REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL 124 OF 2019

(CORAM: F. GIKONYO J.)

MM.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in Githongo CR. 23 of 2018

by Hon. E. W. Ndegwa R.M on 25/7/2019)

JUDGMENT

1. MM was charged with the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 28/10/2018 at about 1900 hrs, at [Particulars Withheld] sub location of Gaitu East location in Central Imenti Sub county within Meru county, intentionally and unlawfully caused his penis to penetrate the vagina of P.K a child aged 11 years.

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 28/10/2018 at about 1900 hrs. at [Particulars Withheld] sub-location of Gaitu East location in Central Imenti Sub county committed an indecent act to P.K a child aged 11 years by touching her breasts, buttocks and vagina.

3. He was tried for the offence and convicted on the 1st Count. and sentenced to serve life imprisonment.

4. Having been dissatisfied with the conviction and sentence he filed this appeal setting out 7 grounds that can be collapsed into 4;

> *a. That the learned trial magistrate erred in both law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.*
>
> *b. That the learned trial magistrate erred in both law and fact by failing to note that the incident occurred at night which makes the identification of the appellant to be in dispute since the light used to identify him was not tested.*
>
> *c. That the learned trial magistrate erred in both law and fact by failing to note that the prosecution case was not proved beyond reasonable doubt.*
>
> *d. That the learned trial magistrate erred in both law and fact by failing to note that the age of the complainant was not proved.*

Duty of court

5. This being a first appeal, this court should re-evaluate the evidence afresh and draw own conclusion and findings. See **Okeno v. Republic [1972] EA 32.** However, in doing so the court must warn itself that it did not have the advantage of seeing the witnesses testify; demeanor thereof is best left to the trial court.

Evidence

6. **PW1 P.K** testified that she recalled that on 28/10/2018, she was behind their house washing her legs when the accused person who live

with them came and held her hand and took her to his house. While there he undressed her and laid her on the bed. He then inserted his body used for urinating into hers. Later her grandmother PK came looking for her but she did not respond to her calls. She asked the accused if she was in his house and he said she was not but when she entered his house she found her sitting on top of the accused's bed. Her grandmother told her to go outside and when outside she started screaming. M asked her why she was screaming and the accused went outside near her grandmother's house. Thereafter they went to the hospital and later to the police station.

7. **PW2 PK** told the court that the appellant is her son. She recalled that on 28/10/2018 PW1 told her that she was going to the appellant's house to pick an avocado so that they could eat. When she went she called her but she did not respond. She decided to go and find out why she was not responding. She found her sitting on a chair in the appellants' house and she asked the appellant why he did not tell the child that she was calling her. PW1 went back to the house and while there PW2 started beating her because she had refused to answer to her call. She went to sleep on her bed. JM later come to the house and later left.

8. She also recalled going to chaaria police post and recorded her statement. She did not say that she found PW1 seated on the appellants bed and she never told her that the appellant had defiled her before. She did not tell M that she found M red handed defiling PW1.

9. **PW3 JUDITH KATHAMBI** a clinical officer working at Giaki Sub County hospital told the court than on 29/10/2018, P.K aged 11 came to their facility while carrying a panty stained with blood. On examination of the stomach there was nothing. On the upper limbs she had pain on the left shoulder. The approximate age of injury was one day. On examination there was a tear on the lower part of the vagina. There was no blood discharge but there was a fungal infection. The hymen was broken and there was a tear on the lower side of the vagina.

10. **PW4 CPL MACKLIN MWAKALE** told the court that he is currently attached at chaaria Police Patrol Base. He recognized the witness statement dated 29/10/2018 which he recorded from one PK. The statement was interpreted by David Muthamia from kimeru language which he then recorded. After recording the statement he read it to David Muthamia who interpreted it to the witness who affixed her thumbprint on it.

