REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 45 OF 2019

AAM..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 7 of 2019 of the

Senior Resident Magistrate's Court at Lamu Law Court-V. K. Asiyo, SRM dated 7th November, 2019)

CORAM: Hon. Justice R. Nyakundi

The appellant in person

Mwangi for the State

J U D G M E N T

The appellant was charged before the Resident Magistrate sitting at Lamu with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge averred that the Appellant on the 30th day of April, 2019 at [Particulars Withheld] Area, Mkomani Location, Lamu West Sub County within Lamu County, intentionally and unlawfully caused his penis to penetrate the vagina of **AK** a child aged 8years.

He was also charged with an Alternative Charge of committing an indecent act with a child Contrary to Section 11 (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence being that on the 30th day of April, 2019 at [Particulars Withheld] Area of Langoni Location in Lamu West subcounty within Lamu County, intentionally touched the vagina of **AK** with his hands against her will, a girl aged 8 Years.

The appellant who denied the charge was tried, convicted and sentenced to serve 30 years imprisonment.

Aggrieved by the sentence and the conviction of the trial court, the appellant lodged an appeal on the following grounds:

1. ***That the Learned trial Magistrate grossly erred in both Law and facts by relying on the evidence of a single witness which was insufficient to warrant a safe and justified conviction.***

2. ***That the Learned trial Magistrate erred in both Law and facts by failing to consider that the sentences imposed to the appellant was manifestly harsh and excessive in all the circumstances.***

3. ***That the Learned trial Magistrate erred in Law and facts by failing to adequately consider his defence.***

4. ***That the learned trial magistrate erred in law and fact by discounting and not considering in detail my defensive evidence.***

Background

PW1 AK, the victim was sworn in after voire dire examination. She told the court that they went to take food to their uncle **A** which was given by **C's** mother. That she proceeded to give the food to her uncle who told her to remain behind. She also said that she had gone with **Z,**

C, O and **H**. That the uncle told the others to go while she remained behind. She added that he took her to bed, removed his *'mdudu'* from his trouser and put it in her private part. That he took her to the toilet and washed her then later sent her home.

She stated she felt pain when he put his *'dudu'* in her private part. That when he put it inside she felt pain. That she let out a scream when he put her in bed but no one heard her. That she went home and forgot to tell her mother. That **C's** father told her mother what had happened. That **C** was the one who told her dad.

Upon cross examination, she told the court that she could not remember the date when **C's** mother gave her the food. That the appellant was alone when he told her to remain in the house. That she made noise but no one came and it was true that he did those bad things.

PW2 ZS was sworn in after voire dire examination. She told the court that the victim is her cousin sister. That the victim entered the house when they had taken food to Uncle A; rice, fish and stew. That she was in the company of the victim, herself, **C, O** and **H**. That he gave her Kshs.10/ and the Victim Kshs. 20/- but C was not given any money. That **C** got out and the victim entered the house. That the appellant had already eaten when he gave them the money.

She also told the court that they went to buy chocolate and when they went back to the house, the victim was inside. That the appellant locked the house and they did bad manners. That the appellant told the victim to enter and told them to go. She later she that they went back for the dishes but the appellant told them that the victim had already left.

She further said that the appellant gave **S** Kshs. 10/- , they went and bought chocolate and when they went back he told the victim to enter the house and the rest of them to go. That when they later went back to collect the dishes, they asked the appellant where the victim was, he told them that she had left.

PW3 Sudi Mohamed Bwana told the court she recalled the events of the 3oth day of April, 2019. That the appellant called the **Hassan** to come to her house. He asked her what the victim had told her. He said that he heard the victim tell his child that the appellant had done bad manners to the victim at 2:00 p.m when the children had gone to take food to him. That he told her if she does not report to the police, he will report his brother to the police.

She further stated that when she asked the victim what had happened, she informed her that the appellant had defiled her when she had taken food to him. She told her that he put her on a bed then defiled her and after that he took her to the toilet where he cleaned her.

She also told the court that she took the victim to her father who was at the petrol station. That she told him that the victim had been defiled and so they took her to hospital. That **Salim** followed them to the hospital to confirm that they had taken her to hospital.

