REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. E050 OF 2021

GABRIEL MWONGELA......................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction of the Senior

Resident Magistrate's Court at Tigania in Criminal Case No.

20 of 2019 delivered on 27th November 2020 by Hon. P. M. Wechuli SRM)

JUDGMENT

1. The Appellant, Gabriel Mwongela was charged 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 offence as set out in the charge sheet dated 29th July 2019 were that: -

> ***'On the 27th day of July 2019, at*** [Particulars Withheld] ***Village, Mutionjuri Sub-location, Kianjai Location in Tigania West Sub-county within Meru County, intentionally and unlawfully caused your penis to penetrate the vagina of VK a child aged 9 years.'***

2. He was charged with the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of offence for this alternative charge were that: -

> ***'On the 27th day of July 2019, at*** [Particulars Withheld] ***Village, Mutionjuri Sub-location, Kianjai Location in Tigania West Sub-county within Meru County, intentionally touched the vagina of VK a child aged 9 years with your penis against her will.'***

3. The Appellant first pleaded guilty on 29th July 2019. He was warned of the severity of the offence and the Court ordered for fresh plea taking. On 1st August 2019, he again pleaded guilty. Despite him pleading guilty, the accused was taken through the trial process and the record shows that he fully participated in the proceedings.

4. The Court also observes that the Prosecution had at one point prayed for the Appellant to be taken for mental assessment. The record bears a medical report dated 24th October 2019, signed by a Psychiatric Consultant from Meru Teaching and Referral Hospital confirming that the Appellant was, at the time, of a normal mental state and was fit to stand trial.

5. The accused was placed on his defence and by Judgment delivered on 27th November 2020, the trial Court, Hon. P. M. Wechuli, SRM convicted the Appellant for the offence of Defilement and sentenced him to serve life imprisonment.

The Appeal

6. Being dissatisfied with the Judgement of the trial Court, the Appellant has preferred the instant appeal raising the following grounds of appeal: -

> ***i) That the learned trial magistrate erred in both law and fact by failing to note that the Appellant was submitted to full trial even without the mental status report available even after several court orders to produce the same.***

> ***ii) That the learned trial magistrate erred in matters of law and facts by failing to note that the Prosecution did not prove their case to the required standards as required by the law.***

Appellant's Submissions

7. The appeal was canvassed by way of written submissions. The Appellant filed submissions on 31st August 2020.

8. He urges that he went through the full trial despite the Court presuming that he was a person of unsound mind and despite an order being made for him to be taken for a mental assessment to verify his mental status. He urges that no person of sound mind would take a plea of guilty even after being warned of the seriousness of the offence. He urges that upon being read to the charges over again and explained in his native Kimeru language, he answered in affirmative. He urges that on 1/08/2019, the court ordered that he be taken for mental assessment at Meru Level 5 Hospital. That on 14/8/2019 the court made a second order on the same and that on x/xx/xx, when he was presented to court this vital report was not yet presented before court.

9. He urges that the investigating officer was sent court summons to explain why the mental assessment was not conducted. That on 11/10 2019, the mental assessment was yet to be conducted and the IO was again sent court summons to explain why the mental assessment was yet to be conducted.

10. He urges that on 16/10/2019 the court again accepted the OCS' explanation as to why the mental assessment was not yet done and a new order was made by the court that he be taken for mental evaluation at Meru Level 5 Hospital on the following day (17/10/2010). He urges that on 18/10/2019 the OCS Tigania Police Station told the court that the psychiatric was in Mombasa till 24/10/2019.

11. He urges that during the case mention on 23/10/ 2019, the court made a further order that he be taken for mental assessment the following day on 24/10/2019. That surprisingly, on 6/8/2020 after several case mentions, the case started with the Prosecution calling 3 witnesses and he was put to trial despite his mental status not being clear. He urges that the psychiatric report was a very vital document that should have been produced before the Court to clear him to face trial if it was to show that he was fit to stand trial.

12. He urges that Chapter 65 (i) of the Evidence Act, Cap 80 was not adhered to and that important documentary report from the psychiatric was not produced as evidence. He urges that Section 11 of the Penal Code is very clear on presumption of sanity. He cites the said section as follows: "Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved." He urges that he was subjected to full trial thought to be a person of sound mind but that the contrary would have been proved had the mental evaluation been conducted and that he would first have to have be treated before proceeding with the full trial in unknown mental state.

13. He urges that he was not assigned an advocate as per article 50 (2)(h) of the Constitution of Kenya-2010 yet this was a very sensitive case which carried and resulted in a very severe punishment. He urges that the Court scrutinizes the whole trial process and the submissions tendered herein and arrive at a better conclusion.

