REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 173 OF 2018

BETWEEN

HARRISON MUTISYA MBALUKA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 5512 of 2012 delivered by Hon. E. Kimaiyo (SRM) on 24th August 2018).

JUDGMENT

1. The Appellant herein was charged with 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 the 2nd day of April, 2012 in Industrial Area within Nairobi Area Province committed an act which caused penetration with his penis into the vagina of **SH**, a child aged four (4) years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 in that he intentionally and unlawfully committed an indecent act with **SH**, a child aged four (4) years by touching her private parts namely vagina.

3. The Appellant pleaded not guilty to both counts. Upon trial, he was found guilty of defilement and convicted accordingly. He was sentenced to serve life imprisonment. Aggrieved by both his conviction and sentence, he preferred the present appeal to this court.

4. In a Petition of Appeal filed on 28th September, 2018 the Appellant, through the law firm of Gichina, Macharia, Matotse & Co. Advocates raised eleven (11) grounds of appeal. These are that:

> ***i. The learned magistrate erred in law and fact in convicting him when the evidence on record was manifestly insufficient, inconsistent and had glaring gaps hence incapable of sustaining a conviction.***
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> ***ii. The learned magistrate erred in law and fact in convicting him against the weight of the evidence on record.***
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> ***iii. The learned magistrate erred in law and fact in failing to find that he was not properly identified.***
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> ***iv. The learned magistrate erred in law and fact in failing to warn herself that she was relying on the single witness identification by a minor.***
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> ***v. The learned magistrate erred in law and fact in failing to hold that the two medical reports produced by the prosecution were at variance/ inconsistent.***
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> ***vi. The learned magistrate erred in law and fact in admitting into evidence an adverse medical report by a person who was not the maker without sufficient basis and/or giving the Appellant an opportunity to approve or disprove the same.***
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> ***vii. The learned magistrate erred in law and fact in failing to stipulate the reasons for disregarding his compelling defence.***
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> ***viii. The learned magistrate erred in law and fact in stepping into the arena of the litigants and making presumptions in respect of the complainant's testimony to the detriment of the Appellant.***

ix. The learned magistrate erred in law and fact in failing to give due consideration to his defence which was not sufficiently challenged by the prosecution.

x. The learned magistrate erred in law and fact in failing to consider the Appellant's mitigation and the positive recommendation conveyed in the pre-sentencing report.

xi. The learned magistrate erred in law and fact in passing a sentence which was manifestly harsh and excessive in the circumstances.

Summary of Evidence

5. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses and give due regard for that. (See **Okeno v Republic (1972) EA 32).**

6. The prosecution's case can be summarized as follows: **PW1, SH**, the complainant, then a minor aged five years gave a minor aged five years gave a sworn testimony. She recalled that on 2nd Aril, 2012 at 7.00 pm, her mother **PW3, GAM** went to buy vegetables and left her playing outside the Appellant's house with other children. The Appellant who was known to her sent her to go and buy him steel wire which she did then took to his house. She found him alone and gave him the steel wire. The Appellant removed his trouser then removed PW1's trouser and defiled her. Thereafter, the Appellant gave her rice and ndengu which she ate in his house then bought her a sweet when she was leaving.

7. PW1 went back to their house and found the door still locked with a padlock so she sat outside waiting for PW3. PW3 went in and prepared supper but PW1 refused to eat and looked sickly. At around 10.00 pm, PW1 started screaming saying her stomach was aching. PW3 gave her water but she refused to take. Come morning, PW3 tried carrying PW1 on her back but PW1 kept screaming in pain and was unable to walk. PW1 said that someone had strangled her neck. PW2 took PW1 to RTI Dispensary at Railways. The doctor placed her on the bed and she screamed saying *"usinidunge penye mtu alinidunga jana usiku"* while pointing at her vagina. PW3 and the doctor asked her to explain and she told them that a neighbour whose name she did not disclose had defiled her. The doctor examined PW1 and found that she had indeed been defiled. He therefore advised PW3 to take PW1 to Nairobi Women's Hospital. At the said facility, PW1 was tested and treated.

