REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL 17 OF 2018

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon.A.N. Sisenda

(R.M) in Narok CMCR SOA No. 7 of 2018 on 5th July 2018)

SAMMY WANDERI KUGOTHA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

[1]. The Appellant is challenging his conviction and life sentence imposed for defilement contrary to Section 8(1) (2) of the Sexual Offences Act No.3 of 2006. The girl he defiled was aged 4 years. The particulars of the offence were that on 24/01/2018 at [Particulars withheld] area in Narok- South Sub- county, intentionally caused his penis to penetrate the vagina of LJ a child aged 4 years. He was also faced with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006.

[2]. The Appellant cited ten (10) grounds in his amended petition of appeal, namely;

a) That the learned trial magistrate erred in both law and fact in holding that the appellant was guilty of defilement contrary to section 8(1) as read with section 8(2) of the sexual offences act.

b) That the learned trial magistrate erred in both law and fact by failing to notice that the prosecution did not prove the allegation to the required standards and only relied on uncorroborated and circumstantial evidence to push their case.

c) That the learned trial magistrate erred in both law and fact by failing to be faithful to the law and to be cautious enough to notice and or appreciate the inconsistencies, yawning gaps or missing links and lacunas evidence while sentencing in this case.

d) That the learned trial magistrate erred in both law and fact by relying on insufficient medical evidence to convict the appellant.

e) That the learned trial magistrate erred in both law and fact by ignoring and or not considering the appellant's defence.

f) That the learned trial magistrate erred in law and fact in relying on uncorroborated evidence of a minor without warning itself or cautioning itself about the dangers entailed thereby.

g) That the learned trial magistrate erred in law and fact in relying on contradicting evidence which did not place the appellant at the scene of crime.

h) That the learned trial magistrate erred in law and fact in convicting the appellant to life sentence despite the fact that he was a first time offender.

i) That the honorable learned magistrate erred in law and fact in convicting the appellant despite there being no DNA test done to link him with defilement.

j) That the honorable learned magistrate erred in law and fact by not appreciating the appellant's conduct during trial and

when he was arrested.

Evidence

[3]. The complainant testified as **PW1**. A *voir dire* was conducted and the trial magistrate was not convinced that she understood the magnitude of taking an oath. She proceeded and gave unsworn evidence. She stated that she is 4 years old and is in PP1 at AIC school. She was stood down for being unresponsive to questioning.

[4]. The prosecution made an application to have PW1 declared a vulnerable witness and have her testify through the use of an intermediary her father- WKL. The application was allowed by the court.

[5]. PW1 testified that she was in court because someone did 'tabia mbaya' to her. She identified the person by pointing at him. She stated that she felt pain when he did 'tabia mbaya' on her while pointing at her genital area. She stated that she remembered that day she was taken 'huko chini' to a bush by the appellant where he did bad manners to her. After that, one Saito took her home and she told Terry, Isaac and Ramsey what had happened to her. She remembered being taken to hospital and seeing the doctor.

[6]. On cross examination, she stated that she went to play with Isaac, Ramsey, Terry and the accused with a ball and that the accused promised to buy her juice cola so that she went with him to the nearby bush and left the other children behind.

[7]. **PW2** –HJK. She is the mother to the complainant. She recalled that on 24/1/2018 in the evening at around 5.00p.m. She was at work when she was called by her neighbor Mrs. Kaspa who told her to go home. She left. Outside the gate she found crowd of people with her child LJ in the middle. She stated that PW1 was born on 26/11/2013. She produced a copy of her birth certificate as **P Exh 1**. She asked what was happening and someone responded from the crowd that the child had been raped. She then took PW1 to the house to check on her. Upon removing her under pants, she saw some dirt on it (blood like stains). She rushed the child to ololunga district hospital where the doctor examined her. The doctor concluded that the child had been defiled. She then sought to find from the child who had defiled her and the child told her it was ''uncle' who had shaved 'box' hairstyle who had done bad manners to her. From the description PW2 was able to identify the perpetrator. On the following day, she reported the matter to ololunga police station. She testified that she knew the accused for about 3 years as he also lived in ololulunga. She concluded by pointing him in the dock and that they had never differed or quarreled.

[8]. Upon cross examination she confirmed that the accused had since changed his hairstyle from what he usually spotted.