That the victim was examined and it was confirmed that she had been defiled and **Salim** told her that they settle the matter out of court. That the doctor told him that it was a police case. The Doctor filled the P3 Form and she went to report the incident to the police. That the police gave her and OB Number and asked Kale to look for the accused. That if he sees him, he should report to the police.

She also added that she was given another document identified as Protection and Care Form dated 1st May,2019. That she knows the appellant, he is her neighbor and like a brother and she has no grudge with him. She also confirmed that the victim was 8 years old having been born on the 4th day of March, 2011. A copy of the Birth Certificate was marked as PMFI 3.

Upon cross examination, she confirmed in hospital that the victim had been defiled. That it was Hassan his brother who told her. That he is only her neighbor. That she did not see him defiling the victim and it was the victim who told her it was him who did it. That **Hassan** said that he heard the victim telling his daughter that the Appellant had defiled her. That she told the doctor and police that the Appellant had defiled her.

PW4 HB told the court that she recalled on the 30th day of April, 2019 at around 3:00 p. m she was at home with her children. That she was lunch being made by her daughters, it was packed ad **C** was sent to take food to her uncle the appellant. That when she left the house she was alone and she did not know if she met other children outside. But the food was taken to the appellant.

PW5 Madi Sheambu Clinical Officer based at King Fahad Hospital. He confirmed that on the 30th day of April, 2019 a child called **AK** who lives in Twaif was brough to hospital by her mother at 2:00 p.m. The doctor examined her and concluded that the hymen was not intact. That she had lacerations and swelling on the vagina. That there were red blood cells which indicated she had bacterial infections, that she was given PEP and antibiotics.

He also told the court that he had the P3 Form filled on the 1st day of May, 2019 and it was produced as Plaintiff. Exhb 4, the PRC Form as Plaintiff Exhb. 2.

PW6 No. 81287 PC Benson Obuya attached to Lamu Police Post indicated to court that he remembered the events of the 30th day of April, 2019. That on that day he received a complainant **AK** in the company of her mother. That the Complainant was taken to King Fahd Hospital and he took the statements of the complainant and the witnesses and issued then with a P3 Form.

He further said on the 30th day of April, 2019, he received a call that the suspect had been spotted in a neighbor's house where he was hiding. He was arrested and escorted to the police station.

At the close of the prosecution case, the trial court found that a prima facie case had been established and the appellant was placed on his defence and he elected to give a sworn statement.

He stated that on the 20th day of April, 2019, he was at work and later went home at 4:00 p.m. He put his things in the house and went to visit his neighbor called Badawi. He waited for food and his brother brought him food at 5:00 p.m. That his brother called him and they met at the stair case, he told him that the neighbor had said he touched their child.

He also said that they had gone to the police and hospital. That he told him that no children had come to his house. That he told him to go into hiding, that he refused and he told him that he will not be in a position to help him. That they went to the family of **Badawi** and told them what had happened then members of the public came armed and surrounded the house and later the police came and arrested him and took him to the police station.

He further said that on the 28th day of April, 2019 when the children brought him food, he gave them Kshs. 10/- and that on the 30th April, 2019 no child brought him food.

Analysis and determination

The first duty of an appellate Court which is to re-hear the case and evaluate the evidence a fresh of the trial Court. If the question arises which witness is to be believed and that question turns on manner and demeanor, I will be guided by the impressions if any made by the trial Court **(See Moses Thuo v R CCR Appeal No. 154 of 1985, Mark Kariuki v R CR Appeal No. 121 of 1984, Pandya v R {1957} EA 336)** then comes the vital question relating to the grounds of appeal and whether the appellant was properly convicted for the offence of incest. The nature of the offence under Section 20 (1) of the Sexual Offences Act refers to any Sexual Intercourse with a child under the age of 18 years but which act falls within the definition defined under Section 22 of the said Act.

In criminal cases before a trial Court one of the fundamental duty of the Court is to establish whether the burden of proof and standard of proof has been discharged beyond reasonable doubt against an accused person. The issue of proof is a matter of evidence**.** In **R v Subordinate Court of the First Class Magistrate at City Hall {2006} EA 330** it was held that**:**

> ***"When a person is bound to prove the existence of any fact it is the Law that the burden of proof lies on that person."***

The general provisions on the legal and evidential burden is to be found in Section 107, 108 and 109 of the Evidence Act. It is trite Law that the state or the prosecution in criminal cases has the burden of proof to prove the existence of certain facts that the accused is guilty contrary to the right on presumption of innocence under Article 50 (2) (a) of the Constitution. The state has to discharge any given issue in an offence framed against an accused to create a doubt in the mind of the Court that he cannot be entitled a right of presumption to innocence**.** In **Woolmington v DPP {1935} AC 462 Lord Sankey** stated in the following terms:

> ***"But while the prosecution must prove the guilt of the prisoner, there is no such laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury to his innocence. Throughout the wees of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilty."***

Having stated that, this being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyse it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. **(See Okeno v R (1972) EA 32, Eric Onyango Odeng' v R (2014) eKLR).**

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the Appellant.

On the authority of the case of **Charles Karani R Criminal Appeal No. 72 of 2013,** the court in construing the provisions of Section 8 (1) of the Sexual Offences Act, stated that:

> ***"The critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant."***

On the element of age, it is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and secondly it establishes the age of the complainant for purposes of sentencing. **(See Moses Nato Rapheal v Republic (2015) eKLR).**

It has been held that the age of the victim in sexual offences can also be proved by the direct evidence of parents or guardian or by observation by the court. In **Thomas Mwambu Wenyi v Republic (2017) eKLR** cited with approval **Francis Omuromi v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** which held that:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense."***

In **Richard Wahome Chege v Republic (2014) eKLR** the Court of Appeal sitting in Nyeri pronounced itself thus:

> ***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily***

by production of a birth certificate.PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself"

In the instant case, proof of age of the complainant was given by the mother. **(PW3)** stated that she was born on 4th March, 2011 making her 8 years at the time of committing the offence. There was no dispute as to the age of the complainant and I hold that it was satisfactorily proved.

On the element of penetration, 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 organs of another person."

The prosecution has a duty to establish that the complainant was partially or fully sexually penetrated by the appellant. In determining penetration, courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng v Republic (2013) eKLR** where the court stated that:

"In cases of defilement, the court will rely mainly on the evidence of the complainant which must be corroborated by medical evidence…"

In this case, the victim clearly recounted in court how the appellant proceeded to take her to bed, removed his *'dudu'* from his trouser and put it in her private part. Having assessed the evidence on record, the victim clearly recounted that the said act of penetration on the day of committing the offence. It is common place that penetration can be proved by the evidence of **(PW1)** alone as provided by Section 124 of the Evidence Act which provides that:

"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"

This position was succinctly held by the Court of Appeal in **Williamson Sowa Mbwanga v Republic (2016) eKLR**, where it stated that:

"The import of the proviso to section 124 of the Evidence Act is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this court in George Kioji V Republic Cr App. No.270 of 2012 (Nyeri): "where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and record the reason for such belief"

The evidence of **(PW1)** was corroborated by the medical evidence adduced by **(PW5).** I have analysed the evidence on record and the P3 Form produced and the victim's evidence and I am satisfied that penetration was achieved.

On identification, where identification is based on recognition, this is where the complainant knows the accused and it has been held to be more reliable than identification of a stranger. The Court of Appeal in **Francis Muchiri Joseph v Republic (2014) eKLR** held that:

"In LESARAU v R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name".

In the instant case, the victim informed the court that she knew the appellant and that she was sent there to take food when the appellant asked her to stay behind while he sent the other children away. According to **(PW1)** evidence the period of observation of the appellant was over long period of time to support recognition of the appellant positively.

From the evidence of the appellant, he did not disapprove that he did not engage in sexual intercourse with the complainant. Though the case on identification was solely that of the complainant, I find no danger for the trial court to have convicted the appellant as such on a single identifying witness in the circumstances of this case.

As matters stand, all essential element of the crime, which is the act constituting or linking the appellant to the circumstances of the defilement was pleaded in the charge sheet and proved beyond reasonable doubt.

In the premises this appeal lacks merit on both facts and Law. It is hereby dismissed. The conviction is hereby affirmed and sentence contains no illegality and wrong factors to be substituted by an appellate Court.

Accordingly, the appeal is dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF NOVEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for the state

2. The Appellant