11. **PW5 JK** told the court that she recalled that on 29/10/2019 she received a phone call from M who asked her to go and escort P.K to hospital. He told her that M's mother had found P.K at M's house and found P.K sitting on a chair inside. She escorted P.K to Giaki Dispensary.

12. **PW6 DAVID MUTHAMIA** told the court that on 28/10/2018 he was at home at around 8pm when JM came to his house. He informed him that his brother M had defiled P.K. He then took his phone and called the area assistant chief one Bernard and asked him to come to his home in order for them to go and find out what was happening. Together with the assistant chief and M they went to M's homestead and upon arrival they found M asleep in his bed. They woke him up and asked him if he had done what was being claimed and he denied it. They went and got P.K and inquired as to the incident and she told them it was true that she had been defiled. They then proceeded to take M, Muroki and the girl to Gaitu Patrol base.

13. **PW7 BERNARD MUTWIRI MARETE** told the court that he is the assistant chief at Mbajone sub location. He recalled that on 28/10/2018 he received a call for the area manager who told him that a girl from their area had been defiled by her uncle. He went to the area manager's home and found JM who is the brother to the perpetrator. They all then set out for M M's homestead and they interrogated him about the incident which he denied. They woke PW1 up and she confirmed that M had defiled her.

14. **PW8 JM** testified and told the court that he recalls that on 28/10/2018 he heard his mother PK making noise. When he went to inquire on what the problem was she told him that she would beat P. She told him that P had gone to her uncle's house to pick avocado. He left her mother and went to M's house and found him drunk. He asked him what was wrong and he told him to go away. He went to the area manager who called the area chief and they went back home and later escorted him to the station at Chaaria.

15. **PW9 PC ELISHA OLUOCH** told the court that he is based at Chaaria Patrol Base. He recalled that on 29/10/2018 at around 12.30 am he received a complaint from P.K that on 28/10/2018 at around 7.00 pm she was sexually assaulted by her father's brother MM. He booked the report in the O.B and gave her a P3 form. The accused person was escorted to the base and he interrogated the accused person about the incident. He recorded the witness statements, later the complainant's aunt JK brought the complainant to the base having taken her to Giaki sub county hospital. He compiled a file and charged the accused with the offence he is facing. The complainant however disappeared from 4/12/2018 to 8/3/2019. He investigated and found that one FK the complainant's aunt took the complainant on 4/12/2018 from Gaitu Police Station to Meru town and hid her at Mama Maina's home.

16. **DW1 MM** in his testimony told the court that he left home in 1986 and went to Narumoro and upon going back home he found his father was deceased. His brother is the father of the complainant. He found his sister FK at home and JM and his mother. They got surprised to see him as they thought he had died. F had custody of the complainant after the complainant's mother abandoned her. F and JM did not want him to inherit his father's land after he went back home and they resulted in framing him with this case.

Appellants Submissions

17. The appellant in his submissions argued that there were inconsistencies in the testimonies of the witnesses. That PW1 who in her voire dire was found to be intelligent enough to tell the truth told the court that on the date of the incident "she was outside washing her legs" while PW2 said that "she was going to pick an avocado so that we come and eat" Additionally, PW1 claimed that PW2 found her sitting on the appellants bed while PW2 said that she found her sitting on a chair in M's house. To him, clearly there were inconsistencies from the statements by the witnesses. On this he cited **Dankerai Ramkisham Pandya v. R E.A.CA [1957]** at page 336 where the court held that

> **"When the evidence is contradictory or is inconsistent, it should not be relied upon"**

18. He submitted further, that it seems that PW1 went into hiding because her conscious was haunting her for framing her uncle. It was also

PW2 testimony that the appellant did not defile PW1 and the appellant concurred with the sentiments by PW2 that there was a scheme hatched by JM, the area manager and David Muthamia. That the area manager was the wrong person to interpret to PW4 who was the I.O of this case. The I.O should have investigated the relationship between the accused and his siblings so as to discern the real bone of contention.