Prosecution's Submissions

14. The Prosecution filed submissions dated 15th September 2021. They start by outlining the elements which must be proven in order to secure a conviction on a charge of defilement. They cite Section 2 of the Sexual Offences Act and the case of *George Opondo Olunga vs Republic* [2016] eKLR, for the ingredients which they urge include the identification or recognition of the offender, penetration and the age of the victim.

15. They cite *Kaingu Elias Kasomo vs Republic* [2010] eKLR for the importance of proving the age of the victim. They urge that they proved the age of the victim, PW1 to be 9 years through evidence by the clinician PW5, which was uncontested and unimpeached. They urge that PW5 produced a P3 form to that effect. They cite *Joseph Kiet Seet vs Republic* (2014) eKLR and *Francis Omuroni vs Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000 for the proposition that the age of a victim can be determined by medical evidence and other cogent evidence.

16. Citing the definition of penetration under Section 2 (1) of the Sexual Offences Act, they urge that penetration was proven. They urge that PW1 in her witness statement stated that the Appellant did "bad manners" to her pointing to her crotch. They urge that bad manners in Swahili means tabia mbaya. Citing *Too vs Republic* [2020] eKLR they urge that tabia mbaya is a term commonly used by minors to refer to sexual assault. They urge that the trial Court found the testimony of PWI to be truthful and honest within the proviso of section 124 of the Evidence Act. They cite *J.W.A. vs Republic* [2014] eKLR, and *Mohamed vs Republic* [2006] 2 KLR 138. They further urge that PW5, the clinician who attended to the complainant provided in his statement that upon examination of the complainant he observed that the vulva had bruises and the hymen was torn. That this led to the conclusion that the complainant had been defiled. They urge that PW5's statement was further collaborated by the production of the P3 form which was marked as prosecution Exhibit 1 (P. Exhibit 1) together with the treatment notes marked prosecution Exhibit 2a.b.c. They urge that the element of penetration was proved beyond reasonable doubt. They further urge that PW1 did inform PW2 and PW3 about what the Appellant had done to her. That the Appellant was also found with the panty of PW1. That PW1 testified that the Appellant ran away with her inner pant and this was confirmed by PW2 and that PW3 also witnessed PW1's inner pant being removed from the Appellant's pocket. That the investigating officer PW4 did also corroborate this particular fact that upon the Appellant being searched they found PW1's inner wear in his pocket and the same was produced as P exb 2.

17. Citing *Anjononi & Others vs Republic* [1989] KLR they urge that the Appellant was positively identified by the complainant as the individual who defiled her. They urge that PW1 in her statement stated that she knew the Appellant as Baba G and that she also stated that the Appellant run away with her inner cloth. They urge that when the Appellant was brought to the police station, it was the evidence of PW4 that upon searching him, they found the underpants of the juvenile in his pocket. They urge that this is consistent with what the minor said that the Appellant had run away with her inner cloth. They urge that PW1 identified the Appellant as her uncle and this fact was corroborated by PW2 who stated that the Appellant was her son and PW3 confirmed that the Appellant was her uncle. They thus urge that the identity of the Appellant as the assailant was not at all mistaken.

18. They urge that in his defence, the Appellant gave unsworn evidence and that he pleaded leniency which does in fact prove the he committed the offence. They urge that the Appellant also did not offer an explanation of how and why PW1's inner pant was found in his pocket.

19. They urge that the appeal lacks merit and urge that it be dismissed in its entirety, and for the conviction and sentence to be upheld.

Evidence at the trial Court

20. In a first appeal, the Court is enjoined to consider both issues of law and fact and make its own independent findings, bearing in mind that it is the trial Court that had the benefit of observing the demeanour of the witnesses. See ***Okeno v Republic (1972) EA 32.*** The evidence adduced at the trial Court is reproduced hereunder: -

Prosecution's Case

PW1

21. PW1 was taken through a voire dire and found competent to testify. She testified as follows: -

> ***"I am VK. I am from*** [Particulars Withheld]***. Our school is*** [Particulars Withheld]***. I am 10 years old. I know the accused. He is Baba G. On that day he did bad manners to me. I had gone to fetch Baba Charity's phone. He is my uncle. Baba G pulled me and took me to the farm. He did bad manners to me. I had put on a blue dress with black circles. I had on inner clothes. It was blue in colour. The accused removed my blue inner cloth. He then did bad manners here. (points at crotch). I could not scream he had covered my mouth. Someone saw. I ran and told shosho. He ran away with my inner cloth, shosho beat Baba G and then went to police station. I also went there. I was taken to hospital and treated. That person is also in dock. The accused used to sit at M's place. Baba G is the accused in dock."***
>
> ***Cross examination***
>
> ***"It is not true that when you send me to buy cigarrete and I ate the money. Nobody has told me to tell lies. Shosho did not tell me to say lies. Am saying the truth."***
>
> ***Re examination***
>
> ***"All I have said is truth."***

PW2

22. PW2 testified as follows: -

> ***"I am CK. I am from*** [Particulars Withheld]***. The complainant is my grandchild. The accused is my son. On 27/7/2019 I recall mama M came holding the complainant by the hand. That time I was sick. The complainant told me that when her uncle sent her to pick a phone, she went running but she tripped and fell. That the accused grabbed her and took her to the farm. He removed her underpants and lay on her. She could not scream since he had held her throat. She said he had defiled her. She related the accused private parts to something like an animal's. I checked her. I understand what she was saying. I looked for people. They arrested the accused. We went to police station. At the police station the accused was found with the child's panty in his pocket. She was treated. The accused is Baba G also. He is in the dock."***
>
> ***Cross examination***
>
> ***"Yes at that time I was selling marwa. I am the one who advised the people there to arrest you. The inner pant was in your pocket."***

PW3

23. PW3 testified as follows" –

> ***"I am AKM. I am from*** [Particulars Withheld]***. I do menial jobs. The accused is my brother. I followed him. The complainant is my niece. On 27/7/19 I had sent the child to take my phone to charge. While on a path the accused pulled the child by the hand and took her in the maize plantation. A passing neighbour came and told my mum. She saw the accused pulling the child. We went to police and hospital. The girl said the accused removed her inner clothes and defiled her. I was present when accused was arrested. He had the girl's inner pant in his pocket when he was checked at Tigania police station. He is in the dock."***
>
> ***Cross examination***
>
> ***"I am not the one who put the child's clothe in your pocket. Where could I have found it? You had it. You were arrested in the***

market taking miraa."

PW4

24. PW4 testified as follows: -

> ***"I am no 116671 PC Pretronia Mwake of Tigania Police Station. On 27/7/19 at 1500 hours the OCS assigned me this case. The accused had already been arrested by the public while in the company of the minor. We escorted them to Miathene hospital. She was examined. She was found defiled. She was handed over to her grandmother. We searched him and found the underpants of the juvenile in his pocket. The minor told us that the accused took her underpants. The minor was without an underpant."***
>
> ***Cross examination***
>
> ***"I was not then the arresting officer. Members of public arrested you."***

PW5

25. PW5 testified as follows: -

> ***"I am Geoffrey Muthomi clinician at Miathene hospital. I have P3 of Vivian Kendi a 9 year old. She was brought on 25/7/2019. Her uncle had sexually assaulted her. The vulva had bruises. Hymen was torn. No spermatozoa based on bruises of vulva and torn hymen I made conclusion of defilement."***
>
> ***Cross examination***
>
> ***"I did not examine you."***

Defence Case

DW1

26. The Appellant tendered unsworn evidence as follows: -

> ***"I am Gabriel Mwongela. I come from Kianjai. I know the charges. I had even pleaded guilty to the offence. This is the first time in court. I plead for courts leniency. I sent the minor. She spent a lot of money. I disciplined her. I then quarreled with my family. I was arrested by many people."***

Issues for Determination

27. The Appellant's grounds of Appeal raise two main issues for determination as follows:-

> ***i) Whether the Appellant was fit to stand trial.***
>
> ***ii) Whether the Prosecution proved their case beyond reasonable doubt.***

Determination

Whether the appellant was fit to stand trial

28. At the outset, the court observes that the burden of proving an averment of insanity, once it is raised, lies upon the accused person to show on the balance of probabilities that at the time of committing the act giving rise to the offence was either suffering from disease affecting his mind and through such disease, was incapable of understanding what he was doing or of knowing that he ought not to commit the act. See ***Chemagong v. R*** (1984) KLR 611 of 6/11/1984 (per Kneller & Hancox, JJA & Nyarangi, Ag. JA). The position is reiterated a year later on 11/12/1985 by Nyarangi, JA, Platt & Gachuhi, Ag. JJA, in ***Marii v. R*** (1985) KLR 710 that where an accused raises the defence of insanity, the burden of proving insanity lies on him.

