REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 58 OF 2020

ERICK MURIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. S. Abuya SPM

in Meru S.O No. 2 of 2019 on 30/7/2020)

JUDGMENT

1. **Erick Muriuki ('the appellant')** was charged with the offence of defilement contrary to **Section 8 (1) (3)** of the **Sexual Offences Act No. 3 of 2006**. It was alleged that on 6/1/2019 at [Particulars Withheld] Village, in Imenti North sub-county within Meru County, he intentionally and unlawfully caused his penis to penetrate the vagina of **SK ("the complainant")** a child aged 12 years old.

2. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 6 (a) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on the same day and place, he intentionally and unlawfully caused his penis to come into contact with the vagina of SK a child aged 12 years old.

3. After denying the charges, he was subsequently tried, convicted on the main charge of defilement and sentenced to 20 years imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant lodged this appeal setting out 5 grounds of appeal as follows;

a. The trial court erred in law and fact by convicting and sentencing the appellant to serve 20 years imprisonment despite the light used to identify him not having been proved

b. The trial court erred in law and fact by failing to note that the complainant had a mental disability.

c. The trial court erred in law and fact by failing to note that the report of the clinical officer did not prove the complainant's allegation that she had been defiled.

d. The trial court erred in law and fact by failing to consider the provisions of Section 333(2) of the CPC on pre-trial detention.

e. The trial court erred in law and fact by failing to consider the appellant's defence.

5. In his submissions filed on 29/9/2021, the appellant faulted the trial court for sentencing him to 20 years imprisonment without analyzing the insufficient light at the scene used to identify him. He quoted the case of **Maitanyi v R (1986) KLR 198**, on the need to ascertain the nature of light available for identification. To further bolster that point, he cited **Cleophas Otieno Wamunga v R (1989)eKLR**, on the need to examine the evidence of visual identification to ensure it is reliable and free from possibility of error. The case of **Lesarau v R (1988) KLR 783**, was cited to caution the court on the possibility of mistaken identity, even where identification is based on recognition by reason of long acquaintance. He submitted that since the testimony of the complainant on lighting at the scene was contradictory to that of PW3, the allegation that they saw him at the scene of crime was not proved. He faulted the prosecution for failing to call the owner of the kiosk, mama Carol to ascertain whether he was at the kiosk during that time.

6. In faulting the testimony of PW4 for being unclear, he submitted that the evidence of broken hymen was insufficient proof of defilement, as was held in **P.K.W v R (2012) eKLR and R v Jacob Mutegi (2021)eKLR** . He submitted that since the complainant had a mental disability, the prosecution's failure to amend the charge sheet to align with section 146 of the Penal Code, rendered it defective and he should

be acquitted. I must state that Section 146 of the Penal Code is only applicable where the complainant is an adult, and not a child, like in this case. He felt that the prosecution did not prove the ingredients of defilement beyond reasonable doubt and cited **Philip Nzaka Watu v R (2006) eKLR, Stephen Nguli Mulili v R (2014) eKLR** among others in support thereof. He lamented that the trial court failed to take into consideration the period he had spent in custody during trial as provided under Section 333(2) of the Criminal Procedure Code. He submitted that the trial court failed to analyze his defence before declaring it untrue and urged the court to use its powers under Article 23(1) of the Constitution to correct that injustice. He urged the court to set aside the conviction and sentence and set him at liberty.

7. The prosecution's submissions were to the effect that since it had proved the inextricable elements of defilement as outlined in **Moses Mwarimbo Dau v R (2018) eKLR**, the sentence meted out to the appellant was within the law. It submitted that the baptism card produced as Exh.2 proved that the complainant was aged 12 years. It submitted that the evidence of PW1 that she had been defiled was corroborated by PW3 and PW4. It maintained that the evidence by PW1 that it was the appellant who had defiled her was corroborated by PW3, and therefore there was no margin of error as to the identity of the assailant. It concluded that the appeal should be dismissed, as the evidence adduced was solid.