[9]. **PW3**-The Clinical Officer, Mr. Felix Rotich based at Ololunga district Hospital. He testified that he examined and filled the P3 form on 25/1/2018. He testified that he saw the stained pant with brownish stains, bruises on her labia majora with no visible discharge or injuries on her intact hymen. He concluded that it was an attempted defilement since the hymen was still intact. He produced the P3 form, treatment form/ notes and post rape care forms as **P Exh 3 (a), (b**) and **(c)** respectively.

[10]. On cross examination he stated that at the facility where he works they were unable to pint out or confirm who the suspect was.

[11]. **PW4- AS**. He testified that he was 13 years old. On the material day, he was at home at around 5 p.m. when the appellant went to borrow his football to play with in the field. He stated that they used to play together, so it was not unusual. He testified that his mother had sent him on that day so he did not go with the accused but went later to the field but did not find the accused. He only found one Ramsey. He then heard a child crying in the bush and informed a passerby to check what was happening and that he did not see the complainant that day. He confirmed to the court that he knew the accused very well. On that day the accused had an orange jumper and had shaved his hair box hairstyle.

[12]. PW5- Esther Wambui Rotino. She testified that she knew the accused and that on the material day she saw him borrow a football from her neighbor's son. She also confirmed knowing pw1 as a daughter to her neighbor PW2.

[13]. **PW6**- no. 77858 CPL Charles Chamwada attached to ololunga police station. He was The Investigating officer. He testified that on 24/1/2018 at around 6.30 p.m. he was in the office when he received a phone from pw1's father who informed him that his daughter had been defiled. He left for Ololunga hospital where the minor had been rushed. The minor's mother informed him who the suspect was. He went with another officer to arrest the suspect but did not find him. He conducted investigations and ascertained the circumstances under which the offence occurred. At around 8 p.m. the accused was arrested by members of the public and escorted to the police station. He then recorded that statements and retrieved the birth certificate and the soiled pants. He produced the soiled pants as **P Exh 2**. He finally identified the accused by pointing at him. He stated that at the time of arrest his distinctive feature was his box shaved hair.

[14]. The appellant was found with a case to answer after the close of the prosecution case he was placed on his defence.

[15]. To his defence, he gave unsworn evidence and chose not to call any witness. It was his testimony that on 24/1/2018 he went to borrow football from PW4 at around 3.00 p.m. He then went to the field to play by himself. After about an hour he went to the neighbouring house to ask for drinking water and stayed there for a while. He then saw pw4 and called him over to that house to return his ball. In the evening he went to the shopping center where a friend informed him a mob was looking for him. Soon thereafter a mob attacked him and started beating him yet he did not know why. PW1's father stopped them and they escorted him to the police station he was later informed of the reason for his arrest.

Appellant's submissions

[16]. The Appellant submitted that the age of the minor is not disputed.

[17]. The appellant, however, submitted that there was no penetration. In to the opinion of PW3 who examined the complainant, it was an attempted defilement. He urged the court to note the distinction between defilement and an attempt to commit it. He cited the cases of ***Samuel Ayaa Oketch V Repuclic [2016] eKLR, John Mutual Munyoki Vs Republic [2017] eKLR And Chrisipine Waweru Njeri Vs Republic [2015] eKLR***

[18]. The appellant submitted further that he was not properly identified. There was also no identification parade. He cited the cases of ***Michael Mumo Nzioka V Republic [2019] eKLR, Ramreddy Rajeshkhanna Reddy & Anor Vs State Of Andhra Pradesh , JT 2006 (4) SC 16, Ali Mlako Mwero Vs Republic[2011] eKLR, Republic Vs EKK [2018] eKLR And Matanyi Vs Republic [1986] KLR 198***

[19]. The appellant submitted that the prosecution did not call a witness who was to give a corroborative testimony with PW4. He cited the cases of ***Director Of Public Prosecutions V Kilbourne [1973] 1 AER 440,*** and ***director of public prosecutions v Hester[1972] AER 1056 at page 1065,***

[20]. More submission; that the trial magistrate did not take into consideration the appellant's testimony. And, that his *alibi* was not rebutted by the prosecution. He cited the case of ***Okethi Okale Vs Republic [1965] EA 558 at Page 559, Nguku Vs Republic [1985] eKLR, Karanja Vs Republic [2005] Eklr, Ricky Ganda Vs State [2012] Zafshc 59.***

[21]. The appellant summed up on conviction and stated that he was unfairly convicted for defilement despite disparaging evidence that showed that he did not committed the offence. He was accused based on suspicion and the fact the he used to play football with the children and was last seen on the field. He cited the case of ***Michael Mumo Nzioka V Republic [2019] eKLR,***

[22]. On sentence, the appellant submitted that the sentence meted out on him was excessively harsh.

