REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. E004 OF 2020

JJM...................APPELLANT

VERSUS

REPUBLIC......RESPONDENT

(An appeal from the judgment of Hon. Omido, J. M. (Mr.), Principal Magistrate, delivered on 26th June 2020 in Kwale Magistrate's Court Sexual Offences Case No. 20 'A' of 2019).

J U D G M E N T

1. The Appellant JJM was convicted and sentenced in Kwale Chief Magistrate's Court Sexual Offence Case No. 20'A' of 2019 with the offence of defilement contrary to Section 8(1) as read with Sections 8(2) of the Sexual Offences Act No. 3 of 2006. The appellant was sentenced to serve 30 years imprisonment.

2. The brief facts of the case are that the appellant an uncle of the complainant defiled the complainant 9 years old girl child when he was left with her at home. The complainant was 'struck' with pain and she ran away and proceeded to report the matter to PW3 a neighbour who in turn went to where the complainant's mother was working and she reported to PW2 the mother of the complainant.

3. PW1 narrated to her mother PW2 what transpired and n PW2 examining the complainant's private part observed some dirt. She reported the matter to police and PW1 was taken to hospital where PW4 examined her and confirmed she had been defiled and P# form was filled on 8.2.2019.

4. The appellant on his sworn defence denied having defiled his niece. He said that his sister – PW2 the mother of the complainant caused him to be arrested because she did not want his to sell land which he had been given by his father.

5. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following grounds:-

> **i. That the trial Magistrate erred in law and fact in convicting the appellant when the ingredients of the offence had not been proved against the appellant to the standard required in law or at all.**
>
> **ii. The learned trial Magistrate failed to properly or at all address himself on issues of identification.**
>
> **iii. That the Learned trial Magistrate erred in failing to warn himself of the dangers inherent in relying on the testimony of a single identifying witness.**
>
> **iv. That the Learned trial Magistrate erred in convicting the appellant in absence of cogent, proper conclusive, credible and admissible medical evidence and he erred by relying on medical evidence that was inadmissible, unreliable, shaky and of no evidential value.**
>
> **v. That the learned trial Magistrate erred by convicting the appellant when evidence on record was scanty, inconsistent uncorroborated incredible.**
>
> **vi. That the Learned trial Magistrate fatally shifted the burden of proof and he erred by merely restating the testimony of the prosecution witnesses.**
>
> **vii. That the learned trial Magistrate's judgment neither contained the issues or points for determination nor the findings**

thereon and the reasons for such findings and his decision and conviction was unsafe, improper biased and indefensible and the sentence meted out were irregular, improper, unjust, vindictive, excessive and unlawful.

6. The appellant prayed that the appeal be allowed, conviction quashed and sentence set aside and/or revised/modified. This appeal was canvassed by way of written submissions.

7. The appellant's submissions were to the effect that it was not proved that the appellant was the one who defiled the complainant because the appellant was not subjected to medical examination and that the fact that the complainant's hymen was missing was not proof of penetration. It was further submitted that evidence of prosecution witnessed contradicted each other as to whether there was penetration or not.

8. It was also submitted that there was no eye witness account of what happened and that appellant had denied the same and attributed the chare to dispute over land between him and PW2 his sister and mother to the complainant. It was submitted that the court ought to have been cautious when relying on identifying evidence of a single witness.

9. The appellant's counsel also submitted that the sentence meted against the appellant was harsh, excessive and unlawful. He relied on the holding in **Muruatetu & another –vrs- Republic, David Esokon Samuel –vrs- Republic** and Court of Appeal case on **Johana Lwebe Muyugo –vrs- Republic.**

10. The Respondent's submissions were that the appellant was properly identified as he was well known to the complainant as he was the victim's uncle and used to live with them prior to his arrest.

11. The Respondent also submitted that PW4 examined the complainant and established that her hymen was broken, there was presence of pus cells as well as blood and pus in the urinalysis test, PW4 concluded that there was penetration and he filled P3 form to that effect. It was submitted that appellant was not clear on what he claimed to be doubtful.

12. In the clinical officer – PW4's evidence, the state submitted that the offence of defilement was proved beyond all reasonable doubt.

13. In regard to allegations that appellant was framed the state submitted that the trial magistrate weighed the defence by the appellant against the evidence by prosecution witnesses and concluded that the evidence by the appellant was an afterthought after issues were identified, analyzed and determined and that the appeal should be dismissed.

ANALYSIS AND DETERMINATION

14. This court has the mandate to re-examined and re-evaluate the evidence on record in the trial court and come up with its own conclusion also whether the judgment of the trial magistrate was based on sound principles of law and evidence on record.