19. It was also the appellant's argument that the clinical officer's report was not a report to be relied on as she did not explain what prompted her to change the age of PW1 from 13 to 11 years as earlier recorded yet there was no birth certificate or age assessment report to rely on. The birth certificate of the complainant was the best placed document to clarify the actual age of PW1 and upon the age assessment conducted it found that PW1 was approximately 11-12 years. According to Section 8 (1) as read together with Section 8 (2) of the Sexual Offences Act if person is found guilty of defiling a child below 11 years shall be imprisoned for life. While Section 8 (1) as read with Section 8 (3) gives a lesser sentence.

Submissions by the state

20. Vincent Maina Senior prosecution counsel argued that in **Criminal Appeal 32 of 2017 G.O.A v. Republic,** Hon Justice A. C Mrima observed that there are three key elements of defilement that the prosecution must prove

a. Age of the complainant

b. Proof of Penetration

c. Whether the appellant is the perpetrator

21. On the first issue; a Health Card of P.K was produced as exhibit No. 5 which indicated that she was born on 21/8/2007 meaning that she was 11 years at the time of the incident. This was corroborated by the age assessment report produced as exhibit 6 which indicated that she was between the age of 11 and 12 years.

22. On the second issue of penetration it was argued that PW1 stated that she was washing her legs when the appellant came and took her to his house. He removed her skirt and blouse and then removed his and defiled her by inserting his body part of urinating into her. PW3 a clinical officer who examined her stated that she had a vaginal tear on the lower side and fungal infection. That the hymen was also broken. Therefore the issue of penetration was proven beyond all reasonable doubt.

23. Finally, on the issue of identification; the appellant is an uncle to the victim- a person well known to her. Further, it was PW1 evidence that it was not the first time that she has been defiled by the appellant. Therefore in conclusion the case was proven beyond all reasonable doubt.

Analysis and Determination

Elements to be proved

24. According to Section 8(1) of the Sexual Offence Act: -

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

And Section 8 (2) provides that

> **"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

25. From these sections, the prosecution must establish three things, namely:

1) That the person defiled was a child and the age thereof;

2) That there was penetration of the child; and

3) That the person who caused penetration with the child is the Appellant.

Victim was a child

26. According to age assessment done on the complainant, the victim herein was of the ages of 11- 12 years. This was corroborated by the P.K's health card that indicated that she was born on 21/8/2007. Accordingly, at the time of the incident P.K was aged 11 years. The appellant's argument that the victim was aged between 11-12 years therefore fails. This was an attempt to take advantage of a lesser sentence which is quite natural act of self-preservation.

Penetration

27. According to section 2 of the Sexual Offences Act: -

"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

28. What does evidence say about alleged penetration? P.K testified that on the material day, she was behind their house washing her legs when Mariko came and took her to his house where he undressed her and laid her on the bed. He then removed his trousers and inserted his part for urinating into hers. PW3 a clinical officer stated that on examination the approximate age of the injury was one day; the left side of her shoulder was swollen; her hymen was broken and there was a tear on the lower side of the vagina. These pieces of evidence prove penetration on P.K.

Was the Appellant the perpetrator?

29. It must be shown beyond reasonable doubt that the appellant did the act that caused penetration. Identification of the perpetrator is key. The appellant testified that he had left home and stayed away for a long time. His brothers thought he had died. They were therefore shocked to see him when he returned. He told the court that they did not want him to inherit their father and so they fabricated these charges to keep him away from his inheritance. Claims of fabrication of cases as a way of disinheriting individuals have become prevalent and is made in almost every sexual offences case in this region. If this be true, then it would be a sad day for the administration of justice; it would be the highest order of travesty of justice and abuse of court process. I also think that these matters should be a concern to anyone who cares including the nation of Meru, national government and non-state actors; it is time someone took care to establish the truth or otherwise of such claims through targeted investigations, research and other follow-up mechanisms. This is why I have stated in cases without number that such defence of trump-up charges is not a trifle, and when it is made, it should be prosecuted much more robustly than merely making the claim in the hope only that it would change the course of things. In this case, there was no real material to show this case was a fabrication although I note the evidence of PW2 was dangerously wavering and non-committal. Nonetheless, she was not the only witness; other witnesses also testified whose evidence will be properly evaluated.

