



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO. 50 OF 2020**

**EVANS MAKOKHA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original sentence in Criminal Case No. 14 of 2019 in the*

*Senior Principal Magistrate's Court – Kimilili Law Courts by Hon. IG Ruhu (RM) on 06/03/2020)*

**JUDGMENT**

1. Evans Makokha, the Appellant herein, 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 were that on 13<sup>th</sup> March, 2015 at [particulars withheld] village in Bungoma North District within Bungoma County, he unlawfully and intentionally caused his penis to penetrate the vagina of MW (*name redacted*), a child aged 8 years.
2. He faced 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** in which it was alleged that on diverse dates between 1<sup>st</sup> January, 2019 to 14<sup>th</sup> January, 2019 at [particulars withheld] village, Kimilili sub-county within Bungoma County, he unlawfully and intentionally caused his penis to come into contact with the vagina of MW, a child aged 8 years.
3. In sum, the prosecution case was that on the material day, the Appellant went to the home of the Complainant as he often did, being the Complainant's Uncle by virtue of being her Step-mother's brother. On this particular day, he followed the Complainant into the house and he instructed her to climb on top of a chair. He removed her clothes, consisting of a skirt, long trouser and a T-shirt. The Appellant then removed his own long trouser and defiled the Complainant. When the Complainant's step-mother returned that evening, the Complainant reported to her what the Appellant had done. The step-mother escorted the Complainant to Makhonge Hospital and thereafter to Kamukuywa Police Station where they reported the matter. The Appellant was subsequently arrested on 18<sup>th</sup> January, 2019 and charged as stated above.
4. In his defence, the Appellant gave unsworn testimony and called no witnesses. He denied committing the offence and urged that he did not even know the Complainant.
5. At the end of a full trial, the Appellant was convicted on the alternative charge of indecent act with a child, and sentenced to twenty-five (25) years' imprisonment.
6. The Appellant was disgruntled with the outcome and filed a memorandum of appeal against both the conviction and sentence imposed by the trial court. He advanced seven (7) grounds, the gist of which was that: he was not informed of his right to representation; the evidence led by the Prosecution was speculative, insufficient, contradictory and based on conjecture; and by not calling vital witnesses, the Prosecution failed to establish its case against him to the required standard.
7. He later filed amended grounds of appeal in which he stated that he wished to appeal only against the sentence. He asserted that the sentence was harsh considering the evidence adduced during the trial. In his mitigation, he stated that he is the sole breadwinner of his family, his wife having passed away leaving him with young children. Further that he suffers from high blood pressure for which he is currently under medication. Therefore, that the court should allow his appeal and give him a lenient sentence which will enable him to serve and go back home to care for his children.
8. The undated submissions filed by the Appellant also speak to the conviction and sentence in Criminal Case No. 13 of 2019, which is not subject of this appeal. He seeks that the sentence imposed against him in that case, in which he had also been charged with the offence of defilement, be ordered to run concurrently with the sentence imposed in Criminal Case No. 14 of 2019, which is the subject of this appeal. There is however nothing on record to indicate that there was an appeal filed in respect of Criminal Case No. 13 of 2019. As such, I will restrict myself to the instant appeal which arises from Criminal Case No. 14 of 2019.

9. The State opposed the appeal in its entirety through written submissions dated 16<sup>th</sup> July, 2021 in which it stated that all the ingredients of the offence were adequately proved beyond reasonable doubt. Further that the sentence imposed against the Appellant was lenient taking into account the circumstances of the offence. The Prosecution asked the court to dismiss the appeal and enhance the sentence to life imprisonment.

10. This being the first appeal, I have re-considered and re-evaluated the evidence on record bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion, but to make my own findings and draw my own conclusions in line with **Okeno vs. Republic [1972] EA 32**.

11. There are three critical ingredients needed to prove the offence of defilement namely, the age of the Complainant, proof of penetration and positive identification of the assailant as highlighted in the case of **Dominic Kibet Mwareng vs. Republic [2013] eKLR**.

