REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. E020 OF 2020

MKJ.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

JUDGMENT

1. MKJ, the Appellant was charged with the offence of 'Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006' with the alternative charge of 'Committing an Indecent Act with a Child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006' in Meru Criminal Case No. 35 of 2019.

2. The particulars of offence for the offence of Defilement were as follows: -

> *'On the 5th day of December 2017, at [Particulars Withheld] Sub-location in Imenti South Sub-County within Meru County intentionally and unlawfully caused his penis to penetrate the vagina of EN a girl aged 12 years.'*

3. The particulars of offence for the offence of Committing an Indecent Act with a Child were as follows: -

> *'On the 5th day of December 2017, at [Particulars Withheld] Sub-location in Imenti South Sub-County within Meru County intentionally and unlawfully touched the vagina of EN a child aged 12 years with his penis.'*

4. He pleaded not guilty and the matter proceeded to full trial after which the Court, Hon. E. M. Ayuka SRM convicted him for the offence of Defilement under Section 215 of the Criminal Procedure Code. He was thereafter sentenced to ten (10) years imprisonment.

5. Being dissatisfied with both the conviction and the sentence meted by the trial Court, he has preferred the instant appeal. He initially filed grounds of appeal but in his submissions made amended grounds of appeal against conviction only. He raises the following grounds of appeal: -

> ***i) That the Learned Trial Magistrate erred in both law and fact by convicting and sentencing the Appellant to serve ten years imprisonment despite that the complainant and her mother stated it was not the Appellant who defiled her.***
>
> ***ii) That the Learned Trial Magistrate erred in both law and fact by failing to note that the evidence of a broken hymen is not proof of defilement.***
>
> ***iii) That the Learned Trial Magistrate erred in both law and fact by failing to note that the evidence adduced by PW1 and PW2, does not connect the Appellant with this offence.***
>
> ***iv) That the Learned Trial Magistrate erred in both law and fact by failing to consider the Appellant's defense.***

Appellant's Submissions

6. The appeal was canvassed by way of written submissions. The Appellant in his submissions urges that the trial magistrate erred by sentencing him to serve 10 years imprisonment without analyzing the evidence adduced before the Court. That the complainant told the Court that it was not him who defiled her on the material day. He reproduced the record at page 6 and 7 when on 9th December 2019, the complainant testified as follows:-

> *"Am aged 14 years old. I didn't know the accused person with case, prior on 5th December 2017 I was at home. I went to feed the*

goats. I met a person who pulled me into a farm he undressed me and defiled me."

"On 5th December 2017 I had gone to collect fodder for goats. I got some person who got hold of me. He tore my pants. He took me to a maize plantation and did 'tabia mbaya' to me."

7. The Appellant urges that despite the incident having taken place in the daylight, PW1 did not tell the Court that the Appellant was the culprit of the charge of defilement. He urges that the evidence does not therefore connect him to the offence. He further urges that the evidence of PW2, the Complainant's mother does not support the conviction because she stated that on 5th December 2017, at about 5 p.m, she was from a meeting headed home when she saw the Complainant having been defiled, the assailant fled. He submits that PW2's evidence clearly indicates that she implicated the Appellant because of the grudge they had.

8. He further urges that the medical report does not connect him with the offence because there were no injuries seen by the clinical officer which could suggest that the complainant was defiled and that the evidence of broken hymen is not prove of defilement. He cites the case of *P. K. W vs R (2012) eKLR* for the proposition that the hymen may be perforated in several instances other than by defilement. He urges that PW4, the clinician ought to have indicated whether the hymen was old or freshly torn. He further urges that if no blood or bruises are seen in the child's (12 years of age) genitalia, then penetration has not been proved. He urges that breaking of the hymen is an agonizing and hazardous experience and if this was the case, it would have led to the conclusion that the complainant's genitalia was forcefully penetrated. He urges that in criminal trials, a single circumstances creating doubt should be for the benefit of an accused person, not as a matter of grace or concession but as a matter of right. He urges that an accused person is the most favourtie child of the law and every benefit of doubt goes to him. Citing the cases of *DPP vs Woolmington (1935) UKHL 1, Festus Mukati Murwa vs R (2013) eKLR* and *Miller vs Ministry of Pensions (1947) 2 All ER 372*, he urges that the burden of proof (beyond reasonable doubt) lies on the prosecution.

9. He urges that the trial Court dismissed his defence yet the accused has no obligation to prove his guilt or otherwise but the Court is under an obligation to analyze and evaluate the defence before declaring it as untrue. He prays that the appeal be allowed, the conviction and sentence be set aside.