8. They returned home at night. PW1 told PW3 that the Appellant lived next to her friend Babawe's house. At about 7.30 pm, PW1 took PW3 to the Appellant's house and pointed him out as he was drawing water. PW1 ran backwards when she saw the Appellant since he had threatened to kill her if she disclosed the incident to anyone. PW3 did not know the Appellant well as he had just moved into the plot. The incident was reported at Industrial Area Police Station on 4th April, 2012 leading to the Appellant's arrest.

9. PW4, Dr. Zaphania Kamau of Police Surgery examined both PW1 and the Appellant on 10th April, 2012. PW1 did not have any injury on her body. Her outer genitalia were normal. Her hymen was intact. No discharge was seen. PW4 filled and signed a P3 form in the regard which he adduced in evidence. As for the Appellant, he also did not have any injury on his genitals. PW5 filled and produced his P3 form as well.

10. The case had initially been assigned to one CPL Everlyne Muthengi to investigate who was transferred to Nyeri. **PW5, PC Ramadan Yussuf** of Industrial Area Police Station took over the investigations. PW5 visited the scene of crime and found that PW1 and the Appellant were neighbours. PW5 produced PW1's birth certificate in evidence showing that she was born on 9th June, 2007.

11. PW2, Dr. Kinuthia Edward from Nairobi Women's Hospital testified that PW1 was seen at the facility on 3rd April, 2012. He stated that on vaginal examination, PW1 had a tear on her vagina at 7.00 o'clock. HIV, syphilis, hepatitis and pregnancy tests were negative. Urinalysis and vaginal swab were normal. A diagnosis of defilement was reached and she was given antibiotics, prophylaxis and vaccination for hepatitis B. PW2 produced the medical report in evidence.

12. Notably however, PW2 stated that he was not the examining doctor. He stated that PW1 was examined by another doctor whom he could not confirm whether he was still at the facility or had already left.

13. When placed on his defence, the Appellant elected to give a sworn testimony. He stated that on 4th April, 2012, he returned from work in the evening, changed his clothes then went to draw water outside his house in Kayaba at about 7.30 pm. While picking tomatoes as he was waiting for his vegetable to be shredded, someone touched him from the back. He turned and saw that they were police officers from Kayaba Police Post. PW3 came and told the police that he was the culprit. He was surprised as he had just moved into the estate and it was the first time he was seeing PW3. He only used to see her when they were drawing water. He did not know her house.

14. The police arrested him and took him to Kayaba police post. After two days they were taken for examination by a police doctor in the company of a police officer and PW3. Thereafter, a DNA test was conducted on him then PW4 gave the police his report. When he went back to Industrial Area Police Station, the OCS told him that he had not been found with any mistake and was released.

15. Sometime later in November 2012, while preparing to go to work, he heard a knock on the door. He opened and found two police officers and PW3. He left the house and went with them to Industrial Area police station. It was written that the OCS said that PW3 had followed up the case saying her child had been defiled and she could not let go. He was placed in custody and taken to court the following day. He denied the charge.

Analysis and determination

16. The Appeal was dispensed with by way of written submissions. The Appellant filed his written submissions on 19th November, 2019 whilst those of the Respondent were filed on 3rd December, 2019. Upon carefully re-evaluating the evidence on record and considering the parties' respective submissions, I conclude that only issue arises for determination, which is whether the prosecution proved its case beyond a reasonable doubt.

17. Counsel for the Appellant submitted that the prosecution's evidence was inconsistent. He pointed out that PW1's testimony that the Appellant pierced her with a thorn contradicted PW3's testimony that PW1 said someone had strangled her neck. He also noted that the medical report produced by PW2 contradicted the P3 form produced by PW4 as it showed that PW1 had a tear in her vagina whereas the P3 form indicated that PW1's hymen was intact. Further, he pointed out that PW5 was inconsistent with the dates when he stated that PW1 reported that she was defiled by a neighbour on 22nd October, 2012.

18. Counsel submitted that the trial court relied on inadmissible evidence. He stated that the trial court failed to appreciate the provisions of **Section 33** of the **Evidence Act** in as far as the production of the medical report by PW2 was concerned. He argued that the document was not signed by the examining doctor and did not even indicate who its maker was thus raising doubt as to whether it actually originated from Nairobi Women's Hospital. Further, the prosecution was faulted for failing to make an application to have the medical report produced by PW2 on behalf of its maker.

19. It was submitted that the trial court over relied on the testimony of PW1. He noted that there was no other corroborative evidence to support PW1's story that he defiled her. Counsel questioned why the prosecution failed to call the children that PW1 was playing with to corroborate her testimony. In his view, there were several gaps which failed to meet the standard of proof required in criminal cases which is beyond reasonable doubt.

20. In rebuttal, the Respondent submitted that the prosecution ably proved all the three elements of the offence of defilement namely; the age of the child, penetration and the identity of the Appellant. The Respondent further submitted that the inconsistencies pointed out by the Appellant regarding the dates were minor and curable under **Section 382** of the **Criminal Procedure Code.** The Respondent also submitted that the trial court considered the P3 form produced by PW4 and invoked the provisions of **Section 124** of the **Evidence Act** to hold that PW1was telling the truth.

21. The offence of defilement is proved when the prosecution establishes the three key elements namely age of the child, penetration and the identity of the offender. The evidence sufficiently proved that PW1 was four years old at the time of the alleged offence by production of a birth certificate which showed that she was born on 9th June, 2007. I am also persuaded by the evidence on record that the Appellant was well known to PW1 since they were neighbours. The question that arises therefore is whether there was credible evidence to prove the crucial element of penetration and that the Appellant was culpable.

22. The prosecution relied on the testimony of PW1 as well the medical evidence contained in the medical report produced by PW2 to establish penetration. Notably however, the medical report, which purported that PW1 had a vaginal tear at 7 o'clock on examination of her genitalia was not signed and its maker was not known. PW2 was categorical that he was not the examining doctor and could not also confirm whether or not the maker of the document was still working at Nairobi Women's Hospital where the medical report is purported to have originated from. This therefore raises questions as to whether the medical report was genuine and whether it was properly admitted into evidence.

23. Section 33 of the **Evidence Act** provides as follows:

> ***"statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible ……."***
>
> ***(b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty ……."***

24. Section 77 of the **Evidence Act** further provides as follows:

> ***(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
>
> ***(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***
>
> ***(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.***

25. The above statutory provisions contemplate a situation where the officer giving expert evidence knows the maker of the (medical) report and is conversant with his or her handwriting and signature. It follows therefore that allowing an officer who is a stranger to the maker of the report amounts to hearsay and such evidence is of no probative value. In the premises, I find that the admission of the medical report into evidence by the trial court was unprocedural. Precisely stated, the medical evidence tendered from Nairobi Women's Hospital was inadmissible in evidence. It was therefore erroneous for the trial court to conclude that PW1's testimony that she was defiled was

corroborated by the medical evidence produced by PW2.

26. Indeed, the only cogent medical evidence on record which was produced by an expert was the P3 form produced by PW4 which clearly indicated that PW1's hymen was found to be intact upon the examination of her genitals. Even in this event, the same rendered a major inconsistence with that from the Nairobi Women's Hospital, casting a doubt on which evidence to rely upon. I thus find that the prosecution did not establish the crucial element of penetration. This means that the offence of defilement was not established beyond reasonable doubt. The Appellant's conviction was therefore unsafe.

27. In so holding, I am minded that, subject to the proviso to Section 124 of the Evidence Act, the court can solely rely on the uncorroborated testimony of a minor if it believes that the minor is telling the truth. However, when the prosecution elects to corroborate such oral evidence with medical evidence, the latter must be beyond reproach. This was not the scenario in the instant case. The inconsistence and insufficiency of the medical evidence completely shuttered the entire prosecution case. For this reason, I am convinced that the Appellant was not culpable for the offence for which he was convicted.

28. I am equally convinced that the alternative charge cannot be supported by the evidence on record. In her evidence in chief, PW1 was categorical that she was defiled by use of the Appellant's penis. In cross examination PW1 changed tune and said that she was only pierced with a thorn in her vagina. Again, a sharp contrast was evidenced in reexamination when she again stated that she was both pierced with a thorn and defiled. This inconsistency in my view is major and cannot be wished away. I give the Appellant a benefit of doubt,

29. In the result I find that the prosecution failed to prove the case beyond a reasonable doubt. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered At Nairobi this 9th Day of April, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Chandianya *or the Appellant.*

2. Miss Karanja for the Respondent.