a mandatory requirement in sexual offences cases, the medical evidence exonerated the appellant from any wrong doing.

9. Further that the appellant was charged under Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006 which is non-existent and thus a fatal mistake which was never rectified by the prosecution at the trial only to be cured by the trial magistrate *suo moto* which was an error on the part of the court as the same is not curable under Section 179 of the Criminal Procedure Code.

10. The appellant also averred that the learned magistrate erred when she relied on the evidence of the complainant and in the absence of medical evidence and any other corroborating evidence but failed to give reasons why he believed the evidence of the minor, which is contrary to Section 124 of the Criminal Procedure Code. Reliance was had on the case of **Elias Kiamati Njeru Vs Director of Public Prosecution [2015] eKLR**.

11. The appellant also relied on the case of **Arthur Mshila Manga Vs Republic (Supra)**.

12. The appellant submitted that the court merely dismissed the appellant's defence as alibi without good reasons yet the prosecution did not adduce evidence to challenge the said alibi.

13. The appellant further submitted that the sentence was excessive despite his mitigation and the probation officer's report being favourable to the appellant. Reliance was had on the **Francis Karioko Muruatetu & Another Vs Republic, Petition No. 15 of 2015** to support the contention that the trial court had the discretion to give a lesser sentence but the trial court failed to exercise its discretion and imposed the mandatory minimum sentence.

14. On the part of the respondent, it was submitted that the respondent did not oppose the review of the sentence owing to the development in jurisprudence as set out in the case of **Dismus Wafula Vs Republic [2018] eKLR** but urged the court to take into account the seriousness of the offence of defilement when revising the sentence.

15. On whether the complainant was a credible witness, the respondent submitted that she was not a child of tender years who required *voire dire* to be conducted to probe her intelligence and ability to testify. That the prosecution witnesses were consistent and there were no contradictions. Reliance was had on the case of **Erick Onyango Vs Republic [2014] eKLR**. Further that the learned magistrate had every reason to believe that the complainant was telling the truth and she was right in convicting the appellant relying on the evidence of a victim of a sexual offence.

16. On whether the charge sheet was defective, the respondent contended that though the appellant ought to have been charged under Section 8 (4) of the Sexual Offences Act, the complainant was 15 years old and no prejudice was suffered by the appellant for that error.

17. That justice should not bleed on the altar of a technicality. Relying on the case of **Bernard Kamoni Gacheru Vs Republic [2002] eKLR** and the **Sentencing Policy Guidelines 2016**, the respondent submitted that the appellant has not demonstrated that the trial magistrate abused her discretion while sentencing.

18. The court has considered the submissions filed herein and the grounds of appeal as listed in the amended petition of appeal. The court has also re-evaluated the evidence that was adduced before the trial court as it is expected of it being the first appellate court.

19. The appellant herein was charged with the offence of defilement and an alternative charge of committing an indecent act with a child.

20. The duty of the first appellate court was explained in the case of **Joseph Njuguna Mwaura & 2 Others Vs Republic [2013] eKLR** as follows;

***The duty of the first appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its conclusion.***

21. In regard to the charge sheet, the appellant was charged with defilement as the main charge. The record shows that the complainant was aged around 15 years. The appellant herein was charged under Section 8(1)(2) instead of Section 8(4) of the Sexual Offences Act No. 3 of 2006. The learned magistrate raised the issue on her own motion but the appellant has raised it as one of the grounds of appeal. I concur with the appellant that there was error since Section 8(2) deals with defilement of a child aged eleven years or less while Section 8(4) deals with a child aged between sixteen and eighteen years.

22. The two sub-sections bear different sentence terms on conviction of the accused person. Under Section 8(2) the mandatory minimum sentence is imprisonment for life whereas under Section 8(4) a term of not less than fifteen (15) years is provided for. In her judgment the trial magistrate applied Section 179 of the Criminal Procedure Code and proceeded to find the accused guilty of the offence of defilement contrary to Section 8(1) as read with 8(4).

23. In his submissions, the appellant submitted that Section 8(1)(2) is a non-existent Section which submission is erroneous. It exists, only that the age of the complainant in this appeal is 15 years and not 11 years so that the appellant ought not to have been charged under that sub-section. The appellant further submitted that the error was not curable under Section 179 and thus it was a fatal mistake. To this submission I say the following;

***i. Section 179 deals with the substitution of the charge sheet and the issue before us in this appeal is not substitution but whether the charge sheet conforms with Section 137 of the Criminal Procedure Code.***

***ii. In our case, the offence the appellant was charged with is the same, the offence of defilement as created under Section 8(1) while Section 8(2) provides the penalty of the offence but where the age of the complainant is 11 years.***

24. In my considered view, citing the wrong penalty section does not go to the root of the charge. I am of the view that the error in the charge sheet did not occasion a failure of justice as the same is curable under Section 382 of the Criminal Procedure Code. See the cases of **Samuel Kilonzo Musau Vs Republic [2014] eKLR, Criminal Appeal No. 153 of 2013** and **Thomas Aluga Vs Republic [2018] eKLR**.