8. The prosecution in advancing its case against the appellant called 5 witnesses in support thereof. **PW1, the complainant** gave unsworn testimony that she attended Gikumene special class. She knew the appellant and even knew his rented house in Gikumene. She knew the appellant because she used to visit her aunt, K at the plot where he lived. She also knew the appellant crushed ballast/kokoto at Gikumene. On the fateful day, she and a neighbour, namely Carol, went to a crusade in church which went up to 4.00 a.m. On their way home, they passed by the kiosk of mama Carol. At the kiosk, they met mama Carol and the appellant, who was eating chips. Mama Carol invited her to eat chips outside the kiosk, where a light glass lamp had been lit. As they ate chips outside, the appellant started touching her breasts and then touched her vagina. She called Carol who did not come. The appellant then held her hands and pulled her behind the kiosk. After he told her to remove her clothes and she refused, he pulled down her trousers and knocked her down. Before she could scream, he held her mouth, inserted his penis into her vagina and defiled her. The appellant escaped when he saw Carol coming. She rose up and wore her trousers then in the morning, she went with Carol to inform her grandmother, LMM. She also informed the mother of Caroline, the kiosk owner. She then accompanied her grandmother to the appellant's wife to inform her. She, her grandmother and the appellant's wife then reported the matter to the police then thereafter proceeded to the hospital for treatment. She was issued with a P3 form dated 7/1/2019(MF1a) and the appellant was arrested. She lived with her grandmother because her mother was deceased.

9. During cross examination, she confirmed that she had met the appellant at the kiosk, and although it was at night, there was a lamp just 2 m away. She confirmed that she was there with Carol, the appellant and mama Carol, though the latter was not a witness to this case.

10. **PW2 LM** testified that she resided in Gikumene and had brought up the complainant, her granddaughter, since she was 3 months old. She knew the appellant, who also resided in Gikumene. On the material day at about 6.00 pm, she was at home when she was informed that the appellant had defiled the complainant. The complainant had gone to a kesha in church at 4.00 pm with one Carol, but they returned home at about 8.30 pm. Carol told her that they go to the kiosk of her mother, but she entered inside to assist her mother. Carol then heard screams from PW1 and when she rushed to check on her, she found PW1 with the appellant, who fled on seeing her (Carol). They came home and Carol told her that the appellant had defiled PW1, who is mentally unstable. In the morning, she took PW1 to the appellant's wife to inform her, then proceeded to Meru police station to report. She also took PW1 to the hospital after which the appellant was arrested.

11. During cross examination**,** she stated that she did not see the appellant on that day, but saw him in the morning. She confirmed that she took PW1 to the appellant's house and that he had asked for forgiveness but she declined.

12. **PW3 Caroline Njeri,** a resident of Gikumene testified that she knew PW1 because she was her neighbour at home. On the material day, they left for church with her child, namely CM, and PW1. They went to her mother's kiosk at Gikumene market, where she and PW1 entered the kiosk and started helping her mother, also a chips vendor, arrange things. They found the appellant, whom she knew, standing outside the kiosk eating chips. Although it was dark, she was able to see the appellant as there was a kerosene lantern lamp inside the kiosk. The appellant called PW1 offering to give her chips. PW1 went out and after a while, she heard noise behind the kiosk. She went outside and found PW1 in some bush 7 metres from the kiosk. PW1 was standing while trying to put on her trousers and the appellant, who was there, ran off. She asked her what was wrong and PW1 said the appellant had removed her clothes, and she took PW1 to her grandmother.

13. **PW4 Dan Wambugu,** a medical officer of health at Githongo, produced PW1's P3 form signed on 8/1/2019 (exh. 1) on behalf of Dr. Ibrahim, who had since been transferred. It was alleged that PW1, aged 13 years had been defiled. On examination, her hymen was broken, there was urinary tract infection and there was no other findings indicated.

14. During cross examination, he stated that the appellant was not taken to the hospital.

15. **PW5 PC Ruth Ngoi** based at Meru police Station, attached at petty crime office testified on behalf of the initial investigating officer, who had since proceeded on transfer. She told the court that on 7/1/2019, the complainant in the company of her grandmother came to make a report of this case. After the witness statements were recorded, she commenced the investigations which culminated into the arrest and charging of the appellant. The baptism card of PW1 showing that she was born in 2007 was produced as exh. 2. She denied either knowing the complainant or the appellant before the incident.

16. During cross examination, she stated that the complainant reported that the incident occurred on 6/1/2019 at 8.00 pm, though she indicated in her statement that it was at 6.00 pm.

