REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO 13 OF 2018

JOEL MUIRU KARIUKI..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Appeal from original conviction and sentence (Hon. M.O Okuche, SRM), dated 15th December, 2016 in criminal case No. 123 of 2015 at Kajiado)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act No 3 of 2006. Particulars were that on the 22nd day of August 2015 in Kajiado South District, within Kajiado County, intentionally caused his private organ to penetrate the private organ of WWT, a child aged 6 ½ years.

2. The Appellant faced an alternative charge of causing an indecent act contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars being that on the 22nd day of August 2015, at about 11am in Kajiado South District, within Kajiado County, intentionally touched the private parts of WWT, a child aged 6 ½ years with his private organ.

3. The appellant denied the offences and after a trial in which the prosecution called 6 witnesses, and the defence evidence, the trial court found him guilty of the main count, convicted, and sentenced him life imprisonment.

4. Aggrieved with the conviction and sentence, the Appellant lodged a petition of appeal raising the following grounds, namely:

> ***1. That the trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant and that the ingredients of the offence were not proved;***
>
> ***2. That the trial court erred in fact and law by convicting the Appellant when investigations were not conclusive;***
>
> ***3. That the trial court erred in law and fact in that the prosecution did not prove that there was penetration;***
>
> ***4. That the trial court erred in law and fact by dismissing the Appellant's defence.***

5. The Appellant prayed that his appeal be allowed, conviction quashed and sentence set aside. During the hearing of the appeal, Mr. Shikoli, learned counsel for Appellant, relied on their written submissions dated 22nd February 2019 and filed on 25th February 2019. Counsel added that ***voire dire*** explanation was not conducted on PW2. With regard to PW3, counsel submitted that there was no evidence on record that questions were put to her and, therefore, the purpose of the examination was not established.

6. Regarding identification counsel submitted that both PW2 and PW3 failed to identify the attacker, either by name or description. According to counsel, PW2 and PW6 mentioned that the attacker was a son of ***Mkorino,*** but the prosecution failed to provide proof through which PW2 alleged to have identified the defiler. He also argued that the photos which the witnesses were said to have used to identify the attacker were not produced. He submitted that the attacker was not positively identified since PW2 and PW3 did not give any description, yet said that they knew him by appearance.

7. Counsel further argued that even though the trial court stated that PW3 was intelligent, it did not interrogate whether the witness understood the meaning of an oath, which is the purpose ***voire dire*** is intended to achieve. He urged this court to allow the appeal.

8. Mr. Meroka, Learned Principal Prosecution counsel, opposed the appeal and supported conviction. He also relied on their written submissions filed on 18th February 2019.

9. According to learned counsel, the ingredients of the offence were proved. He submitted that the age of the minor was established through a birth certificate. He also submitted that there was proof of penetration as shown by evidence of PW1 and corroborated by that of PW5.

10. On the identification of the attacker, counsel submitted that the victim graphically identified the perpetrator who was a neighbour and a ***Mkorino***. According to Counsel, the offence was committed during the day and there was communication between the attacker and the victim which was corroborated by the evidence of PW2 and PW3. He also submitted that the record of the trial court shows that *v**oire dire*** was conducted.

11. On the solemnity of the oath, he submitted that the witnesses confirmed that lying is a sin, which means they understood the essence of telling the truth. In Counsel's view, the description given by PW2 by a person of that age was sufficient and failure to give a name was not fatal given the age of the minor.

12. Regarding sentence, Mr. Meroka did not purport the sentence meted out. According to him, the sentence of life imprisonment though lawful, was excessive in view of the current jurisprudence, and left it to this court to met out any other sentence it deems appropriate.

13. I have considered this appeal, submissions by counsel for the parties and the authorities relied on. This being a first appeal, it is the duty of this court as the first appellate court to reanalyze, reconsider and reassess the evidence and draw its own conclusions on that evidence. The court should however bear in mind, that it did not see witnesses testify and give due allowance to that.

14. In **Kiilu v Republic** [2005]1 KLR 174, the Court of Appeal held that:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

15. **PW1 GWT,** mother to the victim, testified that the victim was born in 2008; that on 22nd August 2015, between 1pm and 2pm, she got a call from her son, GN informing her that the minor was passing blood. She sent a boda boda rider who went and brought the minor to her shop. She took the minor to Loitokitok District Hospital where she was examined, and the doctor confirmed that she had been defiled. She was admitted in hospital.

16. The witness informed her husband who reported the matter to the police. The witness told the court that when she asked the victim who had attacked her she told her that she had been defiled by a ***Mkorino*** person who was married. She told the court that the ***Mkorino*** was their neighbour and the he had tricked her to bring for him airtime. The minor told her that the man asked the minor to accompany him to the house to give her the money for buying airtime. When they reached his house, he covered he mouth and defiled her. The witness told the court that she had known the defiler who is their neighbour.