12. Age is a critical component in proving the offence of defilement because first, it helps in determining whether the Complainant was a minor at the time of the offence and second, to determine the sentence to be imposed upon conviction. Commenting on the requirement of proof of age, the Court of Appeal in **Martin Nyongesa Wanyonyi vs. Republic Criminal Appeal No. 661 of 2010** cited and applied the case of **Kaingu Elias Kasomo vs. Republic Criminal Appeal No. 504 of 2010** in which it was observed thus:

**“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.** emphasis mine.

13. The Complainant, who testified as PW1 did not state her age in her testimony. However, her step-mother PW2 Lydia Nanjala, testified that the Complainant was aged eight (8) years at the time and was soon to be nine (9) years old. Her testimony was corroborated by that of PW3 Catherine Akiru, the Clinical Officer who examined the Complainant. She produced an age assessment report filed by one Dr. Kamau, her colleague at Kimilili Sub-County Hospital, with whom she had worked for a period of nine (9) years and was therefore conversant with his handwriting and signature. The report placed the Complainant between nine (9) and ten (10) years of age based on her dental formula. In view of the age assessment report which is an accepted mode of proof of age, I am convinced that the age of the Complainant was conclusively proved to the required standard.

14. The second limb is on proof of penetration. **Section 2** of the **Sexual Offences Act** defines ‘penetration’ as constituting the partial or complete insertion of the genital organs of a person into the genital organs of another person.

15. In her testimony, the Complainant narrated what transpired on the material day. The relevant part of her testimony in her own words on record, is as follows:

*“He also removed his clothing “akaingiza kitu yake kwa yangu, kitu yake inatumika kukojoa, kitu yangu pia inatumika kwa kukojoa (He inserted his penis in my vagina)*

*I further wish to state that mjomba made me stand on a chair, while he inserted his penis in my vagina. He was also standing facing me.”*

16. On her part, PW2, the Complainant's mother testified that upon returning home from the market on the material day, the Complainant had informed her that *“her uncle held her and inserted his fingers in her vagina”*. That she examined the Complainant's genitalia and noted that it had no bruises. She later escorted the Complainant to Makhonge Health Centre and later to Kimilili Sub-County Hospital where a P3 form was filled. She however stated that she had no comment in respect of the insertion of the penis urging that perhaps the Complainant had been scared of confiding in her in that respect.

17. The testimony of PW3 the Clinical Officer also spoke to the issue of penetration. She stated that the Complainant was presented with a history of having been defiled by a person known to her on several occasions. She produced a treatment book which indicated that on examination, the Complainant's external genitalia were normal. Further examination revealed a missing hymen. She was escorted to the lab for a Venereal Disease Research Laboratory (VDRL) test and a HIV test, both of which were negative. A Urine test was also conducted and revealed blood cells, pus cells and bacterial cells. The Complainant was then put on anti-biotic medication. According to the treatment book, the minor was first examined on 17<sup>th</sup> January, 2019.

18. PW3 further testified that she filled a P3 form in respect of the Complainant on 20<sup>th</sup> January, 2019 upon examining her. She stated that an examination of the Complainant's genitalia revealed normal external genitalia and a missing hymen. VDRL and HIV tests were negative, but her urine had pus and bacterial cells. In her additional remarks, she noted that the Complainant *“had penetrative sex to lead to torn hymen”*. An examination of the P3 form reveals that on the date when the Complainant was examined and the form filled, six (6) or seven (7) days had lapsed since the date of the offence.