Prosecution's Submissions

10. The Prosecution filed submissions dated 7th July 2021. They urge that in order to secure a conviction for a charge of defilement, the Prosecution must prove all the three elements of defilement as set out in Section 2 of the Sexual Offences Act and as highlighted in the case of *Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013* being the age of the complainant, proof of penetration and positive identification of the assailant. They urge that they established the age of the complainant to be 13 years which was confirmed by the birth certificate which indicated that PW1 was born on 25th November 2005 and was produced as PEX2. Citing the cases of *Richard Wahome Chege vs R (2014) eKLR* wherein the other case of *Jon Gardon Wagner vs R (2010) eKLR*, they urge that in a case of defilement, it is essential to prove the age of the complainant either by way of medical report or other evidence since the Sexual Offences Act has different categories of offences and sentences for different ages of the complainants.

11. They urge that the ingredient of penetration was proven through the testimony of PW1, PW2 and PW4. That PW1 stated that on 5th December 2017, when she had gone to collect fodder for goats, the Appellant got hold of her, tore her pants, then took her to the maize plantation and did *'tabia mbaya'* to her. They cite the cases of *Too vs Republic (2020) eKLR* and *Arasa vs R, Kitale CRA No. 1035 of 2013 (2014) eKLR* for the proposition that *'tabia mbaya'* is a euphemism which PW1 used in her testimony to state that the Appellant defiled her.

12. They urge in addition that PW4, the clinical officer testified that upon examination, he noted that PW1's hymen was broken though there were no tears, bruises or lacerations and that he had formed the opinion that with the hymen being broken, it was suggestive of penetrative sexual intercourse. That this was noted in the P3 form.

13. They urge that a 13 year old is incapable of giving consent to sexual intercourse and that the evidence on record does show that the Appellant defiled PW1. They cite Section 43 of the Sexual Offences Act for the proposition that an act is intentional and unlawful if it is committed (a) in any coercive circumstances and (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence which include when the person is a child.

14. With respect to the identity of the perpetrator, they urge that as per the evidence, the Appellant is PW1's maternal uncle and was therefore not a stranger to PW1 and that identification was by recognition. In addition, they urge that the incident took place in the morning at 6.00 a.m and there was enough sunlight for PW1 to see her assailant and who she was able to identify as her uncle. That further, PW2 stated that on 5th December 2017, she saw the Appellant defiling PW1 and PW2 went and reported the matter to PW3, the area assistant chief and also went to Ntarene Police Post where she reported the matter as well.

15. The urge that in his Defence, the Appellant did not state at all where he was on the date of the incident but he only said that he was being framed by his sister because of a boundary dispute which defence they urge was an afterthought because it was not raised during cross-examination of the Prosecution witnesses. They urge that the Appellant went on the run for 2 years and was only arrested after he returned and that this conduct points towards a guilty mind. They cite the case of *Aggrey Mang'ong'o Amugune v R (2020) eKLR*.

16. On sentencing, they urge that the sentence meted out upon the Appellant was lenient taking into consideration the nature of the offence, gravity of the offence and also the impact which the offence had on PW1. They urge that the trial Court took into account the Supreme Court decision of Muruatetu and stated that the sentence would run from the first day he was placed in remand.

Determination

17. As a first appeal Court, this Court is required to analyze the evidence and law and make its own independent findings, bearing in mind

that it is the trial Court that had the advantage of seeing the demeanour of the witnesses. See ***Okeno v Republic (1972) EA 32.*** The Appellant's grounds of Appeal can be condensed into one issue for determination as follows: -

i) Whether or not the Prosecution proved their case beyond reasonable doubt.

18. Although the Prosecution has submitted on sentence, this was not raised by the Appellant as ground of appeal and this Court will therefore not determine the issue although this Court notes that the same was in fact lenient.

Whether or not the Prosecution proved their case beyond reasonable doubt.

19. The necessary ingredients for the offence of 'Defilement Contrary to Section 8 of the Sexual Offences Act.' The said section provides as follows: -

> ***8. Defilement***
>
> ***(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.***

20. Defilement occurs when a person commits the act of ***penetration*** with a child. Penetration under Section 2 of the Sexual Offences At is defined as follows: -

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

21. A child under Section 2 of the Sexual Offences Act and under Section 2 of the Children's Act is defined as follows: -

> ***"child" means any human being under the age of eighteen years;***

22. The key questions are whether the complainant was a child and whether there was penetration of the Appellant genitals into the complainant's genitals.

