REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.103 OF 2019

MARK ODHIAMBO OUMA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. E. Kanyiri SRM delivered on 8th March 2019 in Makadara CM Cr. Case (S/O) No.76 of 2016)

JUDGMENT

The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between March 2016 and June 2016 within Nairobi County, the Appellant, unlawfully and intentionally committed an act which caused penetration with his penis into the vagina of PNW, a child aged four (4) years. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with a child, contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between March 2016 and June 2016 within Nairobi County, the Appellant unlawfully and intentionally touched the vagina of PNW, a girl aged four (4) years with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge of defilement and sentenced to serve fifteen (15) years imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal, challenging his conviction and sentence. He was aggrieved by his conviction stating that the same was based on wrong provisions of the law. He faulted the trial magistrate for disregarding the medical evidence adduced by the clinical officer and the police doctor which failed to establish the element of penetration. He took issue with the fact that the trial magistrate relied on the evidence of PW2, who stated that the complainant sustained injuries in the anal region, yet medical evidence did not establish the same. He averred that PW2 was not a reliable witness since her testimony was inconsistent and full of contradictions.

The Appellant was aggrieved that the trial magistrate disregarded the evidence of PW3 and PW4 which established that the minor did not exhibit any physical or psychological symptoms which pointed to the fact that she had been defiled. He faulted the trial court for failing to properly evaluate his defence in arriving at its decision. He was further aggrieved that the trial court improperly applied the provisions of Section 124 of the Evidence Act. He complained that his sentence was harsh and excessive in the circumstances. In the premises, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the Appeal, this Court heard oral submission from Ms. Ndegwa for the Appellant and Ms. Akunja for the State. Ms. Ndegwa submitted that the complainant stated that '*alinidunga na msumari*'. It was PW2's testimony that the complainant did not specify what she meant by '*msumari*'. Counsel for the Appellant faulted the trial court for making an assumption that the Appellant inserted his penis into the complainant's vagina. She averred that the element of penetration was not established by the prosecution. To this end, she cited the case of Isaiah Kamwelo vs Republic [2019] eKLR and Vincent Kiprotich Koskei vs Republic [2018] eKLR. She further averred that the trial court failed to appreciate that Section 5 of the Sexual Offences Act provides for penetration by manipulation of objects. She opined that the trial court disregarded the medical evidence adduced which failed to establish the element of penetration. She further submitted that the complainant was not a reliable witness as her testimony was inconsistent. The complainant gave an unsworn statement. She stated that the complainant referred to her younger brother as a visitor.

Counsel for the Appellant was of the view that the complainant's testimony was coerced. The complainant was beaten and threatened to be taken to the police before she allegedly confessed. She pointed out that the house girl was not availed to give evidence before the trial court. She averred that the Appellant's defence was not properly evaluated by the trial court. The Appellant in his defence told the trial court that he worked as a teacher and was therefore in school on the material day. She added that none of the neighbours witnessed the Appellant taking the complainant to his house. She was of the view that the trial court improperly applied Section 124 of the Evidence Act. She further

submitted that the trial court shifted the burden of proof to the Appellant. She averred that the Appellant was charged under Section 8(1) and 8(2) of the Sexual Offences Act, yet he was convicted under Section 8(3) of the said Act, which was in contravention of Section 169 of the Criminal Procedure Code. In the premises, she urged this court to allow the Appellant's appeal.

Ms. Akunja for the State conceded to the appeal. She averred that the medical evidence adduced failed to establish the element of penetration. She opined that in view of Section 5 of the Sexual Offences Act, the trial court ought to have interrogated the minor to determine what she meant by '*msumari*' so as to establish exactly what the Appellant did. She pointed out the fact that the complainant's mother reported the incident three months after the alleged incident. In addition, the complainant was beaten before she allegedly told her mum about the incident. She was of the view that these facts raised doubt as to the guilt of the Appellant. She therefore urged this court to allow the Appellant's Appeal.

The facts of the case according to the prosecution are as follows. PW1, PNW, is the complainant. She gave an unsworn statement. She stated that she lived with her parents, M and her aunt, J. The Appellant was their neighbour. It was her testimony that the Appellant took her to his house. She was wearing a dress, a panty and a biker. He undressed her. She told the court that "*Mark alinitoa nguo na akanidunga na msumari…msumari ilinidunga kwa susu na kwa pupu*." She stated that she cried since she felt pain. She later informed her mother who took her to hospital.