[23]. The appellant urged this court to allow his appeal, set aside and quash his conviction and sentence.

[24]. The counsel for the appellant Mr. Kariuki orally submitted that section 388 of the penal code defines attempt. That the evidence adduced vide p3 form by pw3 noted that she was dealing with attempted defilement as no discharge was noted, hymen was intact with no visible injuries only bruises on majora. Proper offence was attempted defilement. Therefore trial court erred in concluding partial penetration as sentence would be life sentence unless they make a distinction.

[25]. Mr. Kariuki further submitted that post care report (P **Exh 3a**) indicated that the victim was seen 18 hours after the alleged defilement. That the suspect tried to use a blunt object into her vagina. As the evidence on record does not support penetration, the offence was attempted defilement.

PROSECUTION'S SUBMISSION

[26]. The prosecution submitted that the age of the victim was proved through the production of a birth certificate **P Exh 1.**

[27]. The prosecution submitted that the evidence of the victim as well as the observations of the mother and that of the clinical officer shows that there was partial penetration of the victim. The medical evidence corroborated the testimony of PW1 and PW2. They cited the case of ***Erick Onyango Ondeng Vs Republic [2014] eKLR.***

[28]. The prosecution submitted that the evidence of PW1 is supported by the testimony of PW4 who stated that when he went to the field he found the boy Ramsey. PW1 never at any time contradicted herself. Her testimony is corroborated by the documentary evidence adduced in court and the testimony of the other independent witnesses.

[29]. The prosecution submitted that the appellant placed himself at the scene by stating that indeed he has borrowed a ball from PW4 and had proceeded to the field.

[30]. The prosecution urged the court to consider the age of the victim and the methods used to trick the victim when sentencing. They relied in the cases of **Criminal Petition 2 'B' of 2019 EMS Vs Republic [2019], Petition No. 64 of 2019 Abdallah Kahaso Kombe V Director of Public Prosecutions [2020] eKLR.**

[31]. The prosecution submitted that the conviction was safe as against the appellant and urged this court to uphold it as well as the sentence.

ANALYSIS AND DETERMINATION

Court's Duty

[32]. This is a first appellate court. It must evaluate the evidence afresh and draw own conclusions. Except, bearing in mind that the court neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32**

[33]. The issues for determination are:

i. Whether the prosecution proved its case beyond reasonable doubt. Here, I should determine whether the offence committed was defilement or attempted defilement?

ii. Whether the sentence imposed was appropriate to the offence. Here, I should determine whether the sentence is manifestly

excessive or harsh in the circumstances of the case.

Elements of the offence

[34]. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act which provides:

> **8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **8(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."**

Attempted defilement or defilement?

[35]. But, the appellant claimed that medical evidence showed that the offence committed was attempted defilement. He beseeched the court to make distinction between attempted defilement and defilement. I am acutely aware that; i) the two offences are distinct and different; ii) the penalty prescribed for each offence is different with defilement carrying a more severe sentence of up to life imprisonment; and iii) the evidence adduced should support the charge; attempted defilement or defilement.

Offences distinct

[36]. According to ***Black's Law Dictionary***, *Bryan A. Garner, ed. Tenth Edition*, attempt in criminal law refers to: -

An overt act that is done with the intent to commit a crime but that falls short of completing the crime. Attempt is an inchoate offence distinct from the intended crime.

[37]. Section 388 of the Penal Code defines attempt in the following terms:

> **(1) Where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfilment manifests his intentions by some avert act but does not fulfil his intentions to such an extent as to commit the offence, he is deemed to attempt to commit an offence.**
>
> **(2) It is immaterial except so far as regards punishment whether the offender does all that of necessary on his part for completing the commission of the offence or whether the complete is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention.**
>
> **(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.**

[38]. Therefore, the essence of attempted crime is; i) the overt act done- *actus reus*; ii) with the intent to commit a crime- *mens rea*. The overt act or acts manifests the intention to commit the crime. Therefore, the overt act or a chain of acts done with the intent to commit a crime should not be too remote to the intended crime. In other words, the *actus reus* must be more than mere preparation to commit a crime. See ***Abdi Ali Bere – vs – Republic (2015) eKLR.***

[39]. Attempted defilement is established in **Section 9(1) of Sexual Offences Act:** a person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

[40]. Defilement is established in **section 8(1) of the Sexual Offences Act**: a person who commits an act which causes penetration with a child is guilty of defilement.

