REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 47 OF 2019

JC.....APPELLANT

-versus-

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. J. O. Alambo Resident Magistrate in Kehancha Magistrate's Court Criminal Case No. S. O. No. 4 of 2019 delivered on 17/6/2019)

JUDGMENT

1. The Appellant herein, **JC,** 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. He also faced an alternative count of *committing an indecent act with a child.* The Appellant denied both counts.

2. The particulars of the offence of defilement were that '*on 3rd day of February 2019 at [particulars withheld], intentionally caused his penis to penetrate the vagina of E.R. a girl aged 6 years*'.

3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.

4. Four witnesses testified in support of the prosecution's case. **PW1** was the complainant one **E.R. PW2** was a Clinical Officer attached to Ntimaru Sub-County Hospital. The mother of the complainant who was also the wife of the Appellant testified as **PW3**. **PW4** was the investigating officer one **No. 118984PC (W) Magdalene Kibe** attached to Kehancha Police Station. The Appellant appeared in person during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court except for the PW1 whom I will refer to as '**the complainant'**.

5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant gave an unsworn defence without any witness. Thereafter the court rendered its judgment on 11/06/2019 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to 50 years' imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant timeously preferred an appeal by filing a Petition of Appeal on 26/06/2019. The Appellant raised the following 4 grounds of appeal: -

a) That I pleaded not guilty to the charge herein.

b) That the trial court erred in both law and facts by not observing that I was charged with a defective charge since the complainant herein is my daughter.

c) That the trial court erred in both law and facts by meeting a harsh and excessive or defective charge sheet.

d) That the trial court erred in both law and facts by meeting a harsh and excessive or defective charge sheet.

7. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant complied. He submitted that the offence was not proved as there were contradictions on the date the offence was allegedly committed which were not settled, penetration was not proved and the charge was defective. The Appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.

8. **Mr. Kimanthi** Senior Principal Prosecution Counsel opposed the appeal and submitted that the offence was proved beyond any

peradventure. He prayed that the appeal on conviction be dismissed.

9. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions. The trial court properly captured both the prosecution and the defence evidence which evidence I incorporate as part of this judgement by reference.

11. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence. I will consider each of them separately

(a) On the age of the complainant:

12. The age of the complainant was not contested in this appeal. An Age Assessment Report was produced by PW2. The report settled the age between 6 and 7 years old. I hence find and hold that the age of the complainant was rightly proved and the complainant was a minor of tender age within the meaning of the law.

(b) On the issue of penetration:

13. **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.***

14. This position was fortified in the case of **Mark Oiruri Mose vs R (2013) eKLR** when 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….***
>
> (emphasis added).

15. Later the Court of Appeal, then differently constituted, in the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** held as such on the aspect of penetration:

> ***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.***

16. Penetration was hotly contested. The Appellant contended the complainant used the word '*ujinga*' instead of sex. To him, the court erred in translating the word to mean a sexual act. It is true the complainant used the word '*ujinga*' in her testimony. She tendered her evidence in Kiswahili language. She stated as follows: -

> **…. Baba alinifanyia ujinga. Alinishika akanitoa nguo akaniangusha kwa kitanda (the child is crying but calm) ……**

17. In analyzing the evidence, the court stated as follows: -

> ***I take judicial notice that in this area, children describe defilement with words such as ujinga and tabia mbaya. See the case of Lawence Kamau Nganga v. Republic (2017) eKLR.***
>
> ***My finding is that the minor's choice of words to describe what happened to her is commensurate with a 6 year old understanding of defilement and it is enough for the court to find that she was defiled…..***

18. The court, rightly so, was alive to how minors described sexual activities within its geographical area. The court was therefore within the law in taking judicial notice that the words '*ujinga*' and '*tabia mbaya'* as used by minors to mean sexual activities within the Kuria community.

19. I have also noted the context within which the word '*ujinga*' was used. The complainant described the '*ujinga*' to mean the act by the Appellant of holding her, undressing her and lying her on the bed.

20. When the complainant was cross-examined by the Appellant she firmly stated that *'you slept with me on 4th….'*

21. PW3 was not at home when the alleged act took place. When she returned, she found the complainant standing while shivering. She asked her what was wrong and the complainant told her that the Appellant had done '*bad things'* on her private parts. In disbelief, PW3 observed the complainant's private parts. This is what she found out: -

> **…. There was watery discharge like mucus. She left while pulling up the under pant and I removed it….. The child was walking normally but feeling pain on the waist….**

22. PW2 examined and treated the complainant. On examination of the vagina PW3 noted bruises on the *labia minora* and the hymen was broken. PW2 noted that he would have made more observations but the complainant had changed her clothes and taken bath before going to the hospital.