17. When placed on his defence, the appellant identified himself as a resident of Gikumene area and a casual labourer whose work was crushing/breaking stones for kokoto, who on the material day left home for church. After church at 1 pm, he went to buy miraa at Gitimbene and stayed there while chewing miraa until 5 pm. At 5.20 pm, he boarded a motor cycle to his home where he continued chewing the remaining miraa, until 1 pm, when he brushed his teeth and slept. He went to bed thereafter and only woken up the following day (Monday) at 6 am, when PW2 came to inform him that she had heard that he was eating chips in a certain hotel with PW1 the previous day(Sunday). He denied either seeing PW1 or entering any hotel on that Sunday. He then took kokoto to Kanyaria AP post and returned home, where he

continued breaking stones for kokoto until 6 pm then showered and slept. On Tuesday, he woke and continued making kokoto until evening when he retired before the night that day when the police came, knocked on his door and told him that they were looking for him. He asked them why because he did not sell alcohol and they informed him that on Sunday he was in a certain hotel with PW1. He was arrested and brought to court to face the criminal charges.

18. During cross examination, he stated that he lived in Gikumene with his wife Fridah Wanja, in a plot with other house and that on the material day he arrived home at 6 pm and found Kagendo, Wanja and Kataka at home. He admitted that he used to see PW1 walking to a day school and that her home and his were like 100 meters apart. On the material day, he went to Nchaure church with his wife Fridah and he did not know Gikumene Rebirth Glory worship church as he was a stranger at Gikumene, since he had only stayed there for 6 months before his arrest. He was arrested 1 week after disagreeing with PW2 because he had forbidden her from selling alcohol on his door step. He knew PW2 on the day he found her on his door step. He had never disagreed or spoken to PW1 before but he saw her going to school, a week before his arrest. He never told PW2 that she had framed him because of alcohol because he had forgotten. He used to see PW3 visit her mother, who was not selling chips but had rented a house in the plot he stayed in. He stated that he had never disagreed with PW3's mother.

Analysis and determination

19. This being a first appeal, the court is duty bound to re-appraise and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See ***David Njuguna Wairimu v R (2010) eKLR.***

20. The issues for determination are whether the offence of defilement was proved beyond reasonable doubt and whether the appellant was properly and legally sentenced.

21. The key ingredients of the offence of defilement are proof of the age of the complainant, proof of penetration and proof that the person before court was the perpetrator of the offence.

22. On age, PW4 produced the complainant's P3 form where her age was indicated to be 13 years while PW5 produced the complainant's baptism card indicating that she was born in 2007. Although neither PW1 or PW2 led any evidence with regards to the complainant's age, I am satisfied on the documentary evidence adduced that the complainant was at the time of commission of the alleged offence aged 13 years old.

23. The next element is penetration which is defined under Section 2 of the Act to mean *'the partial or complete insertion of the genital organs of a person into the genital organs of another person'*.

24. The evidence on record which the trial court relied on to convict the appellant was the complainant's own testimony together with the corroborative evidence of PW2, PW3 and PW4 along with the medical documents adduced therein which I have critically analyzed. It is clear from the P3 form that the hymen was broken and there was urinary tract infection. PW4 classified the degree of injury as harm.

25. In ***Bassita v Uganda S. C. Criminal Appeal No. 35 of 1995*** the Supreme Court of Uganda held that: **"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."**

26. Consequently, it is my finding that the evidence by the complainant that the appellant defiled her proved and established penetration beyond reasonable doubt.

27. On whether the appellant was the perpetrator, I do find the evidence of the complainant, PW2, and PW3 to have identified the appellant to the requisite standards. The account of the complainant how she and the appellant were eating chips outside mama Carol's kiosk, when the appellant started touching her breasts and vagina, then held her hands and pulled her behind the kiosk where he told her to remove her clothes was not credibly challenged. That the appellant pulled down her trousers, knocked her down and before she could scream, he held her mouth, inserted his penis into her vagina and defiled her also remained unchallenged during cross examination. I find that PW1's testimony was corroborated by PW3 who had found her trying to put on her trousers, in the company of the appellant behind the kiosk.