Evidence adduced at trial Court

Prosecution's Case

PW1

23. PW1, the complainant first testified on 9th December 2019. She testified that she is EN and is currently at *[Particulars Withheld]* Primary School. She said she is aged 14 years and did not know the accused person with the case. She said that on 5th December 2017, she was at home and she went to feed the goats and she met a person who pulled her into a farm, undressed her and defiled her. The Prosecution at this point applied to stand PW1 down.

24. On 26th February 2021, PW1 was recalled and she testified that she is EN and she stays at *[Particulars Withheld]*. She said that she is a student at *[Particulars Withheld]* Secondary School in Form 1 and that she was aged 13 years. She said that it was at 6.00 a.m on 26th November 2006. That the accused is her uncle, a brother to her mother. That on 9th December 2019, she personally testified. That on 5th December 2017, she had gone to collect fodder for goats and he got some person who got hold of her, tore her pants, took her to a maize plantation and did *'tabia mbaya'* on her. That she screamed and the assailant fled. That her mother saw the accused who was then implicated and the case was recorded at the area assistant chief. That the case was transferred to Ntharene Police Station and she was taken to Kanyakine S/C Hospital and treated and a P3 form filled up. That the assailant had sex with her.

PW2

25. PW2 was PG who testified that she stays at *[Particulars Withheld]*. She said that she is a farmer and the complainant is her daughter who is 13 years old. She produced the birth certificate and she said that the complainant was born on 25th November 2005. She said that the complainant is a student at *[Particulars Withheld]* Secondary School and that the accused is her brother. She said that on 5th December 2017, at about 5p.m, she was from a meeting headed home when she saw the complainant having been defiled. That they were having sexual intercourse and that the assailant fled. She then implicated the accused and it was still daylight. That the accused was suspicious. That she reported the case at the area assistant chief and they were referred to Ntharene Police Station and they were then referred to Hospital at

Kanyakine. That the police arrested the accused and charged him before court.

PW3

26. PW3 was Dionision Miriti, the assistant chief Kitaku sub-location. He testified that the complainant hails from his area and that the accused is a resident of his sub-location and an uncle of the complainant. That on 5th December 2017, the complainant's mother reported that the accused had defiled the complainant. That she referred them to Ntharene Police Station and later, the complainant was treated at Kanyakine S/C Hospital. That he was issued with an arrest order but he however learnt that the accused had disappeared from his home since 2017 up to last year when he came back. That ever since the incident took place, the accused went into hiding up to last year when he was arrested. That the complainant's mother and the complainant implicated the accused in the defilement. That he arrested the accused and handed him to Ntharene Police Station.

27. On cross-examination, he testified that he had arrested the accused at his home and the complainant had told him that he, the Appellant had defiled her.

PW4

28. PW4 was Moses Baiyenia, a clinical officer at Kanyakine S/C Hospital. He testified that he studied at K. M. T. C Eldoret and he had worked with his colleague SK for over 3 years and that he knew her handwriting and signature well. He testified that he had medical documents for the complainant aged 11 years on the date of treatment, on 6th December and that he had a treatment card No. 6093 and a P3 form. That the complainant gave a history of defilement by someone known to her on 5th December 2017. That on examination, it was established that the hymen was broken though there were no tears, bruises or laceration. That lab tests of HIV were conducted and numerous pus cells were seen but no spermatozoa was seen. That she tested negative for pregnancy and HIV. That additional remarks was that the hymen being broken was suggestive of penetrative sexual intercourse.

29. On cross-examination, he said that he could not tell who defiled the minor and he could not tell when exactly the hymen was broken.

PW5

30. PW5 was No. 221402 Seargent S. Hassan of Ntharene Police Post. He said that he is the investigating officer as the initial investigating officer Simon Rotich is now transferred. He said that he understands the case. That on 6th December 2017, the complainant and her mother reported that the complainant had been defiled and they recorded the OB No. xxxx and issued a P3 form and that the child was escorted to hospital at Kanyakine. That they arrested the accused and charged him before Court. That the accused had gone into hiding and they were first unable to arrest him but he was later on arrested by the assistant chief who handed him to them. That the offence took place at *[Particulars Withheld]* allegedly in a maize plantation and her passerby came to rescue her and that the accused fled. That the complainant feared to go home and she slept at her grandmother's home. That the complainant at the time was 11 years old.

31. On cross-examination, he said that he did not visit the scene and that he did not know the Appellant prior to the case.

Defence Case

32. The Appellant was placed on his defence. He testified that he is a farmer, and that on 18th October 2019, the assistant chief Gionisio Muthuri went to his home and asked him to accompany him to the police station but he did not tell him what it was. That they went to Ntharene Police Post where he was told that is was alleged that in 2017, he had committed defilement. He testified that from 2017 to the date of arrest, he had always been at home.