29. However, twenty years later on 4/8/2006 in ***Mwangi v. R*** (2006) 2 KLR 89 without referring to any authorities, the Court of Appeal (now Omolo, O'Kubasu and Deverell JJA) held as synthesized by the editor as follows:

> *"1. The burden of raising the defence of insanity is on the person raising that defence. However, when the court itself sees that there is something wrong with an accused person, the court can itself order further medical examination of such a person to determine whether he understands the proceedings or the state of mind at the time the crime was committed.*
>
> *2. In this case, there was no reason for the trial judge to proceed with the trial after he had realized that the appellant was either abnormal or not understanding the proceedings. The Judge should have invoked the relevant provisions of section 162 of the*

Criminal Procedure Code (cap.75).

> *3. The evidence of the prosecution witnesses suggested that the appellant was insane and that shifted the burden of proof to the prosecutor to show that he understood the proceedings."*

The court said ibid, at p. 92-

> *"We agree with the learned judge that the burden of raising the defence of insanity is on the person raising that defence – section 11 of the Penal Code – but **surely that cannot mean that even when the court itself sees that there is something wrong with an accused person as a was clearly apparent to the learned judge here, the court cannot itself order a further medical examination of such an accused person to determine whether that person understands the proceedings before the court** and/or the state of mind at the time of the crime was committed."*

30. In this case, the trial court did not think that the Appellant was insane but as a precaution, because of the serious consequences of a plea of guilty to the charge of defilement of a 9-year old, the court ordered for mental assessment. The record shows in the proceedings of 29/7/2019, the first day of his appearance before the court, that upon his plea of guilty, the court warned the accused that ***"the offence is serious"*** and adjourned the case to 1/8/2019 for ***"fresh plea taking."*** When on 1/8/2019 the charge was re-read over and again explained in ***Kimeru*** language as in the first plea taking the accused again pleaded guilty and the court record shows-

> *"Plea of guilty entered. Alternative charge is dispensed with."*

31. However, on request by the Prosecution that the accused "be availed for mental assessment", the court ordered that "Accused [be] taken for mental assessment at Meru Level 5 Hospital." There was delays in presenting the accused for assessment for various reasons including the absence of the responsible Psychiatrist but this was eventually done on the **24/10/2019.** The submission made for the Appellant on appeal as regards failure of mental assessment appears to have been made without the benefit of the full record of the trial court, because the court file shows that the accused was presented for mental assessment on 24/10/2019 and by a certificate dated 24/10/2019 the accused was certified fit to plead. This court has no reason to doubt the certificate of fitness to plead made by the Consultant Psychiatrist Mwikamba of Meru Teaching and Referral Hospital, and must hold that the Appellant was fit to stand trial.

32. There was delay in the trial occasioned, as the record shows, by the COVID-19 pandemic and the trial eventually resumed on 6/8/2020. On this day, the Appellant having already pleaded guilty to the charge, but before his fitness to plead having been confirmed by mental assessment, the charge should have been read to the accused afresh and if he repeated his plea of guilty, convicted and sentenced at this point. However, the trial court proceeded with the trial as if the accused had pleaded not guilty. It has been held that only an accused who pleads not guilty is entitled to a full trial on the charge.

Right to legal representation

33. Article 50 (2) (h) of the Constitution protects the right of an accused person to counsel at state expense, ***"if substantial injustice would otherwise result."*** The charge of defilement, although undeniably serious, is not one of unusual complexity in the response and defence to which necessarily requires legal representation by counsel. The sentence of life imprisonment is not an "injustice" within the meaning of the Article but a penalty upon a finding of guilty. No exceptional difficulty in defending a charge of defilement was shown or detected or was detectable by the court in this case where the accused was certified mentally fit to plead and therefore stand trial. And in any event, were the accused person found not fit to stand trial, the remedy would be in standing over his trial and making arrangements for his treatment until he is certified fit to plead and stand trial. It is not merely in providing legal representation. The court does not consider that the circumstances of this case warranted an order under Article 50 (2) (h) of the Constitution.

Whether defilement was proved against the Appellant

Plea of guilty

34. The Appellant pleaded guilty three times, twice before his trial commenced and once in his defence, when he reminded the court that he had pleaded guilty to the charge in the beginning. The court can think of several reasons why the Appellant could have pleaded guilty to the defilement charge even in his normal mental status as established by the mental assessment. One reason, which is a complimentary one is that he had felt remorse for having sex-assaulted his niece, and another, which is more pragmatic, is that having been caught red-handed with the girl victim's pantie in his pocket upon arrest and the witnesses being his own mother and brother, it was futile to deny the charge. Whatever, his motivation, his plea of guilty ought to have been accepted as one made by a person of sound mind duly certified fit to plead and stand trial and there ought not have been a trial. However, the trial was to his benefit so that he was convicted on objective evidence presented by the prosecution in the case rather than his subjective feeling in his plea of guilty.

35. In considering whether the defilement charge is proved, the court has looked for the 3 ingredients of defilement, namely, minor age of the victim, penetration and identification of the appellant as the perpetrator.

Age of the victim

36. The complainant PW1 was aged 9 years at the time of the offence. At the time of *voire dire* in court she said she was 10 years and from the record the trial court, which saw and examined the girl before accepting her evidence, apparently believed her and found that the "minor understands importance of truth and an oath. She shall give sworn evidence", and the minor repeated on oath that she was 10 years old. The P3 form indicated her age at the time of defilement on 27/7/2019 to be 9 years. I would find it proved on the material before the court that the girl victim in this case was 9 years old at the time of the alleged defilement.

Penetration

37. Of course penetration is complete for purposes of the offence of defilement if there is only partial as opposed to full penetration. See definition of penetration in section 2 of the Sexual Offences Act. PW1 in testimony that was unshaken in cross-examination detailed the act of sexual assault on her as follows:

> ***"Baba G pulled me and took me to the farm. He did bad manners to me. I had put on a blue dress with black circles. I had on inner clothes. It was blue in colour. The accused removed my blue inner cloth. He then did bad manners here. (points at crotch). I could not scream he had covered my mouth. Someone saw. I ran and told shosho. He ran away with my inner cloth. Shosho beat Baba G and then went to police station."***

38. The evidence of penetration was corroborated the medical evidence of PW5 who examined the victim PW1 on the very day of defilement on 27/7/2019 who found that ***"The vulva had bruises. Hymen was torn. No spermatozoa. Based on bruises of vulva and torn hymen I made conclusion of defilement."*** The court agrees with the assessment of the clinician that the presence of bruises in the vulva and the torn hymen were indicative of penetration regardless of presence of spermatozoa. There is evidence that the sexual act may have been interrupted when as PW1 says, ***"Someone saw. I ran and told shosho. He ran away with my inner cloth.***"

Identification of appellant as perpetrator

39. PW1, the Appellant's niece who knew him as Baba G, a name that his mother confirmed the Appellant was also known by, recognized him as her assailant. Apparently, as PW1 testified someone saw them and the Appellant ran away taking her pantie with him. She told her grandmother PW2 who caused for the search and arrest of the Appellant.

40. The Appellant's identification by PW1 is corroborated by the fact of recovery of the girl's pantie from the Appellant's pocket at the police station upon a search as attested by the grandmother of the complainant and mother to the accused, PW2, and his brother PW3 as well as by the Police officer PW4 who rearrested the Appellant upon arrest by members of the public.

41. It is also significant that the Appellant was arrested upon the mother PW2 being informed of the incident by the complainant PW1. Because of his *identification* by the child PW1 as her sex assailant, the mother PW2 caused people to look for the Appellant and upon his arrest and escort to the police station, the incriminating evidence of the child's pantie was found in his pocket.

42. When put on his defence the Appellant repeated that he had earlier accepted the charge, and further stated that he had disciplined the complainant girl saying ***"I sent the minor. She spent a lot of money. I disciplined her. I then quarreled with my family."*** This does not detract from, or when weighed with the evidence presented in the case as a whole raise any reasonable doubt as to, the appellant's guilt which he himself confirmed saying ***"I had even pleaded guilty to the offence."***

CONCLUSION

43. The appeal must be dismissed for want of merit. The Appellant, being of sound mind as he was so certified upon a mental assessment, sexually attacked his 9-year old niece, while she was running an errand for his brother PW3. Upon the act, he ran away taking the complainant's pantie with him. Medical evidence by PW5 confirmed penetration. When the matter was reported to PW2, the girl's grandmother, and who is his mother, she caused the arrest of the Appellant and escorted him to the police station, where upon a search the complainant girl's pantie was recovered from his pocket, as testified by his brother PW3 who was present and the arresting police officer PW4.

44. The court must return a verdict of guilty by overwhelming evidence of proof presented by the Prosecution against the Appellant as the person who defiled the 9-year old complainant girl in this case. The sentence of imprisonment for life follows the event of the conviction under section 8 (2) of the Sexual Offences Act.

ORDERS

45. Accordingly, for the reasons set out above, the court finds no merit the Appellant's appeal and the same is dismissed. The conviction and sentence of imprisonment for life imposed by the trial court on the Appellant for the offence for defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act are upheld.

Order accordingly.

DATED AND DELIVERED THIS 8TH DAY OF NOVEMBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Nandwa, Prosecution Counsel for the Prosecution.