17. **PW2 WWT,** a seven years old minor, and the victim, testified that on 22nd August 2015, she was at home with her brothers watching TV. She then went out to play with a friend called L. the accused whom she knew by appearance but not by name called her to go and buy him airtime. He told her that he did not have money with him and asked her to accompany him to his house to get money. When they reached the house, he closed the door, removed her pants, blocked her mouth and defiled her. He then threatened to beat her if she revealed what had happened. He asked if he could buy her anything but she declined. He opened the door and she left. When she reached her home, she went to the toilet and it was when she noticed that her skirt was blood stained. She informed her brother that she was passing blood stained urine. The brother called their mother who sent a person to pick her. Her mother took her to hospital where she was admitted. She told the court that the person who defiled her was the one in court.

18. **PW3 JS,** also a minor aged 9 years, told the court that she and PW2, were sent by mama Alex to go and buy beans. On the way they met the complainant and went up to their gate. The accused requested to send them to buy him airtime. PW2 followed him. she said that she knew the accused by appearance. He lived with them in the same village. The person was putting on a white cap. Later, PW2 came to their house knocked but left without saying anything. In cross-examination, the witness told the court that the Appellant wanted to send PW2 to buy him airtime.

19. **PW4 John Mutuku Gitonga,** a Clinical Officer at Newtresh at Loitokitok District Hospital, told the court that he knew Dr. Mutiso, had worked with him and that he was familiar with his handwriting and signature. He testified that on 22nd August 2015 Dr. Mutiso examined PW2 who had a history of defilement. There were blood clouts on the skirt and underwear; cut wound on the left leg and a tear on the clitoris with bleeding.

20. The diagnosis was that she had been defiled and she was put on ARV drip. The degree of injury was assessed as harm. Dr. Mutiso filled the P3 form and signed it. He also filled Post Rape Care Form. He produced the P3 form as PEX 2. He told the court that the Appellant who was 17 years old was also taken for late treatment. Treatment notes were produced as PEX 4.

21. **PW5 Geoffrey Ng'ang'a,** testified that on 22nd August 2015, he was at home when PW2 who had gone out to play came and told him that she was bleeding from her private parts. He checked and noticed that her skirt had blood stains. He called and informed their mother on phone about it. The mother sent a boda boda rider who came and took PW2 to their mother. PW1 later told him that PW2 had been admitted in hospital.

22. **PW6 No. 85297,** CPL Hilima Hussein, attached at Illasit Police Station, Gender Crime, told the court that on 27th August 2015 the

complainant's father reported that the complainant had been defiled and that she had been admitted in hospital. The witness went to hospital and found PW2 in hospital but traumatized. She tried to interrogate her but she could not talk. She later talked and told her that she was defiled by a son to a mkorino who was their neighbour. The OCS sent Police officers to the home of the accused but found that he had gone underground. He was later traced and arrested in Narok.

23. They recorded statements from witnesses, issued a P3 form which was later filled, took clothes to the government Chemist and issued PW2 with Post Rape Care Form which she produced as PEX 3. She told the court that the victim confirmed that the Appellant was the person who had defiled her. She was 6 years according to the birth certificate which was produced as PEX 1. In cross-examination the witness told the court that PW2 identified the Appellant upon his arrest.

24. On being put to his defence, the Appellant told the court that he was 18 years. That on 15th July 2015, he left home and on the way he met two men who told him that they were police officers. They arrested him and later took him to hospital where he was informed that he had defiled a minor. He denied committing the offence.

25. After considering the above evidence, the trial court was satisfied that the prosecution had proved its case against the Appellant beyond reasonable doubt, convicted and sentenced him, giving rise to this appeal.

26. I have myself gone through the evidence of the prosecution and that of the defence. I have no doubt that the prosecution proved the ingredients of age and penetration. On age, there is cogent evidence by way of birth certificate that PW2, the victim, was born on 27th October 2008 which put her age at about six and a half years at the time of the incident and, therefore, a child. PW1 also testified that PW2 was a minor and that she was born in 2008. There was no contestation over this issue and, therefore, I am satisfied that the prosecution proved this ingredient beyond reasonable doubt.

27. Regarding penetration, PW2 told the court that she was defiled and that as a result, she was passing urine with blood. She also told the court that her skirt was blood stained due to this bleeding. PW1 confirmed this fact and that she took PW2 to hospital where it was also confirmed that she had been defiled. PW5 further confirmed that PW2's dress was blood stained and it was him who called PW1 to inform her about the condition of PW2.