25. On whether the prosecution proved a case against the appellant, the ingredients for proof of the offence of defilement are;

***a) Age of the complainant***

***b) Whether there was improper and unlawful penetration***

***c) Identification of the assailant, in this case, the appellant herein.***

26. On the age of the complainant, the prosecution had to prove that the complainant is a child. Among the exhibits that were produced by the prosecution is a birth certificate for the complainant. It shows that she was born on 8<sup>th</sup> day of March, 2003. The offence herein was committed on diverse dates between 21<sup>st</sup> and 24<sup>th</sup> August 2018. Going by these dates, the complainant was slightly over 15 years of age and thus a child.

27. On whether there was proper and unlawful penetration, the evidence available to the court was that of complainant who testified as PW1, she stated that on 21/08/2018, she went to the appellant's home where she found her parents as the appellant had called her earlier and told her to go to their home as there was a party.

28. The appellant was not at home at the material time but he returned at around 5.00 pm when he found the complainant helping his mother to wash dishes. They cooked and ate and at 8.00 pm, they went to sleep. The appellant and the complainant went to sleep in the appellant's house which is 100 metres from the appellant's parents' house. At first she refused to get in but the appellant pushed her in. She later got in and they entered the bed. The appellant touched her breasts and had sex with her. He took his private part and put it in her vagina but she did not scream as the appellant's parents were asleep.

29. In the morning they went to the main house, took tea and the appellant went to work. She told the appellant's father that she wanted to go home. He called her father and told him that she was now married. In the evening J came back home and they had sex again. On the 24/08/2018 the assistant chief and her brother went for her. She was taken to Ena Police Post and later to hospital.

30. The other available evidence is that of the clinician who gave evidence as PW4. He examined the complainant on the 27<sup>th</sup> August, 2018 following a case of defilement. According to him there were no physical injuries seen apart from a pimple on the anal region on her genitalia. He produced the P3 and PRC forms. The laboratory reports had no positive findings.

31. Penetration is defined under Section 2 of the Sexual Offences Act to mean partial or complete insertion of the genital organs of a person into the genital organs of another person. In her judgment the learned magistrate found that PW1 had given a clear and graphic explanation of what happened to her.

32. The appellant relying on the medical report contended that the prosecution's case was riddled with doubts and especially in the light of the medical evidence on record and the inconsistencies in the prosecution's case.

33. It was also the appellant's contention that the learned magistrate solely relied on the evidence of the complainant without giving reasons for the same. According to the appellant the court erred in failing to consider the evidence of the doctor.

34. PW4 produced medical evidence and testified that there were no injuries on the complainant's genitalia. The laboratory report had no positive findings. The medical evidence available to the court is not conclusive on whether there was penetration or not. I am alive to the fact that medical evidence is not the only evidence and it is not mandatory to prove an offence of defilement.

35. However, the court notes that the medical evidence is not conclusive that an offence of defilement was committed by the appellant on the complainant. The complainant was examined the following morning after the alleged sexual intercourse with the appellant. We cannot ignore the medical evidence that was tendered and that form part of the evidence adduced by the prosecution to prove their case and which creates

doubt as to whether the offence was indeed committed. The law is clear that in case of any doubt, the benefit should be given to the accused person.

36. In the circumstances I find that the prosecution failed to prove the case against the appellant in the main count.

37. On the alternative count, it was the evidence of the complainant that he slept in the same bed with the appellant and he touched her breasts. There is sufficient evidence by PW2, PW3 and PW5 that the complainant was at the home of the appellant when he was arrested and that she had spent two nights there.

38. Though in his defence the appellant raised an alibi defence, there is sufficient evidence to prove that he was at home on the dates the offence is said to have been committed. He was arrested at home and he was with the complainant. His defence does not hold water at all.

39. The other element of the offence is the identification. It is on record that the appellant was a brother in law to the complainant. He was well known to her and she stayed with him for 3 days.

40. I find that the circumstances were favourable for identification. In any case, this was a case of recognition and not identification see the case of **Anjononi & Others Vs Republic [1989] KLR** in which the court held;

***Recognition is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.***

41. On the contradictions, the law is clear that contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case. See the case of **Onyango Odeny Vs Republic [2014] eKLR**. The contradictions in the prosecution's case were minor and not grave. In my view they were not material to the prosecution's case.

42. In the end, I find that the prosecution did not prove the case against the appellant on the main count but were able to prove the alternative charge.

43. I hereby quash the conviction and set aside the sentence in the main count. However, the prosecution was able to prove the case against him in the second count.

44. I hereby sentence him to serve seven (7) years imprisonment.

45. It is so ordered.

**Delivered, dated and signed at Embu this 7<sup>th</sup> day of July, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent