REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. E006 OF 2021

ION.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

1. The appellant was tried, found guilty, convicted and sentenced to a term of imprisonment of thirty five (35) years for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. The particulars of the offence were that on the 21st day of September 2019 within Nyamira South Sub-county, the appellant intentionally and unlawfully caused his genital organ, to penetrate the genital organ of SKN a child aged 6 years. His appeal is premised on grounds that: -

i. The learned trial Magistrate erred in law and in fact in holding that there was sufficient evidence to prove the charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006

ii. The learned trial Magistrate erred in law and in fact in relying on the evidence of a child without corroboration

iii. The learned trial Magistrate erred in law and in relying on hearsay evidence

iv. The learned trial Magistrate erred in law and in fact in convicting the applicant on a piece of evidence which was full of contradictions

v. The learned trial Magistrate was wrong on relying on the P3 form to convict the appellant which form was not conclusive/authentic in law

vi. The learned trial Magistrate did not properly evaluate the entire evidence on record and if he would have done so, he would have reached a different conclusion

vii. The learned trial Magistrate was wrong in law in shifting the burden of proof to the appellant

viii. The learned trial Magistrate did not appreciate the appellant's defence in his judgment

ix. The learned trial Magistrate erred in law and in fact not properly considering the first report made to the police and the report made by the examining doctor/clinic officer

x. The learned trial magistrate did not consider in his judgment the fact that the appellant was framed owing to a longstanding dispute between the appellant and the victim's father

xi. The sentence passed against the appellant was harsh and punitive in the circumstances

2. Pursuant to the court's directions the appeal was canvassed by way of written submissions. However, there is only one set of submissions on record.

Appellant's Submissions

3. After briefly rehashing the events culminating in the appellant's conviction the appellant submits that penetration was not proved hence the offence of defilement did not occur. He contends that to prove the offence of defilement, there must be penetration within the meaning of section 2 of the Sexual Offences Act. However, the complainant who testified as PW1 used the term **"alinifanyia tabia mbaya on the bed."** On cross-examination, she admitted that she did not know what **"tabia mbaya**" means and that she had never slept with anyone save for the appellant who did bad things to her. The complainant stated that she felt pain but did not cry nor bleed neither did she know the exact time the incident occurred.

4. The appellant also takes issue with the evidence of PW3, Kerubo Nancy, a clinical officer at the Ikonge Dispensary. She testified that she only saw red blood cells and that the hymen was not intact. Further, the P3 Form and treatment notes she produced as PEx1 and PEx2 respectively stated that there was no injury to the labias. The appellant argues that from PW3's description, her conclusion that there was defilement was not factual. She did not indicate where the red blood cells were seen nor did she say if they were in the vagina. According to the appellant, absence of the hymen did not mean anything. The treatment notes indicated that there were no physical injuries, the outer genitalia, vagina, anus and other significant orifices were normal. There was no discharge. The appellant opined that if PW1 was defiled as alleged there should have been tears, bruises, bleeding, spermatozoa and discharge on her genitalia. He concludes that since there was no penetration as defined by the Sexual Offences Act, the offence of defilement under section 8 was not committed.

5. It is further submitted that in the Voire Dire the trial court concluded that the complainant did not understand the importance of telling the truth but had sufficient intelligence and knowledge to testify. The appellant asserts that this finding runs afoul of the proviso to section 124 of the Evidence Act which states that the court can convict an accused person on only the evidence of the victim if the court is satisfied that the victim is telling the truth. In this case the trial court did not record that it was satisfied that the complainant was telling the truth. He submitted that intelligence to testify was different from telling the truth. That victims can be coached to lie hence the trial court wrongly and unlawfully relied on the evidence of PW1 and PW3 to come to the conclusion that there was penetration.

6. The appellant places reliance on the case of ***John Mutua Munyoki vs Republic (2017)eKLR*** in which the Court of appeal set the following elements to be proved in defilement cases:

> ***i. The victim must be a minor***
>
> **ii.** ***There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.***

He also cites the case of ***Arthur Mshila Mlanga vs Republic (2016) Eklr*** whereby the Court of appeal concluded that the medical evidence before it reproduced verbatim as follows did not establish that the complainant was defiled:

> ***"No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands…."***

The appellant submits that since the Court of Appeal in the above cited case rejected the notion that absence of a hymen did not prove penetration just like in this case, this element has not been proved.

7. With regard to inconsistencies and contradictions in the evidence of Naomi Pacifica (PW4) evidence the appellant submits that it is on record that one "Lena" was told of the alleged incident by the complainant who in turn relayed the same to PW4. He notes that the said Lena was not called to give evidence. PW 4 on the other hand testified that she was informed of the alleged defilement by PW1 herself. Secondly, PW4 stated that the crime scene was 5 miles away from her house. It was PW1's evidence that the alleged defilement took place at 4.00pm. However, PW4 stated that PW1 went to her home at 4.00pm. The appellant contends that PW1 would not have walked 5 miles in less than a second. Further, PW4 testified that she saw sperm in PW1's vagina. PW3 did not state the same. PW1 slept with the clothes she had on overnight till the morning if 22nd September 2021. PW4 did not say whether or not PW1 was wearing underpants. The clothes she was wearing at the material time were not examined by PW3 nor were they produced as exhibits before the trial court.