28. It was not in dispute that the appellant and the complainant were neighbors and that the complainant knew him before the incident. From the evidence on record, the offence occurred at night but there was light from a glass lamp which was outside. PW3 stated that there was kerosene lantern lamp inside the kiosk and when the appellant saw her coming to rescue PW1, he ran off. The evidence of PW3 remained the truth as it was not subjected to any cross examination. PW1, PW2, PW3 and the appellant were all known to each other prior to this incident. The appellant admitted that he used to see PW1 going to school while PW3 and her mother lived in the same plot with him. With such evidence, I draw guidance from ***Peter Musau Mwanzia v Republic [2008] eKLR***, where the Court of Appeal expressed itself as follows:

> **"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometimes, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."**

29. I therefore have no doubt in my mind that the appellant was positively recognized as the perpetrator of the offence by both PW1 and

PW3. I say so because the appellant was well known to both PW1 and PW3 at the time. In conclusion, I find that the trial court duly considered the appellant's defence alongside the overwhelming evidence tendered by the prosecution and reached a conclusion that invites no interference from this court.

30. Having established that all the ingredients of defilement were proved beyond reasonable doubt, I find that the conviction of the appellant was safe.

31. On the allegation by the appellant of non-consideration of his defence that he was not at home when the offence is alleged to have happened, I find that the trial court carefully scrutinized his defence and found it to be implausible, because the consistent evidence of PW1 and PW3 placed him on the scene. The appellant did not call any witness to weaken the prosecution's case. When questioned why he did not cross examine PW2 on the alleged disagreement, the appellant stated that he had forgotten to do so. I uphold the trial court that the assertion of bad blood between the appellant and PW2 was an afterthought, because it was raised for the first time during defence.

32. On failure by the prosecution to call mama Carol to testify, this issue has been addressed by **section 143 of the Evidence Act** which provides that no particular number of witnesses shall, in the absence of any provisions of the law to the contrary, be required for proof of any fact. In ***Julius Kalewa Mutungu v Republic (2005) eKLR*****,** the court held that as a general principle, **"the prosecution is granted a discretion whether or not to call specific witness and courts would not interfere with that discretion unless it is shown that the prosecution had an ulterior motive in which event it will be presumed that the witness not called would have given adverse evidence."**

33. The prosecution called 5 witnesses in support of its case and I find that the evidence led by those witnesses was adequate to sustain the charge. Moreover, it would be an act in vanity for the prosecution to call superfluous witnesses just because they had been mentioned by prosecution witnesses called to testify.

34. I now wish to address the ground that the trial court failed to consider the mental disability of the complainant. A person with mental disabilities is defined under Section 2 of the Sexual Offenses Act to mean *'a person affected by any mental disability irrespective of its cause, whether temporary or permanent, and for purposes of this Act includes a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question, was - (a) unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act; (b) able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation; (c) unable to resist the commission of any such act; or (d) unable to communicate his or her unwillingness to participate in any such act."*

35. From the above definition, did the mental disability of the complainant affect her ability to appreciate the nature of the act and its foreseeable consequences? Section 125(2) of the Evidence Act provides that:

> **"a mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them".**

36. I find that although PW1 had a mental disability and could not appreciate the import of taking an oath, that did not bar her from giving evidence. She vividly recounted with clarity and sufficient detail what transpired on the material day. She also recalled the full names of the witnesses as well as those of the appellant.

37. The remaining question now is whether the sentence meted out to the appellant was harsh. **Section 8(3)** of the **Sexual Offenses Act** provides for a minimum jail term of twenty years, which can be enhanced if there are aggravating factors. I note that the appellant took advantage of a mentally disabled child, knocked her down and held her mouth to silence her. I find in the circumstances, the sentence was commensurate with the offence committed, and I have no reason to disturb it.

38. The court is mandated by the provisions of Section 333 (2) of the Criminal Procedure Code to take into account the period spent in custody as the trial proceeded. It is not disputed that the appellant has been in custody from the date he was arrested being 10/1/2019 until the time of his sentence. The trial court merely set the prison term of 20 years imprisonment without stating a commencement date.

39. In conclusion, I tinker with the sentence to the extent that the sentence of 20 years handed to the appellant shall start running from 10/1/2019 being the date of his arrest.

DATED SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF DECEMBER, 2021

Patrick J.O Otieno

Judge

In presence of

Mr. Maina for the prosecution

Appellant in person.

Patrick J.O Otieno

Judge