[41]. The distinction between these two offences is penetration. S**ection 2(1) (d) of the Sexual Offences Act,** defines ***''penetration''*** to mean: -

> **the partial or complete insertion of the genital organs of a person into the genital organs of another person.**

[42]. In this case, for defilement to hold, it must be established by the prosecution beyond reasonable doubt that a male penis was partially or completely inserted into the victim's vagina.

[43]. In attempted defilement, the prosecution must prove the other ingredients of the offence of defilement except penetration; to wit; the age of the complainant, positive identification of the accused, and proof of intention and steps taken by the accused to execute the defilement which did not succeed.

[44]. What does the evidence reveal?

[45]. PW1 testified that the appellant did bad manners to her genital area and she felt pain.

Elements to be proved for the offence of defilement

[46]. The ingredients of the offence of defilement were well stated in the case of ***Dominic Kibet Mwareng v Republic [2013] eKLR,*** by Ndolo J. as follows:

> ***"The critical ingredients forming the offence of defilement are;***
>
> ***i. age of the complainant,***
>
> ***ii. Proof of penetration***
>
> ***iii. Positive identification of the assailant."***

Age

[47]. The age of the complainant was not contested in this appeal. PW2- mother to the complainant produced a birth certificate which confirmed that the complainant was born on 26/11/2013 hence aged 4 years at the time of the commission of the alleged offence.

Penetration

[46]. 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.'**

[47]. Given the arguments in this appeal, I wish to make a conscious comment; penetration even on the surface of the genitalia is penetration for purposes of the law. Such is partial penetration and constitutes penetration under section 2 of the Sexual Offences Act. It should therefore be understood that partial penetration with a child does not mean attempted defilement. See the case of ***Mark Oiruri Mose vs R (2013) eKLR*** where 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….' (Uderlining mine).**

[48]. Further explanations by the Court of Appeal- differently constituted- was that even the *slightest penetration* is penetration. See the case of ***Erick Onyango Ondeng v. Republic (2014) eKLR*** that:

> **"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."**

[49]. It seems the appellant is of the view - and he so submitted- that penetration was not proved since the hymen was intact. In light of the above decision, I do not think that the fact that the hymen was intact necessarily means there was no penetration in the sense of the law. Their said submission is not totally defensible.

[50]. Be that as it may, in this case the complainant narrated how the ordeal unfolded. PW1 testified that the appellant did bad manners to her genital area and she felt pain. The complainant gave a fair picture of what happened to her considering her age. PW2 testified that she examined her daughter's private parts and under pants and saw some blood like stains.

[51]. PW3 testified that he saw a stained underwear and upon examining PW1, he noted bruises on the labia majora. PW3 concluded that there was an attempted defilement on the girl since the hymen was intact.

[52]. The conclusion by PW3 is not consistent with the results of the examination of the complainant. The opinion thereof is also oblivious of and inconsistent with the law which provides that penetration may be partial or complete insertion of the appellant's genital- herein the penis- into the complainant's genitalia- herein the vagina. Of greater value here is that: -

> **"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." (See *Erick Onyango Ondeng v. Republic (2014) eKLR (ibid).***

[53]. The evidence that there were bruises on the labia majora and the evidence of the mother corroborated the testimony of the complainant that her vagina had been penetrated. I find and hold that penetration was proved.

Was Appellant the assailant?

[54]. The prosecution must prove beyond reasonable doubt that the appellant is the one who penetrated the complainant – a child- and therefore committed the offence of defilement.

[55]. I have considered the fact that the complainant knew the Appellant and gave a description of him as having shaved a box hair style. PW1's testimony that they had gone to play at the playground was corroborated by PW4 coupled with the fact that the appellant did not deny

having been at the said field on the material day. I also concur with the analysis of the trial court of the defence.

[56]. I do not find anything which suggest any element of doubt on the part of the complainant in recognizing the Appellant as the person who defiled her. Her evidence on identification alone may found a conviction as long as the court records reasons for believing the truth of the evidence in accordance with Section 124 of the Evidence Act.

