REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 41 OF 2019

(Appeal arising out of conviction and sentence of Hon. M.N. Osoro (Resident Magistrate) in Kitale

Chief Magistrate's Court Criminal Case (S.O) No. 221 of 2018 delivered on 29th April 2019)

DACKLUS WABWIRE JUMA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, DACKLUS WABWIRE JUMA, faced a sexual offence charge of **defilement of a child** contrary to **Section 8 (1)** as read together with **Section 8 (2)** of the **Sexual Offences Act**. The particulars of the offence were that on the 28th day of December 2018 at [Particulars Withheld] Village within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of PAK, a child aged five (5) years. In the alternative, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars of the offence were that on the 28th day of December 2018 at [Particulars Withheld] Village within Trans-Nzoia County, the Appellant intentionally caused the contact between his penis and the vagina of PAK, a child aged five (5) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted on the main charge and sentenced to serve **life imprisonment**.

The Appellant is aggrieved by his conviction and sentence. He has filed an appeal to this court. In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He convicted that the Prosecution failed to establish the elements necessary to convict him on the charges leveled against him. He lamented that a defective charge was the basis of his conviction hence illegal. He faulted the trial court for failing to consider his defence. He contended that the Prosecution's case was marred with discrepancies and contradictions. He claimed that Articles 49 and 50 of the Constitution were violated. He cited that the sentence imposed on him was harsh going against recent jurisprudence. In the premises therefore, the Appellant urged this court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, both the Appellant and the Respondent (Prosecution) relied on their written submissions in support of their respective rival positions. The Appellant submitted that the omission of the word 'unlawful' rendered the charges defective as the absence of the word evinced the allegations lawful. He added that in the circumstances he was prejudiced as the offence was not disclosed in an accurate and sufficient fashion. He claimed that the evidence of a nanny and PW2's son mentioned by PW2 was critical in conglutinating the evidence of the Prosecution. Since they did not testify, he cast doubt in the evidence of the Prosecution. He raised issue with the medical evidence stating that it was inconclusive. He maintained that the presence of inflammation on the Complainant's private part and failure to hand over the clothes she wore when the offence occurred were insufficient to prove penetration. It was his opinion that he was framed. His perpetuated that defence was credible. Finally, relying on the **Muruatetu decision**, he submitted that the sentenced imposed on him was draconian and thus ought to be placed under reconsideration.

On the part of the State, Learned Prosecutor Mr. Omooria submitted that all the ingredients to a charge of defilement had been sufficiently proved. He stated that the charges were not defective. Be that as it may, the same was curable under **Section 382** of the **Criminal Procedure Code**. He cited that any contradictions, if any, were so minor that they did not go into the root of the entire process. He further added that no Constitutional rights were violated. In any given event, the Appellant has ample opportunity to raise the violations at trial but failed to do so. He further upheld the sentence imposed on the Appellant as legal. He thus prayed that the Appeal be dismissed.

The facts established by the Prosecution and giving rise to the charges are recorded as follows; the Complainant, PW1, a class one (1) pupil at [Particulars Withhed] aged five (5) years old at the time of the offence, was on 28th December 2018 at home. The Appellant who was their herdsboy was within the same vicinity. He was in the employ of PW2 (Complainant's mother) for two and a half (2 ½) years. He also lived within the same compound. The Appellant then escorted the Complainant to his house. It was during the day. The Complainant was clad in

an orange and black dress, black skin tight and coloured panty. While there, the Appellant removed the Complainant's clothes as well as his. He then proceeded to defile her.

Meanwhile, IO (PW2) was at work. She returned home at 7:00 p.m. but did not find the Complainant who came home after five minutes. Unusually, the Complainant expressed sadness. She was muffled. She still had the clothes that she wore. She then opted to change into other clothes. According to PW2, this was unorthodox. She inquired further from PW1. She spotted that the clothes that the Complainant had removed were wet and tainted with a whitish substance. When she examined the Complainant's private parts, she noticed that it was bruised. It was then that the Complainant uttered; "Mommy, *Dougy amenifanyia tabia mbaya*". When inquired about it, the Appellant denied. The Complainant was thereafter taken to Cherangany Nursing Home and later Kitale District Hospital where she received treatment. It was then that the matter was reported at Kitale Police Station.

The Complainant was attended to by Nyongesa Goeffrey (PW3), a clinical officer at Kitale District Hospital. His conclusions were that the Complainant had been defiled. He observed that her labia minora was swollen, her hymen was freshly torn and her cervix was closed. He stated that the Complainant complained of pains in her chest and genitalia when the Appellant defiled her. He presented the P3 form that he filled and signed (PEx.7) as well as the treatment notes (PEx.6).

After the matter was reported to Kitale Police Station, PC Purity Nabwire PW4 commenced investigations. She recorded witness statements and gathered evidence in support of the offence. She observed that semen was visible in the clothes the Complainant wore at the time of the offence. At the time of testifying, the semen appeared as a whitish dried substance. The orange and black dress, black skin tight and colored panty were produced in evidence as PEx.2, PEx.3 and PEx.4 respectively. She produced the Complainant's Birth Certificate, PEx.1. She then preferred charged against the Appellant.