15. I have re-evaluated and re-examined the evidence in the trial court records as well as the judgment of the trial Magistrate as mandated by the holding in Okeno vs Republic and weighing them against the grounds of appeal and the submissions by the Appellant and respondents counsel the issues for determination are:

a. Whether age of the complainant was proved beyond all reasonable doubt.

b. Whether it was proved that there was penetration.

c. Whether the perpetrator was properly identified.

16. The age of the complainant which is one of the ingredients to be proved in an offence of defilement was proved by production of Exhibit P1 – certificate of birth showing that the Complainant was born on 20th February 2019 thus confirming that she was 9 years at the time the offence was committed.

17. As to whether or not penetration was proved, the complainant reported that her uncle went with her into a house, undressed her and started to defile her but she felt pain cried out and he let her go. She went and reported to a neighbor who in turn reported to the complainant's mother, PW2. PW2 said when she got report from PW3 that the accused who was her brother had defiled her daughter, and the daughter was trembling. PW2 examined PW1 and found dirt in her private parts. According to PW2 the accused didn't penetrate the complainant. PW1 however said that this was the 2nd time appellant was doing this to her as he had done it on her elder sister's bed previously. PW3 said when she called PW2 to report what appellant had done to PW1 they examined PW1 and found jelly like substance in her private parts. PW3 said she was the nearest neighbor and was alone at home when PW1 reported that the appellant had defiled her. PW3 said that PW1 went to her while crying and walking with difficulties.

18. PW4 the Clinical Officer confirmed what PW1, PW2 and PW3 said that complainant was defiled, he said that the broken hymen must have been broken recently and 24 hours had not elapsed by the time the complainant was examined. It is true that breaking of the hymen can be caused by different factors however, PW4 said further that apart from the broken hymen urinalysis done showed blood and pus cells which is an indication of penetration. PW4 was the expert who examined the minor medically and his evidence would take precedence over that of a lay person. It is therefore not true that the evidence of PW 2 contradicted that of the Clinical Officer or that their contradictions would vitiate the finding that the Complainant was defiled.

19. Whether the appellant was properly identified or recognized, the appellant and the complainant are related as uncle and niece

respectively. PW2 said the appellant was her last born brother and he had stayed with them for 6 years prior to committing this offence. He stood in position of a parent to the complainant. PW2 met him and the complainant and he said he was going to buy goats. They went back home and he gave her 50/= to go and buy fish. When she returned home after buying the fish she didn't find the Appellant or the complainant and shortly thereafter she was called by PW3 who told her that the appellant had defiled the complainant. The incident occurred during daytime and the appellant was known to complainant and PW2 saw them together shortly before the incident. There is no doubt that the Appellant was recognized as the perpetrator of the offence.

20. Whether the accused was charged because of alleged land dispute, PW2 said she is the one who advocated for the appellant to be given land and it is true she discouraged him from selling as the land was to be shared by her siblings and didn't belong to appellant alone. She said that she didn't frame the Appellant and had no intention to destroy his life. She said she had hopes that the Appellant would change as he was their only brother.

20. In any case PW2 was not present when the appellant defiled the complainant. The complainant ran to the nearest neighbor to report that the Appellant had defiled her and it is PW3 who in turn looked for PW2 and reported. The clinical officer PW4 could not have conspired with PW2 to find that the Complainant was defiled if the charge was a fabrication against the appellant. This court finds that the prosecution properly proved the offence of defilement and the appeal against conviction cannot stand.

21. On the issue of sentence the Sexual Offences Act – S. 8(1) and (2) provides that: -

> (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"**

22. The appellant was liable to imprisonment for life but the trial Magistrate quantified the life imprisonment to 30 years imprisonment. In ground 7 of his petition claimed that the trial Magistrate judgment neither contain the issues for determination not the findings thereon and the reason for such findings and his decision and conviction was unsafe improper, bias and indefensible and the sentence meted out was irregular, improper, unjust, vindictive, excessive and unlawful. From Section 8(2) the proper sentence is "**shall upon conviction be sentenced to imprisonment for life".**

In consideration of the new directive in the Supreme Court holding on **Francis Muruatetu & Another-vrs- Republic [2017]eKLR** that the decision apply to murder cases only, the sentence meted out by the trial Magistrate was in the circumstances lenient and ought to be enhanced save that the law abhors the enhancement of punishment by the Appeal court. That sentence is therefore upheld.

The Appeal herein is therefore dismissed for lack of merit and the conviction and sentence against the Appellant is upheld

Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 7TH DAY OF OCTOBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

<u>In the presence of:-</u>

Ogwel – Court Assistant

Ms. Keya for Respondent

Appellant – present in person

Mr. Chimera Advocate for Appellant

HON. LADY JUSTICE A. ONG'INJO

JUDGE