33. He stated that the main witness, EN told Court that it was not him who committed the offence and that it was a tall slender man who did it and that he, the Appellant only passed by the scene. That the 2nd witness, G stated that it was not her that she saw from a distance. He testified that PW2 has a grudge against him over land and that she is his sister and she is behind the case because of a boundary dispute. He stated that PW2 was only narrated to the offence by the other lady who was not called as a witness. That the case is a harm up and is premised on a land dispute. During cross-examination, he confirmed that he knows the complainant who is a daughter to her step sister and that they live one a half kilometers apart. He testified that the area chief is aware of the land dispute that he has had with the complainant's mother. He testified that he was arrested by the area chief.

Analysis

Age of the Complainant at the time of Offence

34. The age of the complainant was not an issue either at the trial Court or in this appeal. To prove her age of 12 years, PW2 produced her birth certificate which showed that she was born on 25th November 2005 meaning that at the time of the offence, she was indeed 5th December 2017, she was indeed 12 years, thus a child. A person of 12 years old falls under the definition of a child, both under the Sexual Offences Act and the Children's Act as discussed above and the first ingredient of the offence has thus been established.

Act of Penetration by the Accused

Identification

35. On the matter of identification of the accused person, this Court observes that during hearing at the trial Court, the complainant was able

to identify the Appellant as his maternal uncle. When referring to the person who defiled her, she however did not expressly mention his name and there is no indication as to whether she was pointing at the Appellant. Her evidence both on 9th December 2019 and 26th February 2020 when she was recalled did not expressly mention the Appellant as the assailant. She used the following words on 9th December 2019 and 26th February 2020 respectively: -

> ***9th December 2019***
>
> ***I went to feed goats. I met a person who pulled me into a farm. He undressed me and defiled me.***
>
> ***26th February 2020***
>
> ***I had gone to collect fodder for goats. I got some person who got hold of me. He did 'tambia mbaya' to me. I screamed. The assailant fled. My mother saw the accused. The accused was then implicated.***

36. The above shows that although the Complainant testified to have known the Appellant as his maternal uncle, she did not expressly mention him as the assailant. She testifies that it is the mother who saw him. In her evidence, PW2, the Complainant's mother stated as follows: -

> ***The accused is my brother. On 5th December 2017, at about 5 p.m, I was from a meeting headed home when I saw the complainant having been defiled. They were having sexual intercourse. The assailant fled. I then implicated the accused. It was still day lights. The accused was suspicious.***

37. From the above, it is clear that it is PW2, the Complainant's mother who linked the offence to the accused. The Appellant being her brother, she undoubtedly was able to recognize him. She said that the assailant fled and she then implicated the accused who she said was suspicious.

38. PW3, the area assistance chief however in his evidence was very categorical that when the complainant and her mother went to record a statement, they told him that it was the accused who had defiled the complainant. This raises questions to this Court's mind. Why would the complainant's mother, PW2 change her account and say that she implicated the accused because he was acting suspiciously.

39. There would be no reason for the complainant and her mother to change their statements. Significantly, PW1, the complainant was stood down when she first testified on 9th December 2019 when she testified that she did not know the Appellant, the Appellant. This notwithstanding, on 26th February 2021, when she was recalled, she testified that she knew him as her maternal uncle. This discrepancy must by analyzed within the background that the complainant and her mother changed their accounts of the facts of the case. This Court finds that the exceptional circumstances of this case, bearing in mind that the Appellant is an uncle and a brother to PW1 and PW2 respectively, explains the discrepancy in their accounts sworn to the Chief on the same night that the incident happened, and when the facts were fresh in their minds, and the account given on the following day when they went to the police to file a complaint and record their statements.

40. In addition, the accused person is said to have fled and been on the run for almost two years. Indeed, the matter is said to have been reported around December 2017 and yet the accused was only arrested around October 2019, about two years later. Although in his defence, he urged that he was always at home ever since, the area assistant chief who arrested him was only able to arrest him in 2019 and this confirms that he was indeed on the run. This Court is satisfied that it is the Appellant who was the assailant in the case.

Penetration

41. On the matter of penetration, this Court observes that PW1 testified that on 5th December 2017, she had gone to collect fodder for goats and that some person got hold of her, tore her pants, took her to a maize plantation and did *'tabia mbaya'* on her. That she screamed and the assailant fled. The term *'tabia mbaya'* to this Court's mind is what PW1 used to describe the sexual act done against her.

