REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 17 OF 2018

AMN alias AM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrates Court

at Lamu by Hon V. K. Asiyo (RM) delivered on 12th April, 2018

in MCSO Case No. 69 of 2017)

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Mwangi for the state

J U D G M E N T

AMN alias AM, the appellant herein, was tried and convicted before **Hon. Asiyo (RM)** in a Judgment delivered on 12.4.2018 for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. The particulars in brief were that on the 14.3.2017 at Langoni Location, the appellant intentionally caused his penis to penetrate the vagina of **SA** a child aged eight (8) months.

As a consequence of the finding on guilty and conviction, appellant was sentenced to ten (10) years for an alternative count of attempted incest contrary to Section 20 (2) of the Sexual Offences Act. This discretion by the trial Magistrate is exercisable under Section 179 of the Criminal Procedure Code. The prosecution in their quest to discharge the burden of proof called a total of five witnesses and the appellant also testified on oath.

The appellant is now aggrieved of the entire Judgment on conviction and sentence which has applied to this Court for it to be set aside based on the following grounds of appeal.

> ***(1). That the Learned trial Magistrate erred in Law and fact by not considering that the conviction and sentence was founded on a defective charge sheet.***
>
> ***(2). That the Learned trial Magistrate erred in Law and fact by not considering that the prosecution did not prove the case to the required standard of Law (Burden of proof).***
>
> ***(3). That the Learned trial Magistrate erred in Law and fact by not considering that there was grudges between the appellant and the mother in law.***

The appellant in his submission argued that the charges were amended by the Court without adequate notice. Therefore, that one action did prejudice and occasion an injustice which require of this Court to remedy by the violation.

The appellant further argued and submitted that the prosecution did not discharge the burden of proof of beyond reasonable doubt in so far as penetration of the victim's genitals were concerned. In support of his line submissions the appellant cited and relied on the following authorities, **Arthur Mishula Manga v R {2016} eKLR, Woolmington v DPP {1935} AC 462: John Wanger v R {2010} eKLR**. To that

extent the appellant submitted that the conviction and sentence was based on fabricated evidence which ought to be set aside.

Mr. Mwangi for the state pointed out that the appellant conviction was based on sound evidence and proper application of the Law by the Learned trial Magistrate. Relying on the impugned Judgment **Mr. Mwangi** submitted that the Learned trial Magistrate exercise of discretion in terms of Section 179 of the Criminal Procedure Code mend not have been brought to the notice of the appellant. According to **Mr. Mwangi's** contention, there was evidence a filial and bloodline relationship between the victim and the appellant to bring the case within the scope of Section 20 (2) of the Sexual Offences on attempted incest.

Given the provisions on penalty, **Mr. Mwangi** submitted that the sentence impugned was commensurate with the offence to recapitulate the effects of the evidence at this stage, it is clear from **(PW1)** testimony that the appellant is her husband while the victim happened to be their daughter. The bulk of **(PW1)** evidence was on the surrounding circumstances of the material day on 14.3.2017, when she witnesses the appellant and the victim lying on the bed naked. Further, **(PW1)** told the Court that in compromising position, the appellant had put his penis into the genitals of the victim. She recalled the appellant appearing shocked of her presence jumped out of the bed as the victim started crying. That incident stated **(PW1)** was followed by a report being made to the police and she requested referral to King Fahd Hospital. On being shown documentary evidence of P3, treatment notes and birth certificate **(PW1)** was able to positively identify them as relevant material in support of the charge against the appellant.

Supposedly, **(PW2)** testified as the mother to **(PW1)** on the information she received on the defilement allegation. All she did was to accompany **(PW1)** to the police for the matter to be investigated. **(PW3)** – the clinical officer drew attention of the Court on the medical examination conducted and the findings in the P3 Form with regard to the defilement complaint. On examination of the victim **(PW3)** confirmed the presence of bruises and lacerations to the labia, blood clots and painful to touch. In the anal orifice there was a tear. The P3 was produced as an exhibit to corroborate the medical findings on examination of the victim.

The other source of evidence upon which this case depended on was that of **(PW4)** – a police detective attached to Lamu Police Station. She set out in detail the role she played on receipt of the complaint on defilement from **(PW1)**. Against that report she issued a P3 and managed to accompany **(PW1)** to the hospital for a physical examination to be carried out of the victim. In response to the medical examination, it emerged that the victim had sustained injuries to both the vagina and the anus as strong evidence of defilement.

The appellant in rebuttal gave a sworn evidence in which he acknowledged being left with the victim by her mother **(PW1)** on the material day. However, as he was also going to work he took the baby to his friend by the name **Meshack**. He therefore waited for the baby to sleep and went to fetch some water in the next homestead. The next question was from **(PW1)** inquiring from him why the baby was discharging some dirt from her private parts. That is when he advised **(PW1)** to take the baby to the hospital. He denied any acts of defilement. He denied the offence and attributed the whole ordeal being a revenge from the family of the complainant who have never approved their relationship.

Resolution of the Appeal

In this appeal, I am guided by the most authoritative authorities on the duty of the first appellate Court found in **Okeno v R {1972} EA 32: Peters v Sunday Post Ltd {1958} EA** in reiterating the evidence for the appellant to be convicted of defilement. In this case, the prosecution ought to have proven each of the following ingredients beyond reasonable doubt:

(a). The victim if female be aged below eighteen (18) years.