23. Going by the narration by the complainant coupled with the evidence of PW2 and PW3 and to the contents of the treatment notes and the P3 Form, I find no difficulty in holding, which I hereby do, that penetration into the complainant's vagina by a penis was proved.

c) <u>On whether the Appellant was the perpetrator:</u>

24. The Appellant vehemently denied being the assailant and attacked the evidence of the prosecution on several fronts. He contended that the evidence was contradictory and not believable, that the charge was defective and that he was framed by PW3.

25. The witnesses testified before the trial court which observed their demeanors. The court considered the totality of the evidence alongside the defence and was satisfied that the Appellant had been placed as the assailant. The trial court gave its reasons for such belief. I have as well reviewed the evidence on record. I did not come across any meaningful contradictions as alleged. If anything, the date of the offence was clarified by PW2, PW3 and PW4. Apart from that aspect, there is nothing meaningful on record challenging the demeanor of the witnesses and that is why the trial court believed the witnesses. As an appellate Court I am called upon to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to my own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and I must give allowance for that.

26. As to whether the Appellant was framed by PW3, the Appellant cross-examined PW3 on the issue. PW3 denied and stated that she had never had any issues with her husband, the Appellant. She also stated that to her knowledge the Appellant had not slept with any other of their children save the complainant. At the time PW3 testified in court she was indeed staying with the Appellant at home. She vehemently rejected the insinuation that she was at loggerheads with the Appellant for whatever reason.

27. The trial court considered the defence. It rejected the Appellant's position that the case against him was a fabrication. Without attempting to shift the burden of proof to the Appellant, I note that the Appellant gave an unsworn defence. He was indeed well within his right. The prosecution was however denied the opportunity to interrogate, by way of cross-examination, the defence which the Appellant gave at length.

28. The Appellant went into great details in demonstrating bad blood between PW3 and himself. He *inter alia* stated that PW3 was using the case to get a divorce. Having re-evaluated the defence against the prosecution's case I find that no doubt was raised by the defence. The defence was rightly rejected.

29. On the defectivity of the charge, the Appellant contended that the appropriate charge was incest and not defilement. The trial court also noted as such in its judgement. On my part I do not see any prejudice that was occasioned to the Appellant in being charged with the offence of defilement instead of the charge of incest. I have two reasons. One, the law allows such a scenario. **Section 186** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya (as replaced on the enactment of the **Sexual Offence Act**) states as follows: -

> ***When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.***

30. The foregone can only mean that one may be charged with defilement and if the court forms an opinion that the accused person is not guilty as charged then it may consider if another offence was committed under the **Sexual Offences Act**. In other words, the accused person can only be considered for another sexual offence if the one charged with is not proved.

31. The other reason is that both offences (incest and defilement) are sexual offences in nature. The ingredients of those offences are similar save that in the case of incest the relationship between the accused person and the victim must be proved. Further, given the courts discretion in sentencing the differences on the sentences between the offence of defilement and the offence of incest is no longer an issue. (See the Supreme Court in **<u>Francis Muruatetu & Another -vs- Republic 2017 eKLR</u>** and the Court of Appeal in **<u>Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR)</u>**.

32. Having reconsidered the evidence, I am satisfied beyond any peradventure that it is the Appellant who beastly and sexually assaulted the complainant.

33. The trial court therefore rightly found the Appellant guilty as charged. He was lawfully convicted. The appeal on conviction is hereby dismissed.

34. On **sentence**, the Appellant was to be sentenced under **Section 8(2)** of the **Sexual Offences Act** to 50 years' imprisonment. The court called for a Pre-Sentence Report. It was also guided by the **<u>Francis Muruatetu</u>** case (supra), the age of the complainant and the relationship between the Appellant and the complainant. The court further noted that the Appellant was the very person who was take care of the

complainant and that it was a case of breach of trust. The court granted a deterrent sentence.

35. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

36. From the record, I do not see how the sentencing court erred in exercising its discretion. I am as well aware that the Appellant is entitled to one-third of the term on remission. The sentence is commensurate to the nature and gravity of the offence. The appeal on sentence is also dismissed.

37. The upshot is that the entire appeal is unsuccessful and is hereby dismissed.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 17th day of February, 2020.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Joseph Chacha the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant