REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

CRIMINAL APPEAL NO. 9 OF 2020

ASHFORD MURIUKI NKONGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(Being an appeal from the original conviction and sentence by Hon. A.G Munene SRM in Maua Law Court in criminal S.O No. 42 of 2017 delivered on 13/01/2020*)**

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 7 of the Sexual Offences Act No. 3 of 2006. The charge sheet alleged that on 1/7/2017 at Athiru Ruujine Location, Igembe North Sub County, within Meru County, he intentionally and unlawfully caused his penis to penetrate the vagina of ES a child of 12 years with mental disability.

2. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of that Sexual Offences Act in which charge it was alleged that on the same date and place, he intentionally touched the vagina of ES a child aged 12 years with mental disability.

3. He denied the accusations, faced his accusers in a trial at which the prosecution called two witnesses with the appellant choosing to remain quiet. The trial court found the case to have been proved beyond reasonable doubt, convicted for the offence of defilement and meted out a sentence of 20 years' imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant lodged this appeal setting out four broad grounds as follows: -

a. The trial court erred in law and fact by failing to note that the elements of defilement were not proved to the required standards.

b. The trial court erred in law and fact by its failure to invoke the provisions of Section 151 of the CPC and those of Section 31 of the Sexual Offences Act in taking PW1's evidence.

c. The trial court erred in law and fact by failing to note that the charge sheet was defective, as the charges were read to the appellant in Borana, a language he did not understand.

d. The trial court erred in law and fact by failing to appreciate that remaining silent was a constitutional right and that the charges were fueled by an existing grudge.

5. The prosecution in advancing its case against the appellant called 2 witnesses in support thereof. **PW1, Musa Mukaria**, called as the intermediary, testified that on the material day, he was near Mugambi's land looking for the complainant when he heard as if someone was blocking her mouth. When he found the appellant laying on the child, he took a stick and hit him. Although it was at night, he was able to recognize the appellant as he had a torch. He stated that he used to see the appellant at Mugambi's herding cattle. He took the appellant to Athiru AP Camp and escorted the complainant to Laare Health Centre for treatment. On cross examination, he stated that the complainant got lost on the same day and he found the appellant on mounting her on the side of the shamba near a road. He denied having any dispute with the appellant over nippier grass. He added that he took the complainant to hospital the following morning and no neighbor was present as there is no home near except his.

6. **PW2, Faith Kagendo,** a clinician at Laare Health Centre, produced the appellant's and the complainant's P3 forms. On examination, she had laceration on the labia minora and majora. There was also discharge and blood on the vagina. She classified the degree of injury as harm.

7. The appeal was canvassed by way of written submissions, which were respectively filed on 4/8/2021 and 30/6/2021. In the submissions, the appellant faulted the court for having denied him fair hearing by conducting the proceedings in Borana language which he did not

understand, took issues with the matter the evidence of the intermediary was taken then alluded to existence of bad blood between him and PW1 over nippier grass and a boundary. He submitted that no evidence was led by the prosecution witnesses to link him to the commission of the offence and concluded that he had been framed due to a grudge between him and PW1, over a boundary dispute. He relied on **Fappyton Mutuku Ngui v R (2010)eKLR, Francis Ndungu Tweni v R (2017)eKLR, Philip Mueke Mwangi v Republic (2015)eKLR, Yongo v R(1983)eKLR, Geoffrey Nguku v R(1983)eKLR** among others in support of his assertion that the ingredients of defilement were not proved, that the proof of age of the complainant is critical and lastly that any inconsistencies ought to be resolved to the advantage of the accused.

8. The prosecution's submissions were to the effect that the conviction and sentence should be upheld and the said appeal be dismissed because its case had been proved beyond reasonable doubt, as all the ingredients of the offence of defilement had been sufficiently proved. The evidence of the independent witness and that of the clinical officer linked the appellant to the commission of the offence. The prosecutor relied on the decision in **Moses Mwarimbo Dau v R [2018] eKLR and M.M v R[2014] eKLR,** in support of its submissions that even where the complainant does not testify owing to age, where an independent witness and a medical practitioner avail independent witness, a conviction may still be sustained.

9. The starting point must be the contention by the appellant that his rights under Article 50 (2) (b) (j) and (m) were violated, as the charges were read to him in a language he did not understand. The record reveals that the plea was read and explained to him on two different occasions. He had originally pleaded guilty, but later changed his plea to that of being not guilty. In any event, such a complaint would have more weight if the plea was to admit the charge which then led to a conviction. Here the court took its time to explain to the accused the gravity of the charge and the effect of a plea of guilty, the charge was read out a second time and he changed his plea. I do find that even though the language in which the charge was read and interpreted was not indicated, I do not find the right of the accused person to be accorded the use of a language he understands so that he fully follows the proceedings, was never violated. I find that there was no prejudice occasioned to the accused.

10. However, the accused retains the right to remain silent as part of his right not to self- incriminate and the broader right to a fair trial. When he elected to exercise that right, no adverse inference is invited and none should be made. In this appeal, there is reference to the choice of the accused not to give evidence. However, I do not read any adverse or prejudicial inference to have been made. I read the trial court to say that there having been evidence the court was prepared to believe and rely on, it would have been useful to the court for the appellant to comment by way of controverting the evidence on record. I find no prejudice in the comment by the trial court

11. In this matter, even though there appears to have been no strict compliance with the law, I find that the witness and his evidence was not strictly an intermediary but rather an eye witness. His evidence as recorded does not strictly confine itself to what the victim would have said but rather a personal observation which I find to qualify as the evidence of an eye witness. It is thus to the court not open to discredit that evidence merely on account to expressly record having applied section 31 of the Sexual Offences Act.

12. Having considered all evidence before the court, I am satisfied that PW1 qualified to be either an intermediary or just given evidence as an eye witness. His evidence here was that of an eye witness and I find it to have been cogent and unshaken in its material aspects.

13. It is not in doubt that the complainant was a vulnerable witness who was visibly of unsound mind, as correctly stated by the trial court. It therefore negates the notion that the complainant would have been in a position to give her evidence. It was consequently proper for the trial court to admit the evidence of PW1 and to use the same as proof of defilement. Even though discrepancies were pointed out as to the examination of the complainant as narrated by the witnesses, I hold the same are too immaterial to have occasioned any injustice to the appellant.

14. On the age of the complainant, PW2 testified that the complainant was aged 12 years at the time of the commission of the offence, as buttressed by her P3 form which was produced in court. That evidence remained intact because it was not subjected to any cross examination. The evidence of PW2 together with the medical evidence tendered in court was overwhelming and conclusive proof that the complainant had been defiled. PW1 found the appellant laying on the complainant and he recognized him by use of a torch. That evidence was equally not subjected to any cross examination.

15. I find that despite the fact that it was at night, PW1 was able to apprehend the appellant before he could escape. It is therefore my finding that the prosecution had proved all the elements of defilement beyond reasonable doubt. It is thus my finding that the prosecution's case was solid to support and warrant a conviction.

16. Finally, I have noted that the appellant was charged with defilement contrary to Section 7 of the Sexual Offences Act. This was after the court ordered the charge to be amended. However, the court convicted and sentenced him on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. In deed that was an error because the charge under section 8(1) stood substituted and not available to found a conviction. I do find that the conviction ought to have been on the charge facing the accused and not otherwise and therefore it being the law that the prescribed minimum sentence for a conviction under Section 7 of the Sexual Offences Act is 10 years' imprisonment, I set aside the sentence of 20 years and substitute therewith a sentence of 11. The sentence shall be computed from the date the appellant was arrested and charged being the 1st July 2017.

17. The upshot from the foregoing is that the appeal on conviction is accordingly dismissed. The sentence of 20 years' imprisonment is hereby set aside and substituted with a 11 years' imprisonment to start running from 1/7/2017.

DATED, SIGNED AND DELIVERED AT VIRTUALLY THOUGH MICROSOFT TEAMS THIS 4TH DAY OF OCTOBER, 2021.

PATRICK J.O OTIENO JUDGE

In presence of

MR. MAINA FOR THE PROSECUTION

THE APPELLANT IN PERSON

PATRICK J.O OTIENO JUDGE