19. Speaking to circumstances where medical examinations are conducted after the lapse of a considerable amount of time from the date of the offence in the case of **Mark Oiruri vs. Republic Criminal Appeal 295 of 2012 [2013] eKLR**, the Court of Appeal (Onyango Otieno, Azangalala & Kantai JJ. A.) opined thus:

**“...and the effect that the medical examination was carried out on her on 16<sup>th</sup> November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. 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...”**

20. To my mind, the circumstances of the case cited above lend themselves to the present case. Additionally, I find that the Complainant narrated the ordeal with specificity as to what transpired including what she and the Appellant wore on the material day, how the Appellant undressed her and then himself and how he proceeded to, in her own words, “*kuingiza kitu yake kwa yangu*”. She further clarified that “*kitu yake inatumika kwa kukojoa*”, (his thing is used for urinating). Additionally, she stated that the Appellant was standing facing her during the ordeal, while she stood on a chair onto which she had climbed upon the Appellant’s instruction. This, coupled with the presence of pus cells and bacterial cells and the missing hymen, and the testimony of PW1 and PW2, leads to a safe conclusion that the Complainant had engaged in sexual activity prior to her being examined. In my considered view, the evidence of penetration was overwhelming and proved the act of penetration to the required standard.

21. On whether the Appellant was positively identified as the assailant, I note that this is a case of recognition as opposed to identification. Despite the Appellant’s defence that he had no knowledge of the Complainant, the evidence on record demonstrates that the Appellant was someone well known to the Complainant. In her testimony in examination in chief, the Complainant testified that:

*“...I left school for home where I met “mjomba” he is called Makokha...”*

*Mjomba Makokha was known to me prior to the incident. He lives in [particulars withheld]. I had met Mjomba Makokha prior to the incident. I met him when he visited our home.”*

22. The evidence of the Complainant’s step-mother PW2 further lent credence to this recognition. In her testimony in examination in chief, she stated that Evans Makokha, the Appellant herein, is her biological brother and that the Complainant had informed her that he had held her and inserted his fingers in her vagina. She went on to state thus:

*“Evans lives in [particulars withheld] His home to my home is roughly 1 hour walk on foot. He used to visit us (myself and my sister at Matisi) so my brother would visit us there.*

On cross-examination by the Appellant, she stated thus:

*I escorted them to the hospital the same day you came to construct the house. In fact, we met you on the way. Coming to construct.”*

23. It is now well established that evidence of recognition is stronger than that of identification, because recognition of someone known to one is more reliable than identification of a stranger. Additionally, the offence in the instant case occurred during daylight and the Complainant was therefore able to identify and recognize the Appellant as the perpetrator of the offence. I am therefore satisfied that there was proper identification by recognition. (See - **Republic vs. Turnbull and others [1976] 3 All ER 549**).

24. The upshot of the foregoing is that in my considered opinion, the evidence led by the Prosecution would have been sufficient to sustain a conviction against the Appellant not only on the alternative charge of indecent act with a child but also on the main charge of defilement. As such, I find that the conviction in respect of the charge of indecent act with a child was proper.

25. Under **section 354(3)(b)** of the **Criminal Procedure Code, CAP 75**, in an appeal against sentence as in the present case, the High Court has power to increase or reduce the sentence or alter the nature of the sentence. Upon conviction on the alternative charge of the offence of indecent act with a child, the Appellant was sentenced to twenty-five (25) years’ imprisonment.

26. Under **section 11** of the **Sexual Offences Act**, upon conviction for the offence of indecent act with a child, one is liable to imprisonment for a term of not less than ten (10) years. In the circumstances of this case therefore, especially owing to the fact that the evidence led by the Prosecution was sufficient to sustain a conviction on the main charge of defilement, I find no reason to interfere with the sentence imposed upon the Appellant by the trial court.

27. The upshot of the foregoing is that the appeal against sentence is lacking in merit. The sentence imposed upon the Appellant was appropriate in the circumstances of the case and is left to stand. From the foregoing, this appeal must fail and is consequently dismissed.

**DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 1<sup>ST</sup> DAY OF DECEMBER, 2021.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Appellant in Person.**

**In the presence of.....State Counsel.**