REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 34 OF 2019

ALBERT MIGIRO MOSE ALIAS NYAKUNDI KISISI.....APPELLANT

VERSUS

THE REPUBLIC.....PROSECUTOR

{Being an Appeal against the Judgement of Hon. C. W. Waswa - RM Nyamira dated and delivered on the 21st day of August 2019 in the original Nyamira Chief Magistrate's Court Sexual Offence No. 11 of 2017}

JUDGEMENT

The appellant herein was charged with Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act and in the alternative with committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

The particulars of offence in the main charge were that on the 20th day of February 2017 at [particulars withheld] trading centre in Manga Sub-county within Nyamira County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of ZNB a child aged 15 years.

In the alternative charge it was alleged that on 20th day of February 2017 at [particulars withheld] trading centre within Manga Sub-county he intentionally and unlawfully touched the vagina of ZNB a child aged 15 years with his penis.

The appellant pleaded not guilty to the charge but after considering the evidence brought before him the trial Magistrate found that although the prosecution did not prove any of the above offences there was evidence to prove the lesser offence of sexual assault contrary to **Section 5 (1) (a) (i) as read with Section 5 (2) of the Sexual Offences Act.** He therefore convicted the appellant for that offence and sentenced him to imprisonment for a term of four years.

Being aggrieved the appellant preferred this appeal on the following grounds: -

"1. The learned trial Magistrate erred in law and fact by sentencing the appellant with defective charge sheet.

2. That the learned trial Magistrate erred in law and fact in convicting the appellant of the offence of defilement not withstand that the evidence before the trial court, when properly analysed and evaluated did not support conviction.

3. That the trial magistrate erred in law and fact by failing to a ford the appellant a fair trial (sic).

4. That the learned magistrate erred in law and fact in convicting the appellant without considering his mental status.

5. That the learned trial magistrate erred in law and fact by not finding that the prosecution had not proved its case beyond reasonable doubt.

6. THAT the learned trial magistrate erred in law fact in convicting and sentencing the appellant on insufficient evidence.

7. That the conviction and sentence by the learned trial magistrate was unfair and unjust to the appellant.

8. That the learned trial magistrate erred in law and fact in putting the appellant on his defence without the evidence from the arresting or investigating offence (sic).

9. That the learned trial magistrate erred in law and fact in by giving a sentence which was harsh and even the appellant

never committed the alleged offence.

10. That the learned trial magistrate failed to appreciate the prosecution case was riddled with contradictions.

11. That the trial magistrate erred in law and fact by failing to evaluate, analyse and/or prove defilement."

The appeal was canvased by way of written submissions. Mr. Moracha, Learned Advocate for the appellant poked holes in the evidence of the prosecution witnesses and submitted that the evidence was full of contradictions and wondered how the trial Magistrate believed it. He also submitted that it was fatal for the trial Magistrate to sentence the appellant without a medical report or birth certificate proving the age of the victim. He prayed that the appeal be allowed and the appellant be acquitted.

On his part, Mr. Majale, Learned Senior Prosecution Counsel, conceded the appeal on the ground that **Section 200 (3) of the Criminal Procedure Code** was not complied with yet the trial was conducted different Magistrates. He submitted that since the section is couched in mandatory terms this court ought to allow the appeal but order a retrial in the interest of justice noting that the victim was a minor and the nature of the offence was grave.

I have perused the court record both original (handwritten) and typed and it does not reveal that the case against the appellant was heard by different Magistrates. The prosecution called only three witnesses, the victim, her mother and a police officer all of whose evidence was recorded by Hon. Waswa as is evidenced by the handwriting. With due respect to Mr. Majale, there was therefore no cause to comply with **Section 200 (3) of the Criminal Procedure Code** and his concession to the appeal on that ground cannot stand.

It was the trial Magistrate's finding that it was proved that the appellant penetrated the vagina of the complainant. However, he explained in the judgement that he could not convict the appellant for the offence of penetration because her exact age was not proved. In his own words: -

"As stated above, the critical ingredients for the offence of defilement are the age of the victim, proof of penetration and identification of the assailant. I have already made a finding that the actual age of the victim was not proved beyond reasonable doubt. Hence, I cannot convict the accused person with the offence of defilement contrary to Section 8 (3) of the Sexual Offences Act. I hereby acquit the accused person under Section 215 of the Criminal Procedure Code for the offence of defilement."