28. PW4, the Clinical Officer, testified on behalf of Dr. Mutiso and confirmed that from Dr. Mutiso's examination, there were injuries in PW2's private parts, confirming defilement. The P3 form confirmed that there was a tear of the private organ with an active bleeding. Post Rape Care Form also confirmed that there were bruises, a cut labia and broken hymen. This evidence left no doubt that indeed there was penetration of the minor private parts.

29. The law defines penetration as partial or complete insertion of male genitalia into the private parts of a female. The evidence of the witnesses including the doctor and the exhibits, confirmed that there was penetration and, therefore, defilement.

30. The last and only ingredient that remained to be proved was who the perpetrator was. The Appellant argued that he was not the person who defiled PW2 and that this fact was not proved. On the other hand, it has been argued on behalf of the Respondent, that it proved this ingredient beyond reasonable doubt.

31. The trial court evaluated the evidence on the issue and stated at page 3 of the judgment:

> ***"The complainant on the other hand avers that it was the accused who defiled her. The accused denies the same. The complainant was sent by her mother PW1, upon being called by her brother PW5. The complainant at being asked by her mother who had caused the injury, she asserted that they were caused to her by a "Mkorino". She knew the Mkorino is married and by appearance but not by name. <u>she was shown the photograph of the Mkorino and she identified him in the photograph.</u> It is her evidence that the said Mkorino had called her with a view to sending her to buy for him a safaricom voucher and on reaching his house, he turned on her and defiled her. When she was called by the accused, she was at the time playing with her friends…"***

32. The court thus concluded:

> ***"The evidence placed the accused person at the place of the offence and the evidence is exclusive that it is the accused person who committed the offence."***

33. I have a problem with this conclusion. First, the evidence of PW2 or that of PW3 did not give the name of the person who defiled PW2. They said they knew person by appearance but not by name. They said the attacker wore a white cap and described him as ***Mkorino,*** a neighbour. None of the witnesses stated who the Mkorino was and whether there was only one Mkorino in the area. There was also mention of a son of ***mkorino.*** The evidence is not clear whether the attacker was the "***son"*** of mkorino or the ***"mkorino."***

34. PW6 told the court that when the report was made, it was alleged that it was a son to Mkorino who had committed the offence. Is this person the same as Mkorino, since PW1, PW2 and PW3 did not mention a ***son to Mkorino?*** Second, PW6 testified that when the Appellant was arrested, PW2 identified him. It is not clear how PW2 identified the Appellant and whether an identification parading was conducted for that purpose.

35. What is even more troubling, is that the trial court referred to some "***photographs"*** that were shown to the witnesses through which they identified the Appellant. It is not clear who took the photographs and whether they were ever produced as exhibits since the record is silent on them. This leaves a glaring gap in the prosecution's case as to the identity of the real perpetrator of the crime.

36. PW6 also stated that she forwarded samples to the Government Chemist but did not tell the court what the result of the analysis of those exhibits was, if they were ever analysed. The question that remains unanswered is why PW6 forward exhibits for analysis but did not get the result to enable the prosecution connect the Appellant with the crime. This is not the first time this particular witness has done this, which is a worrying trend. PW3 did not say she saw the Appellant commit the offence.

37. The law in criminal trials, is that the prosecution bears the burden to prove its case beyond reasonable doubt. It is the duty of the prosecution to adduce evidence through its witnesses in order to achieve this purpose, and the court must only convict on the strength of the prosecution's case and not on the weakness of the defence.

38. In ***Stephen Nguli Mulili v Republic*** [2014] eKLR, the Court of Appeal observed:

> ***"[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, (2013) eKLR."***

39. In ***Miller v Ministry of Pensions,*** *[1947] 2 ALL ER 372* **Lord Denning** stated on proof beyond reasonable doubt:

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

40. And in ***Bakare v State*** (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria, amplified the phrase thus:

> ***"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".***(emphasis)

41. Flowing from the above decisions, it is clear to this court, that the prosecution's case should not leave doubt in the mind of the court that the accused committed the offence he/she is charged with. On the evidence on record, I am unable to agree with the trial court that the prosecution proved beyond reasonable doubt that the Appellant committed the offence. The identity of the attacker was not proved to the required degree. It is possible that the Appellant committed the offence, but possibility is not the same as proof beyond reasonable doubt.

42. Having considered the appeal submissions and the authorities, the conclusion I come to is that the prosecution failed to prove a vital ingredient of the offence, namely, the person who committed the offence. For that reason, I have no option but to allow the appeal.

43. Consequently, the appeal is allowed, conviction quashed and sentence set aside. The Appellant is hereby set at liberty unless otherwise lawfully held

Dated, Signed and Delivered at Kajiado this 14th day of February 2020.

E. C. MWITA

JUDGE