PW2, JWM, is the complainant's mother. She stated that the complainant was at the material time aged five (5) years. Sometime in mid-March 2016, the house girl informed her that the complainant was feeling pain in her anal region. PW2 examined the complainant's anal region and noticed some lacerations. Her anal region had also reddened. She asked the complainant what had happened but she did not say anything. PW2 testified that she later noticed some changes with the complainant which included bed-wetting and isolating herself. Sometime in June 2016, the complainant informed her that the Appellant used to tickle her and lift her up and that she felt nice.

The following Monday, the complainant informed her that the Appellant undressed her and asked her to lie flat on a surface. She told her that on two occasions, Mark '*alimdunga na msumari kwa susu na kwa pupu'*. She however stated that she did not get to know what the complainant meant by '*msumari'*. She further told PW2 that the Appellant warned her against telling her parents what had happened. PW2 took the complainant to a clinic for medical examination. She also reported the matter to the police. The Appellant was arrested. She further testified that the Appellant was her neighbour.

PW3, Penninah Angwenyi, was a clinical officer working at MSF Clinic based in Mathare. She stated that the complainant was examined at their facility based at Mama Lucy Kibaki Hospital on 27th June 2016. She was alleged to have been sexually assaulted about three months prior to the examination. On examination, PW3 stated that the complainant was calm and had no visible physical injuries. Her external genitalia was normal. Her hymen was intact. Her anal region was normal. She produced the complainant's medical report and Post rape Care form into evidence. The complainant was also examined by PW4, Dr. Shako, based at Police Surgery on 28th June 2016. She stated that the complainant's genital region was normal. Her hymen was intact. She had no visible physical injuries. She produced the complainant's P3 form into evidence.

PW5, Cpl. Ibrahim, investigated this case. He interviewed the complainant and her mother. The complainant told her mother that the Appellant invited her to his house and undressed her. He then put a '*msumari*' in her vagina. This happened on diverse dates between March 2016 and June 2016. She stated that the Appellant also inserted his fingers into her vagina. PW5 further testified that the Appellant lived in the same plot as the complainant and her mother. After concluding his investigations, PW5 arrested the Appellant on 29th June 2016 and charged him with the present offences.

The Appellant was put on his defence. In his sworn statement, he denied having sexually assaulted the complainant. He told the court that he worked as a teacher at Twilight Secondary School in Kayole. He lived in the same apartment as the complainant and her parents. He stated that being a teacher, many parents trusted him with their children. He had never been accused of sexually assaulting any child before. He pointed out that none of the neighbours witnessed him taking the complainant to his house. In addition, the househelp was not availed in court to give evidence. He stated that he worked from Monday to Saturday from 7.00 a.m. upto 5.30 p.m. He maintained that the allegations against him were false since PW2 did not inform the complainant's father that the complainant had been sexually assaulted. He asserted that the medical evidence did not establish that the minor was sexually assaulted. He was of the opinion that PW2 framed him of the present charges since she was a secret admirer. He was arrested on 29th June 2019 while at the school where he worked.

The Appellant availed DW2, Walter Ratemo, to give evidence. He was the caretaker at the plot where the Appellant lived. PW2 informed him that the complainant stated that the Appellant had sexually assaulted her. He stated that when the Appellant was arrested, he organized a meeting with all the tenants to find out what had happened. DW2 stated that none of the neighbours witnessed the complainant go to the Appellant's house.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanor of the witnesses (See Okeno vs Republic [1972] EA 32). In the present appeal, the issue for determination is whether the prosecution established the charges of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case as well rival submission by the parties. Section 8(1) of the **Sexual Offences Act** provides that:-

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

The prosecution is required to establish three elements forming the offence of defilement namely; the age of the complainant, proof of

penetration and positive identification of the perpetrator. PW2, who was the complainant's mother, testified that the complainant was born on 6th August 2011. She was aged four (4) years at the time of the alleged sexual assault. The complainant's birth certificate produced into evidence confirmed that the complainant was indeed four (4) years of age at the time of the alleged sexual assault. **The Appellant did not challenge the evidence adduced with regards to the complainant's age. This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act.**

With regards to penetration, Section 2(1) of the Sexual Offences Act defines the same as:

> **"the partial or complete insertion of the genital organ of a person into the genital organs of another person."**

It was clear from the evidence on record that the prosecution solely relied on the evidence of the complainant to secure the conviction of the Appellant. It was the complainant's testimony that the Appellant took her to his house and undressed her. She then stated that "*akanidunga na msumari kwa susu na kwa pupu"*. The trial court observed that the child pointed to her vagina and buttocks. When he was done, she dressed and left his house. She felt pain and went back to the house crying. She stated that the Appellant promised to buy her something. This court notes that the trial court failed to interrogate the minor to establish what she meant by '*msumari*'.