[57]. The evidence on record proves beyond reasonable doubt that the appellant caused penetration of the complainant. I so find and hold.

[58]. From the foregoing I find that the charge of defilement was proved beyond reasonable doubt. The arguments by the appellant that the evidence proved attempted defilement holds no sway.

Of sentence

[59]. Under Sexual Offences Act, sentence for defilement is prescribed based on the age of the victim of sexual assault. Although the Act does not expressly state, the manner the penalty is prescribed show that, the younger the victim, the more severe the sentence. Therefore, it appears to me that, age of the victim of sexual offence is an aggravating factor which the court should always consider as such in sentencing. I should think, therefore, that, if the law could clearly so state and use appropriate terms thereto, the potency of many objections being raised on constitutional front on minimum sentences in the Sexual Offences Act, may be greatly minimized, or eliminated or rendered ineffective. Apt legislative art is required here.

[60]. In this case, the complainant was below the age of 11 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the Act which provides:

> **"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."**

[61]. I ask myself whether the life sentence imposed on the appellant is appropriate sentence in the circumstances of this case.

[62]. The Court of Appeal in ***Thomas Mwambu Wenyi vs. Republic [2017] eKLR*** cited the decision of the Supreme Court of India in ***Alister Anthony Pereira vs. State of Maharashtra at paragraphs 70-71*** where it was held on sentencing that: -

> **"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."**

[63]. Of important consideration: first, the victim of the offence is a child of 4 years. Second; the said child will forever live with the shame and great mental trauma caused to her by this savage act of sexual debauchery. Third; this is a serious offence of which extreme societal desire to get rid of society of these wickedness and sexual perversion has been expressed publicly and formally through Sexual Offences Act. See James ***Okumu Wasike (2020) eKLR.***

[64]. In aggravation the appellant used an unfair advantage to secure and satisfy his sexual desires on the minor. The Court considers the offence to be quite egregious, and it was committed against a minor. It bears repeating that the penalties enacted in the SOA reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement.

[65]. The trial court sentenced the appellant to life imprisonment after considering his mitigation. The sentence is also lawful. Nonetheless, the manner section 8(2) of the Sexual Offences Act is couched portend and has been understood by many judicial commentators to portend a mandatory sentence. Such fettering of judicial discretion in sentencing is inconsistent with the Constitution. But, I proclaim a new approach; a new yardstick. Section 7 of the Transitional Provisions under the Sixth Schedule of the Constitution foresaw the dilemma of application of the Constitution upon existing law. It permitted existing laws to continue in force, but, provided courts with legal tool to construe such law with such modifications or adaptations or alterations or exceptions in order to bring it into conformity with the Constitution. The section provides: -

> **7. Existing laws**
>
> **(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.**

[66]. In light thereof, I do think, it is no longer a peremptory rule or requirement that courts should always strike down a provision of a statute- especially existing law- if the offensive or objectionable element thereto could be resolved in the manner commanded in section 7 stated above. I will therefore, read the word ‘*’shall’’* in section 8(2) of the Sexual Offences Act to mean ‘*’may’’* in order to bring the section into conformity with the Constitution.

[67]. Be that as it may, Parliament and other state organs with legislative mandate should embark on harmonizing existing law with the Constitution. In the meantime, they should take up pronouncements such as this one, and carry out appropriate legislative enactments or amendments to existing law in order to bring it into conformity with the Constitution.

[68]. The possibility of fetter-real or perceived- on the discretion of the trial court in sentencing under this provision is likely. This is an important consideration here.

[69]. I note also that the appellant is a young person. The need to rehabilitate and reintegrate offenders into society to eke meaningful life after imprisonment is one of the objectives of punishment; it should never recede to the background in sentencing. In the circumstances of this case, life sentence may not serve such restorative or rehabilitative purposes for this young soul. I shall, therefore, impose a sentence that punishes the offender but also gives him an opportunity of re-integration into society to eke a meaningful life after imprisonment.

[70]. In sum, I set aside the life sentence. In lieu thereof, the appellant will serve 20 years' imprisonment from the date he was first sentenced. It is so ordered. The appeal on sentence succeeds.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 10TH DAY OF NOVEMBER, 2021

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F. GIKONYO M.

JUDGE

In the presence of:

1. Appellant

2. Ms. Cheruto for Kariuki for accused

3. Ms. Torosi for DPP

4. Mr. Kasaso – CA