



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL APPEAL NO. 71 OF 2019**

**NNG.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the original conviction and sentence in the Principal Magistrate's Court at Githunguri, D. Kavedza, SPM, dated 3<sup>RD</sup> September, 2019 in Sexual Offences Case No. 18 of 2018)*

**JUDGMENT**

1. **NNG**, (the appellant) was convicted before the Senior Principal Magistrate's Court at Githunguri with the offence of incest contrary to **Section 20(1)** of the **Sexual Offences Act (SOA)**. On conviction he was sentenced to imprisonment of 20 years. He has filed this appeal against that conviction and sentence.

2. This is the first appellate court and the duty of this Court is to as was stated in the case of **ATANASIO MBAE FUNDI VS. REPUBLIC (2019) eKLR** thus:-

***"In the case of DAVID NJUGUNA WAIRIMU VS REPUBLIC [2010] eKLR the Court of Appeal reiterated this duty as follows:-***

***'The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.'***

3. The prosecution's case was that WN, a 6 year old girl child defiled by the appellant on three different occasions. She was unable to state the dates she had been defiled by the appellant but said it was three times. WN. informed another student at her school and it is that other student who informed a teacher of that school. The teacher called WN. and inquired of her when WN. informed her that appellant "used" to defile her on a seat. The teacher telephoned WN's mother and in the presence of her mother WN. told her mother and the teacher that appellant "used to remove her trousers and defile her on the seat." WN. again said the defilement had occurred three times.

4. WN.'s mother in her testimony said:-

***"The minor (WN.) told us that her uncle had defiled her three times."***

5. It was on being informed by WN. that she was defiled that the teacher and WN's mother reported the matter at Kamondo AP Post. They also made another report at Githunguri police station. WN. was taken by her mother to Githunguri Health Centre where she was examined and a P3 Form filled. WN's mother further said that the appellant was her uncle and that he was therefore WN's grandfather.

6. **P.C. Zipporah Sialo**, from Githunguri Police station was the officer who received WN.'s complaint of her defilement by appellant. This police officer confirmed that WN. was referred to the health centre for treatment and examination and a report that is P3 Form and treatment notes were provided. The officer produced both those documents in evidence.

7. The trial court found at the end of the prosecution's Case that the appellant had a case to answer.

8. Appellant in his sworn defence alleged that two workers of WN's mother alleged he had committed the offence but he denied having committed the offence. Appellant did not call any witness.
9. I will consider this appeal on the submissions made by the appellant.
10. Appellant submitted that the trial court erred in convicting and sentencing him on the offence of defilement which was contrary to the charge.
11. Appellant, as stated before was convicted for the offence of incest and was sentenced to 20 years imprisonment. I fail to understand why the appellant submitted that he was convicted of defilement contrary to **Section 8** of the **Sexual Offences Act**. Perhaps it will be helpful to consider what **Section 20(1)** of the Sexual Offences Act provides. That Section is in the following terms:-

***“(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:***

***Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”*** (emphasis mine)

12. It is also helpful to note that in common speech it is usual to speak of defilement when referring to a sexual offence against a child. The mother of WN, the teacher and even the child WN, herself referred to the word defilement. What however is plainly clear, in the trial court's judgment the appellant was convicted as charged. The court in its judgment in concluding stated:-

***“For the foregoing reasons, I do find that the prosecution case is proved against the accused person as charged under section 20(1) of the Sexual Offences Act and proceed to convict the accused person under section 215 of the CPC.”***

13. It is therefore crystal clear that appellant was not convicted of defilement but of the offence of incest. That submission by appellant, consequently is rejected.
14. Appellant further submitted that the trial court erred in relying on WN's evidence when it was not corroborated.
15. I got the impression that appellant misrepresented the provisions of **Section 124** of the **Evidence Act** in submitting that WN's evidence needed corroboration. **Section 124** of the Evidence act provides:-

***“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him.***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

16. Appellant needs to pay particular attention to the proviso of the above Section. For that proviso to operate, the trial court needs to record that it is satisfied that the victim of the sexual offence is telling the truth. The trial court in its well-considered judgment had this to say:-

***“I therefore find that the fact that she, WN, chose to share the complaint with her classmates is evidence enough that she knew what had happened to her was wrong. Had she colluded with her mother to frame up the accused person then her mother could have been the first person to report the case...”***

***As indicated above, the child, W.N. knew the accused person as baba K. She was very clear in her evidence that baba K removed her trouser before penetrating her. She further told the court that after defiling her he wiped her legs and gave her the toilet paper to throw in the toilet. A child of this age cannot imagine such lies. She lacks the intellectual capacity and ability to fabricate such a story.”***

17. The above, in my view, suffices for the trial court to receive and convict the appellant on the evidence of WN, alone. It needs however to be noted that the trial court not only had WN's evidence to rely on but it also had the P3 form and treatment notes adduced in evidence by the Investigating Officer (I.O).
18. Appellant faulted the trial court on its admission of P3 Form and the treatment notes by the I.O. and not by the doctor who examined WN. Appellant argued that because the P3 Form and the treatment notes were not produced in evidence by their maker, by the doctor, the authenticity of them was in question. Appellant did not, in his cross examination of the I.O. who produced those documents, question their authenticity. Further, it needs nothing that section 77 of the Evidence Act permits the court to use experts reports in criminal proceedings and the court in receiving such a report can presume the signature thereof is genuine and further the court may summon its maker if it deems it fit. That Section does not require a doctor or any other expert to produce such report. I wish to rely on two cases which make it clear on this issue.