8. The appellant avers that PW4 and PW5's evidence amounted to hearsay. P.C James Fredrick Otieno who testified as PW5 stated that PW1 was playing with her friends when the accused who is her uncle took her to his house, forcefully removed her underpants and defiled her. He did not disclose the source of his information which was not presented in court by PW1 and PW5. He then continued that the accused warned the complainant not to say anything but she informed her friend who in turn informed the complainant's aunt who examined her and noted that she had been defiled. The said friend's identity was not disclosed neither did she testify before the trial court. Moreover, according to PW5's evidence it is not clear whether PW4 is the complainant's aunt or grandmother. The appellant states that this minor detail is relevant because this case is fabricated; caused by a land dispute between the complainant's father, PW4 and the appellant.

9. Finally, the appellant submitted that the complainant's age was not proved beyond reasonable doubt as required by law. PW4 did not know the age of the complainant yet she produced her birth certificate. The appellant did not object to this development as he was not represented by a lawyer during PW4's testimony. He continues that the complainant's birth certificate was issued on 24th September 2019 after the date of the alleged defilement. He was arrested on 23rd September 2019 and those who arrested him were not called as witnesses. The appellant was then detained at the police station until 25th September beyond the 24 hour limit for purposes of obtaining the said birth certificate. The appellant in submitting that the birth certificate should not have been relied on quotes the case of ***William Odhiambo Siara vs Republic (2014) eKLR*** in which the court stated thus:

> ***"…It is notable that documents like birth certificate, baptismal cards or school admission papers will indicate the date of birth unless they are shown to have been made when the prosecution was launched, are materials corroborating evidence"***

10. In light of the foregoing, the appellant contends that his evidence was not shaken nor materially rebutted. The trial court was wrong in

finding that there was no iota of evidence to prove his case. He concludes that the conviction was unsafe and the harsh sentence meted out by the trial court uncalled for. The appellant urged this court to quash and set aside his conviction and that he be acquitted unconditionally.

Respondent's Submissions

11. The respondent's submissions are not on record despite their active participation all through the proceedings.

Analysis

12. This being a first appeal, it behoves this Court to consider the case in its entirety on matters of both fact and law; notwithstanding that the court does not have a similar opportunity to the court of first instance to engage in intricacies such as the demeanour and delivery of the witnesses.

13. The key elements of the offence of defilement are: -

i. that the victim is a child and her age as the sentence to be imposed depends on the age of the victim

ii. proof of penetration

iii. the identification of the accused person as the perpetrator

14. A birth certificate which was produced as proof of age establishes that the complainant was born on 20th December 2013. The certificate was issued pursuant to the Births and Deaths Registration Act and the facts therein are presumed to be correct and genuine as provided in Section 83 of the Evidence Act. A birth certificate being the best evidence of age and in the absence of any evidence to controvert the one produced in this case, this court finds that the complainant was six years old at the time in issue. It is immaterial that the certificate was obtained in the course of the trial. What would have been material is evidence that it is a forgery and there is no such evidence.

15. That said it is however my finding that penetration was not proved beyond reasonable doubt either by the witnesses called by the prosecution or by documentary evidence. The child's grandmother (PW4) and the child herself testified that she was penetrated in her genital organ. However, there were omissions by the prosecution which created gaps in the case. I agree with the appellant that the person to whom the report was made, one "Lena" should have been called as a witness being the first person to come into contact with the child. Her evidence would have shed light on the state of the complainant when she found her. PW4 in her testimony did not mention the said but and stated that the complainant walked to her house, told her she had been defiled and upon examining her vagina she saw the presence of spermatozoa. The P3 Form and treatment notes produced by PW3 did not however attest to this. Granted, the examination was conducted the following day but even then one would still have expected some signs of penetration would still be visible. From the record, the clinical officer (Pw3) who examined the child stated that there was no injury to the labia; that there were Red blood cells but there was no hymen. It is trite that the absence of the hymen is not proof of penetration. The absence of other physical injuries such as bleeding, lacerations to the labia soreness and discharge is telling and in my view raises some reasonable doubt in regard to the issue of penetration. The child's evidence was that the appellant did "tabia mbaya". to her. She was not however pressed to say what she meant by that. It could be that the perpetrator kissed her as that is also considered to be "tabia mbaya" by children of that age. It therefore behoved the prosecutor and the court to "press" the child to describe to the court what exactly was done to her because as it is the absence of such description creates a gap in the prosecution's case which raises doubt as to the guilt of the appellant, the benefit of which must go to the appellant. I am alive to the principle that a court can convict solely on the evidence of a victim of a sexual offence. It is my finding however that the testimony of the victim in this case falls short of the standard acquired to sustain a conviction and I need not go into the other elements of the offence. For the aforegoing reasons this appeal is allowed. The conviction is quashed and the sentence is set aside and the appellant should be set at liberty forthwith unless he is otherwise lawfully held.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 14TH DAY OF OCTOBER, 2021.

E.N. MAINA

JUDGE