30. Be that as it may, the record show that the appellant was the uncle to the complainant. The complainant used to live with her grandmother, while the appellant lived in a house next to theirs. She knew her uncle well and so this was identification by recognition. Her evidence was cogent and was not discredited in any material respect. It was believable. It was corroborated by other witnesses. I do not see any element of mistaken identity. In light thereof, the complainant was able to positively identify the appellant as the person who defiled her. This ingredient was proved beyond any reasonable doubt.

31. In the upshot, the prosecution proved their case beyond any reasonable doubt. Accordingly, the appeal on conviction fails.

On sentence

32. It was the appellant's argument that the mandatory sentence that was meted out on him did not conform with the tenet of fair trial under article 25 (c) of the constitution and beseeched this court to be guided by the case of **Gideon Majau Gitire Alias Kombo Meru Criminal Appeal No. 131 of 2018.**

33. The above mentioned case reiterated the progressive thinking which renders mandatory sentences unconstitutional for they take away the discretion of the court in sentencing. It was stated: -

"The sentence of life imprisonment imposed by the learned trial court was lawful as by law provided. But since the Supreme court decision in Francis Karioko Muruatetu & others versus Republic [2017]eKLR, jurisprudence on mandatory sentences has developed to the effect that mandatory sentences such as death for murder and other capital offences, deprive the court of its discretion to pass a sentence that is commensurate with the circumstances of the case. In the case of the death sentence, the Supreme Court declared it unconstitutional and following that decision the Court of Appeal has proceeded and commuted death sentences to either life or other appropriate terms.

37. Regarding the strict sentences under the Sexual Offences Act, the Court of Appeal in Denis Kinyua Njeru versus Republic c[2017]eKLR held that, "The penalties under the Sexual Offences Act, may be described as "straight jacket" penalties leaving no room for exercise of any discretion by the sentencing court...." I had held such view as well, until the Court of Appeal decision in Evans Wanjala Wanyoyi versus Republic [2019] eKLR held, citing the earlier decision in Christopher Ochieng versus Republic [2018] eKLR and Jared Koita Injiri versus Republic Kisumu Criminal Appeal no. 93 of 2014 (of which this court had inadvertently not noted earlier),

".....on the basis of the mandatory sentence stipulated by section 8(1) of the Sexual Offences Act, and if the reasoning on the Supreme Court was applied to this provision, it too should be considered unconstitutional on the same basis ….....Needless to say, pursuant to the Supreme Court decision, we would set aside the sentence of life imprisonment imposed and substitute it therefore with a sentence of 30 years imprisonment from the date of sentence by the trial court."

38. I am inclined to adopt this progressive approach to dealing with the strict sentences under the Sexual Offences Act, and to accordingly interfere with the sentence in this case…….

34. On that basis, and in light of the circumstances of this case, I hereby set aside the sentence of life imprisonment imposed on the appellant as a mandatory sentence. I will then impose appropriate sentence. In this case, P.K was aged 11 years at the time of the incident. The appellant injured her childhood and took her innocence through obnoxious act of defilement of child. Consequently, I hereby inflict a sentence of 20 years Imprisonment upon the appellant with effect from 25/7/2019 when the appellant was first sentenced.

35. It is so ordered.

Dated, signed and delivered at Milimani Nairobi this 21ST day of APRIL 2020

F. GIKONYO

JUDGE

Representation: -

Appellant acting in person

Vincent Maina, Senior Prosecution Counsel for the state

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