The complainant's mother, PW2, told the court that sometime around mid-March 2016, her housegirl informed her that the complainant was feeling pain in her anal region. PW2 stated that she examined the complainant and noted that her anal region had reddened. There was presence of some scratches. She however did not take the complainant to hospital. She only applied some vaseline on her anal region. She stated that she interrogated the complainant but she did not tell her what had happened. Sometime in June 2016, the complainant told her that the Appellant undressed her and told her to lie flat on a surface. He then inserted '*msumari*' in her vagina and anus. The complainant told her that she felt pain and went back to the house crying. She also informed her that the Appellant did that on two occasions. PW2 took the complainant to a medical clinic for examination.

The medical evidence adduced by the prosecution failed to establish that the complainant's vagina and anus were penetrated. The complainant was examined at Mama Lucy Kibaki Hospital on 27th June 2016. PW3 stated that the complainant was calm. She had no visible physical injuries. Her external genitalia was normal and her hymen was intact with smooth margins. Her anal region was also normal. PW4 who also examined the complainant and stated that the complainant's genital region was normal. Her hymen was intact. She had no visible physical injuries.

Aside from the complainant's unsworn testimony, there is no other evidence that was led by the prosecution to establish the element of penetration. The trial court misdirected itself by assuming that the word '*msumari'* meant penis without interrogating the complainant further on the same so as to ascertain exactly what the Appellant was accused of doing. The complainant did not inform the court whether the Appellant was undressed during the alleged incident. The complainant mentioned that she felt pain and went back to the house crying. Her mother or the house help ought to have noticed the complainant crying when she went back to the house. The house help, who told PW2 that the complainant was feeling pain in her anal region, was not availed to adduce evidence before the trial court. She was a crucial witness who ought to have been procured by the prosecution to adduce evidence.

Section 124 of the **Evidence Act** allows the court to admit a victim's evidence without corroboration in sexual offences. However, the court should be cautious in considering such evidence because the Section requires that the court ***"is satisfied that the alleged victim is telling the truth".*** In the present appeal, the complainant was a young child of tender age. She even referred to her younger brother as a visitor. Such children are impressionable. In **Fappyton Mutuku Ngui –vs – Republic [2012] eKLR** the court observed thus:

> **"Indeed courts should be cautious before convicting on the uncorroborated evidence of minors. There are many reasons for this. In J Heydon Evidence: Cases and material 2nd ed Butterworths London 1984, 84, the reasons were put this:**
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> **First, a child's power of observation and memory are less reliable than on adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children."**

In the present appeal, the particulars of the offence stated that the Appellant inserted his penis in the complainant's vagina. As observed earlier in this judgment, the trial court failed to ascertain what the complainant meant by '*msumari*'. As it is, this court cannot state with certainty that the complainant's testimony was to the effect that the Appellant inserted his penis in her vagina and anus. Further, the complainant did not tell her mother what had allegedly happened until three months had elapsed. PW2 stated that sometime in March 2016, she examined the complainant's anal region and discovered that the same had reddened. There was presence of lacerations. She however failed to take the complainant to the hospital for examination immediately upon discovery of the same. She took the complainant for medical examination after three months had elapsed. The medical evidence adduced established the complainant's genitalia to be normal. Her hymen was intact. There were no visible physical injuries. The investigating officer stated that he did not interrogate any of the neighbours to find out if any of them witnessed the Appellant take the complainant to his house.

This court is not convinced that the complainant was telling the truth due to the stated gaps in the prosecution case. The prosecution failed to establish the element of penetration to the required standard of proof beyond any reasonable doubt. **In the circumstances of this case, it cannot be ruled out that the complainant was influenced by adults in her life to implicate the Appellant in the alleged sexual assault. There is simply no evidence to support the charge. The Appellant in his defence denied sexually assaulting the complainant. He stated that he was a teacher and was at work when the incident was said to have taken place. He may well be telling the truth.**

Taking into consideration the totality of the evidence adduced by the prosecution witnesses and the defence, this court is of the considered opinion that the evidence that was adduced by the prosecution witnesses failed to establish the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt. It may well be that the alibi defence given by the Appellant is true. In the premises

therefore, the appeal has merit and is hereby allowed. The Appellant's conviction is hereby quashed. The custodial sentence imposed on him is set aside. The Appellant is ordered set at liberty forthwith and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MARCH 2020

L. KIMARU

JUDGE