(b). A sexual act of penetration on the victim genitals.

(c). That it was the appellant who performed the Sexual Act upon the victim.

It will be seen that the victim was aged eight (8) months at the time of defilement but one year on 1.8.2017 when the mother gave evidence before the trial Court. Besides **(PW1)** testimony on proof of age, the trial Court admitted the notification of birth as an exhibit to buttress prove of this ingredient has proof of this element by the prosecution remained consistent with the settled principles in **Hadson Ali Mwachongo v R {2016} eKLR: Alfayo Gombe Okelloh v R CR Appeal No. 203 of 2009**. The defence did not contest this ingredient during cross-examination or in his respective defence on oath. It is therefore a fact that the victim herein was below eighteen (18) years and to be precise sexually assaulted at the age of eight months.

The second ingredient required to be proved beyond reasonable doubt was the fact of a sexual act of defilement of the victim. As defined under Section 2 of the Sexual Offences Act, it comprises either partial or complete insertion of the penis to the genitals. As far as this ingredient is concerned, the first part of call is the victim herself. Since matters of carnal knowledge belong to the realm of right to privacy, human dignity, and freedom to associate as espoused in our Constitution. I think the fair intention is to keep bedroom matters out of the view of the public. The paucity of evidence on this element is also made up of circumstantial evidence, which in most cases is confirmed by the medical examination of the victim.

As reflective of the record in the instant case, the prosecution presented credible evidence from **(PW1)** the mother of the victim and the clinical officers opinion on defilement conclusively reached on the findings of lacerations of the labia minora, blood clots in the genitals and trauma as well. In the admitted evidence of the P3 and treatment notes, the basis of the clinical officer was sacrosanct and overwhelming to corroborate this act of defilement. The appellant when confronted with this evidence alleged that the indictment came about as a result of non-approval of their relationship with **(PW1)** by her own family. There were of course other pieces of evidence admitted that indeed, **(PW1)** left the victim in his custody to enable her wash some clothes. On the second occasion, appellant pleaded in his defence that he also wanted to go to work therefore leaving the victim under the watchful eyes of **Meshack**. That of course means he had left the victim sleeping on the bed. The rest of the appellant's story is in a form of a surprise when **(PW1)** told him that the victim had some dirt oozing out of her private parts. This concept goes hand in hand with the evidence of recognition of the appellant when considered together to squarely place

the appellant at the scene of the crime. The essentials of these findings are as supported by the principles explained in **Roria v R {1949} 16 EACA 135: Wamunga v R {1989} KLR 424 and R v Turnbull & Others {1976} 3 ALL ER 549**.

As the record stands, its difficulty to draw any other hypothesis other than the evidence properly examined pointed to the guilty of the appellant. If that is so, I arrive at the same conclusion with my brother **Hon. Asiyo (RM)** that the evidence showed consistency in support of the charge beyond reasonable doubt to secure a conviction in favor of the prosecution. The circumstances of last seen together does apply to the facts of this case to lead to an inference that it was the appellant who committed the crime. The evidence here points to an account of close proximity of place and time between the event of the appellant having been with the victim last and the factum of defilement that rational conclusion leads me to seek answers on the part of the appellant that he was not liable for the offence at hand as against the victim. It is difficult to find any of such answers in the appellant defence.

Last seen together concept is a vital factor and piece of evidence that forms a chain to connect the appellant. That he was the main architect and executioner of the sexual act in which the victim was defiled. I then turn to the issue of sentence. It is trite that the act of imposing a penalty by a trial Court on an offender to a crime goes to emphasize the core relationship between the offence and punishment. The verdict on sentence denotes the action of a Court seized of criminal jurisdiction formally declaring to an accused that there are legal consequences of being found guilty of a crime. It is an order referred to as sentence being punishment inflicted upon a convict at the end of the trial.

I consider custodial sentence objective as a means of attainment of deterrence of the offender. It seeks to dissuade potential often the would be offenders from engaging in such criminal conduct. In this particular case a specific deterrence of ten (10) years imprisonment was imposed for an alternative charge of attempted defilement. It is of the greatest importance that on review of the evidence, I do not seem to agree with the trial Court in regard to the application of the Law to reduce the charge of defilement to a lesser offence of attempted defilement.

Despite a variation of views with the Learned trial Magistrate as to what constitutes the elements of defilement and attempted, this is one case in line with the Law, applicant defiled her own child aged eight (8) months. For instance, **(PW1)** categorically stated that she found the appellant naked with his victim lying on the bed. The evidence of the defilement emerged from **(PW1)** testimony and the circumstances that the clinical officer demonstrated in his P3 report. I wish to place it on record that I have much sympathy for the victim in this case for the lenient sentence passed against the perpetrator of this heinous crime. However, I am inclined to salvage this order by subjecting these proceedings to a due process trial to enhance the sentence open to the Court. On life imprisonment it's unfortunate but that is part of the disparities likely to creep in our criminal justice system. For these reasons I dismiss the appeal for lack of merit.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 and DISPATCHED via email ON 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the state

2. The appellant