42. The Court of Appeal in the case of ***Muganga Chilejo Saha vs R, Criminal Appeal No. 28 of 2016 (2017) eKLR*** where Asikhe Makhandia, K. M'Inoti and W. Ouko *(as he then was)* JJA held as follows: -

> ***"Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M M v R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her.***

43. Furthermore, the clinical officer, PW4 testified that on examination, it was established that PW1's hymen was broken though there were no tears, bruises or laceration. The Appellant has urged that a broken hymen was not evidence of defilement. The Court agrees as much, since the test for defilement not whether the hymen is broken but is on whether there has been penetration. It is indeed possible that the victim was not a virgin at the time of the offence. The Appellant's other contention that the clinician ought to have clarified whether the

hymen was freshly torn or already torn in the past does not hold water.

44. This however does not mean that defilement was not proven. PW1 was on record that someone did *'tabia mbaya'* on her which this Court has already found meant sexual intercourse. PW4 also went further to state that examination revealed numerous pus cells. This Court is satisfied that penetration by the Appellant was proven.

Analysis of other issues raised by Appellant

Purported frame up

45. The Appellant in his defence did not deny having committed the offence. He merely urged that he was framed up because of an apparent grudge that his sister, PW2 had against him. Although he testified that the chief knew about this grudge, he failed to call the Chief as a witness or any other witness to confirm this dispute. Even when the assistant chief came in to testify, he failed to cross-examine him on this apparent land dispute that had been brought to the attention of the Chief. He also did not cross-examine PW2 his sister on this issue, with whom he alleged to have had the grudge with. In fact no question at all was put to the witness. This leads to the conclusion that his defence was a mere afterthought.

46. We affirm the trial Court's finding which had the benefit of observing the witnesses' demeanour *(See Okeno v R (1972) EA)* and held as follows: -

> ***"Undisputed evidence on record is that the complainant and her mother recanted their earlier reports to the area chief and police as well as their earlier recorded witness statements. The area assistant chief, PW3 was very categorical that the complainant's mother reported to him that the accused had defiled her daughter. She went ahead to report the same at Ntharene Police Post. I am convinced that the accused was the complainant's assailant and that her mother (PW2) caught him red handed in the act but she refused to point that out before Court to cover up her brother (Accused). The conduct of the accused after the offence also points to a guilty mind. He vanished from his home area and went hiding for almost two years."***

47. This Court also observes that the Appellant disappeared from his home and his arrest was only effect about two (2) years later when he returned home. Although he claimed in his defence to have been at home all the while, there is no other explanation as to why PW3, the Assistant Chief would claim to have only been able to arrest the Appellant two (2) years after the incident and yet the matter was booked on 6th December 2017, a day after the incident. PW5 also confirmed that the Appellant had gone on the run and the arrest only happened two (2) years later upon his return.

Conclusion

48. The complainant, a young girl of 12 years who had gone to collect fodder was defiled by her own uncle. During hearing, the complainant said that after the attack, her assailant fled and it is her mother, PW2 who saw him. PW2 then testified that she implicated the Appellant who was suspicious and that the complainant and the Appellant were having sexual intercourse. The complaint was accompanied by her mother, PW2 to report the matter to the area chief where they reported that it was the Appellant who was the assailant. They were then referred to the police station.

49. Although during hearing the complainant as well as her mother, PW2 failed to expressly point out the Appellant as the assailant, this Court finds that the first report which they had already made to the Chief, PW3, naming the Appellant as the assailant, was the most accurate report. In addition, the trial Court which had the benefit of observing their demeanour pointed out that they were covering up for the Appellant who was related to them, and that this explained their change of accounts. This Court finds this a sound conclusion given the proximity of their relationship to the Appellant. The act of penetration was also proven by the evidence of PW1 herself as well as the medical evidence which revealed a broken hymen and pus cells. The Court has also considered, as a manifestation of his guilt, that the Appellant went hiding after the incident and attempts to arrest him proved futile until 2019, two years later when he returned.

50. The Court also observes that in the circumstances of the case, the trial Court meted out a lenient sentence of ten (10) years imprisonment against the Appellant, for a charge of defilement of a young child of 12 years of age. The Court is aware of the Supreme Court directions issued on 6th July 2021 in the *Francis Muratetu* case which clarified that the holding in *Francis Muruatetu* was with respect to the offence of murder and was not intended to have a blanket application to all other offences. This Court will, however, not disturb the finding of the trial Court on sentence because it was not urged.

ORDERS

51. Accordingly, for the reasons set out above, the Court makes the following orders: -

> ***i) The Appeal is hereby declined and the finding of the lower Court on is hereby affirmed.***

Order accordingly.

DATED AND DELIVERED ON THIS 17TH DAY OF SEPTEMBER, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

Michael Kinyua Jacob, the Appellant in person.

Ms Nandwa, Prosecution Counsel for the Respondent.