The Appellant was placed on his defence. His unsworn testimony was that he was not aware of the reasons he was arrested and charged with the present offence. He stated that on 28th December 2018, he was working at his employer. He purchased pesticide. He went home at 8:00 p.m. While in the company of his cronies, a stamped ensued. He thus ran away. He was apprehended in the end arrested and charged. He maintained that he was innocent.

This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate's so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses **(See Njoroge -vs Republic [1986] KLR 19).** In the present appeal, the issue for determination by this court is whether the Prosecution established to the required standards of proof that the Appellant committed the offence that he was charged with.

For the Prosecution to sustain the charge of defilement, it must establish that the following three ingredients to the required standard of proof:

1. Age of the Complainant

2. Penetration

3. Identification of the perpetrator

On the Complainant's age, PW1, the Complainant, testified that she was five (5) years old at the time of the offence. Her evidence was corroborated by that of her mother (PW2) who stated that the Complainant was born on 3rd March 2013. Furthermore, the original birth certificate was availed in court. A copy of the same was presented in evidence after it was satisfied that it was a copy of the original. This court thus finds that the age of the minor was ascertained by the Prosecution.

The next ingredient is penetration. Section **2 (1) 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."**

PW1's testimony was that the Appellant took her to his house. He removed her clothes and defiled her. PW2 was also informed by the Complainant that he defiled her. She observed that the clothes she wore were wet. Further observations on PW1 revealed that she had bruises on her genitalia. Upon examination in hospital, the PW3 found that her labia minora was swollen, her hymen was freshly torn and her cervix was closed. The absence or lack thereof of DNA samples did not negate proof of this element. In other words, penetration was proved to the required standard.

On the element of the identification of the perpetrator, PW1 testified that she knew the Appellant who was working for their family as a herdsboy. This was further confirmed by PW2 who testified that the Appellant had worked for him for two and a half (2 ½) years. The offence occurred during the day when PW1 was able to recognize him. Further observation in the line of cross examination by the Appellant to PW2 further confirmed that he was recognizable. The Appellant further admits familiarity by stating that PW2 is behind his arrest as a vendetta. This court sees no reasons to interfere with this finding.

The Appellant raised several grounds in this Appeal. On the claim that the charges were defective, this court finds in the negative. The charges and particulars read out disclosed the offence. He took plea after understanding the charges leveled out. The charges were not equivocal. Be that as it may, the same is curable under **Section 382** of the **Criminal Procedure Code** thereby posing no prejudice against him. He further failed to disclose the nature of Constitutional violations. His defence was unconvincing.

Before penning down, this court feels the need to address the demeanour of two witnesses. The Complainant broke down during her testimony and wept. It was so dire that the trial court was compelled to turn her chair facing away from the Appellant. She was then stood down when she was back on the dock as she was too emotional. PW2 in her upshot testimony broke down and cried. In her words; "He has been like a family member. We trusted him." While being emotional is a natural human occurrence, testifying while breaking down is

indicative of the level of emotional and psychological torture one is placed with when testifying on an offence. It was quite evident that this heinous act was traumatizing to the Complainant and PW2; particularly so because the Appellant had been with them for over two years. According to this court, that agglutinated the evidence of the Prosecution without casting any doubt.

This court further adopts the provisions of **Section 124** of the **Evidence Act** given the fact that the minor was the sole eye witness. It is tenable that the Complainant was telling the truth. She was subjected to a *voire dire*. She was further cross examined by the Appellant. For this presupposition, this court adopts the sentiments of the Court of Appeal in **D W M v Republic [2016] eKLR** that held:

> **"In *Nicholas Mutula Wambua & another versus Republic Mombasa Criminal Appeal No. 373 of 2006 (UR)* this Court when confronted with a similar issue construed Sections 208 and 302 of the Criminal Procedure Code governing trials in the subordinate court and the High Court respectively and arrived at the conclusion that cross-examination of a witness who had given evidence not on oath is permitted by law. The Court approved the view taken by the Supreme Court of Uganda in the *Sula case (*supra) that cross-examination of a child who gives evidence not on oath is meant to test the veracity of such child's evidence. In the *Nicholas Mutula case (supra)* the Court went over the responses given by the child witness both during the *voir dire* examination and in cross-examination of his/her unsworn testimony and then observed thus:-**
>
> ***"But in our evaluation, the answers the child gave during the voir dire were intelligent. He understood that it was wrong to lie. His evidence was coherent;"* and on that account allowed the child's testimony to stand.**

This court finds that indeed the Prosecution established the ingredients of defilement to the required standard of proof beyond reasonable doubt. The Appellant's appeal against the conviction lacks merit. It resultantly fails and is hereby dismissed.

The Appellant was under **the Sexual Offences Act** sentenced to **life imprisonment** by dint of the provisions of **Section 8 (2)**. The court meted out the mandatory minimum sentence imposed therein. In his mitigation, the Appellant stated that he was an orphan. He prayed for a lenient sentence. He however did not show any remorse at trial and on appeal. The Muruatetu decision specifically applies to offences of murder hence the sentence imposed is well within the law. This court therefore shall not interfere with the sentence imposed at trial. The Appeal against the sentence is hereby dismissed. The Appellant shall continue to serve time unless otherwise lawfully ordered.

It is so ordered.

DATED AT KITALE THIS 14TH DAY OF DECEMBER 2021.

L KIMARU

JUDGE