He then moved onto the alternative charge and held: -

"I already made a finding in this judgement that the prosecution had proved the act of penetration. The definition of indecent act as described under Section 2 of the Sexual Offences Act restrains me from convicting the accused person under Section 11 (1) of the Sexual Offences Act. This is because penetration is not an ingredient for the offence of indecent act. The definition of indecent act expressly states that penetration does not amount to an indecent act. Justice Makau in the Muhatia case (supra) holds a similar view.

In John Irungu v Republic [2016] eKLR the Court of Appeal held that penetration having been proved the appellant could not be convicted of committing an indecent act with a minor.

My hands are tied by the law and I therefore acquit the accused person for the offence of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act."

He then exercised the power bestowed upon the court under **Section 179 of the Criminal Procedure Code** to convict the appellant for the lesser offence.

It is my finding that he fell into error. I have considered and re-evaluated the evidence in the court below as I am bound to and my finding is that the charge for which the appellant was convicted although it indeed is a minor offence to defilement was not proved at all. **Section 5 (1)** of the **Sexual Offences Act** states: -

"5 (1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life."

The offence of sexual assault is committed where any person unlawfully penetrates the genital organ of another person with **(i) any part of the body of another or that person or (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purpose or;**

> **(b) where the person manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other persons' body."**

None of the above acts were proved as to warrant a conviction for that offence. In fact, contrary to the trial Magistrate's finding penetration was not proved at all as there was no evidence that the appellant inserted his genital organ into the genital organ of the complainant. The words used by the complainant were that the appellant defiled her. **"Defiled"** is a technical term and she should have in her own words narrated what the appellant did to her and left it to the court to determine whether or not defilement was proved. In the case of **Muganga Chilejo Saha v Republic [2017] eKLR** the Court of Appeal cautioned trial Magistrates from using technical words such as **"he defiled"** as the same cannot be attributed to children. The court stated: -

> **"Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "*alinifanyia tabia mbaya*", (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "*he pricked me with a thorn from the front part of this body.*", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "*he inserted his "dudu" into my "mapaja"*, (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "*he used his munyunyu*", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M M v R Voi H.C Cr. App. No. 35 of 2014, EMM V R Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her."**

Secondly, the trial Magistrate fell into error for finding that since the exact age of the complainant was not proved he could not find the appellant guilty of defilement. It is now trite that the age of the victim can be proved by the evidence of her mother or even herself and that even the apparent age will suffice. In this case therefore the trial Magistrate could have relied on the evidence of the complainant's mother that she was born in 2002 and her own evidence that she was 17 years old to deduce her age at the material time, unless of course he did not believe they were telling the truth. He could also have relied on his own assessment of or what he approximated to be her age (apparent age). **(See Maripett Loonkomok v Republic [2016] eKLR** where the court held: -

> ***"We can only reiterate what has been said before that at a certain age and in this day and age a child of a certain age bracket is able to give his or her age accurately.***
>
> ***The complainant was a pupil in a boarding primary school. So that her statement that she was 13 years in 2012 must be taken to be accurate. She repeatedly stated that she was born in 1999."***

See also **Simon Mwande v Republic Court of Appeal Kisumu Criminal Appeal No. 244 of 2012 (ur)** where the court stated: -

> ***"Apart from the testimony of the girl herself as to her age, there was the evidence of her mother and that of the medical officer all to the effect that the complainant was eight years old when she was defiled. It will always be preferable that the prosecution produces a document in the form of a birth certificate or baptismal certificate to help in ascertaining the age of a complainant. This is more poignant because the imprisonment terms provided by the various subsections of Section 8 of the Sexual Offences Act No. 3 of 2006 are dependent on the ages of the complainants. It will however be noted that the said Act adopts a definition of a child in the Children's Act and by Section 2 thereof "age" is defined as: -***
>
> > ***"……where a child's age is not known means the apparent age……."***
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> ***So the actual age does not have to be proved. It will do if apparent age is proved.* (Paul Odhiambo Mbola v Republic Kisumu Criminal Appeal No. 16 of 2014 (ur)"**

While **Section 179 of the Criminal Procedure Code** gives a court power to convict on a lesser charge, the fact that the exact age of the complainant was not proved was not on its own a good reason for convicting the appellant on the charge of sexual assault. The prosecution ought to have proved the ingredients of that lesser offence which in my finding they did not do at all. I agree with Counsel for the appellant that the charge against the appellant was not proved beyond reasonable doubt. Accordingly, I allow the appeal, quash the conviction and set aside the sentence and further order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered in open court this 13th day of February 2020.

E. N. MAINA

JUDGE