19. The first case is, DAVID MUTISYA KIVALA VS. REPUBLIC (2012) eKLR where the court had this to say:-

**“Even if this were not the case, Section 77 of the Evidence Act provides that:-**

**‘(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.**

**(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.**

**(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.’**

**11. My understanding of this section is that it is not necessary for the expert maker of such a report to produce the evidence. The court may summon the maker of an expert report for cross examination when necessary.”** (emphasis mine)

20. The second case is HASSAN JUMAPILI VS. REPUBLIC (2020) eKLR and the court stated thus:-

**“18. The Appellant argues that the Age Assessment Report was not properly adduced in evidence. He relies on Section 77(2) of the Evidence Act. Section 77 provides:-**

**‘(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.**

**(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.**

**(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.’**

**19. In the circumstances, it is clear that Section 77 of the Evidence Act does not lend any support to the submission that the Court could not and should not have relied upon it. In this case, the report was prepared by a doctor in the course of his duties. He has signed the Report. It forms part of the records of the Hospital. His signature was verified by a colleague of 10 years standing. For this Court that is sufficient to make the evidence admissible.”**

21. The P3 Form, filled by doctor *Hildah W. Gitau* at Githunguri health Centre, detailed the physical state of WN’s injuries to her genitalia as follows:-

**“Lacerations plus bruises at the Labia Minora. Hymen not intact.”**

22. That form also showed that WN. was prescribed antibiotics and analgesia medicine.

23. The P3 Form corroborated the evidence of WN. and proved penetration of W.N. The Court of Appeal in the case IRENE ATIENO OCHIEN V. REPUBLIC (2017) eKLR had this to say about penetration:-

**“15. Section 2 of the Sexual Offences Act defines penetration as:**

**‘the partial or complete insertion of the genital organs of a person into the genital organ of another person.’**

**This position was fortified in the case of MARK OIRURI MOSE VS R (2013) eKLR when the Court of Appeal stated thus:**

**‘...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ....’** (emphasis added).

**16. Later the Court of Appeal, then differently constituted, in the case of ERICK ONYANGO ONDENG V. REPUBLIC (2014) eKLR held as such on the aspect of penetration:**

**‘In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.’”**

24. Although I am satisfied as the trial court was also satisfied that the evidence of WN. coupled with the P3 Forms proved that WN. was defiled, I need to comment of appellant's submission that the evidence of the teacher being hearsay ought not to have been considered.

25. I dare say that, that evidence falls under the exception of hearsay rule because in my view, the trial court did not rely on it to prove the truth of defilement of WN. but rather as proof that WN. informed her co-students, her teacher and her mother. That evidence was therefore correctly received by the trial court. This exception to the hearsay rule was the holding in the case ***KINYATTI VS. REPUBLIC (1984) eKLR*** as follows:-

***“7. The evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is not admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.”***

26. The age of WN. was proved by production of a birth certificate. WN. was born on 17<sup>th</sup> September, 2012. The offence occurred in June, 2018. WN. was a few months shy of her 6<sup>th</sup> birthday when the offence occurred. WN. was under 18 years of age accordingly Under **Section 20 (1)** of the **Sexual Offences Act** the appellant on being convicted was liable to imprisonment of life. The learned trial magistrate sentenced him to 20 years imprisonment.

27. The trial court after considering the mitigations offered by the appellant set out the reasoning of the sentence of 20 years imprisonment which emphasized the moral blameworthiness involved in a relative luring and sexually abusing a child of 6 years of age. The harm done to WN. is inherent in the crime appellant committed against WN. Harm done to children who are sexually abused was considered in a Canadian case, which I find useful to cite, that is, ***R. V. EF 2021 ABQB 272***, as follows:-

***“The important point is that in assessing the moral blameworthiness of EF’s crime for the purpose of crafting a fit sentence, I must fully appreciate the scope of that inherent harm.***

***[49] The harm inherent in sexual interference was discussed at length by the ABCA in R v Hajar 2016 ABCA 222 beginning at paragraph 61. The discussion includes these points:-***

***‘a. The harm to a child victim of sexual interference includes a serious violation of the victim’s body and sexual integrity and a breach of their human dignity and privacy. (para. 62)***

***b. Many victims of child sexual assault have something very important stolen from them – their childhood. (para. 62)***

***The ABCA quoted an academic writing on this point:-***

***‘Children and adolescents who are exposed to sexual experiences of one sort or another with an adult have been cheated out of their opportunity to experience sexual contact in a situation of genuine choice in the context of an equal power relationship. They may also have been fooled into making faulty self-attributions of consent. In addition, there is always injury in terms of the affront to human dignity arising from having bodily and psychological integrity infringed without giving informed consent independent of any resultant psychological symptoms, level of resilience, or reports of psychological harm. (Sonja Grover, “On Power Differentials and Children’s Rights . . .” cited by ABCA in footnote 37.)***

***c. It is the likelihood of harm rather than the causation of harm that characterizes an instance of major sexual interference. The likelihood of psychological or emotional harm is a major consideration where the child victim of sexual interference is under 16. (para. 63”***

28. It is because I find that appellant abused his niece/granddaughter not once but three times and because that abuse undoubtedly harmed and may continue to harm WN., I find and hold that there is no basis of interfering with the trial court's sentence.

29. In view of the above finding, I have come to a conclusion that appellant's appeal against conviction and sentence lacks merit and it is hereby dismissed.

**JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 7TH DAY OF OCTOBER, 2021.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

**COURT ASSISTANT: NDEGE**

**FOR APPELLANT: MR. GITAU**

**DPP FOR RESPONDENT: MR. KASYOKA**

**APPELLANT PRESENT**

**COURT**

**JUDGMENT DELIVERED VIRTUALLY.**

**MARY KASANGO**

**JUDGE**