REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 27 OF 2018

CHARLES MWANIKI NJERU... APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(An appeal from the original conviction and sentence by E.M. Kagoni, Senior Resident Magistrate, delivered on the 9th October, 2017 in Mombasa Chief Magistrate's Court Criminal Case No. 2295 of 2016).

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on diverse dates between 8th November, 2016 and 11th November, 2016 in Changamwe Sub-County within Mombasa County, he intentionally and unlawfully caused his penis to penetrate the vagina of CS [name withheld] a girl aged 11 years. He was sentenced to life imprisonment.

2. He filed a petition of appeal on 20th April, 2018. On 28th October, 2019, he filed amended grounds of appeal, with leave of the court. They are to the effect that:-

(i) The Learned Trial Magistrate erred in law and fact by admitting the evidence of PW1, the victim of the alleged incident, without considering that she gave indirect evidence hence the provisions of Section 124 of the Evidence Act cannot stand in law;

(ii) The Learned Trial Magistrate erred in law and fact by placing much reliance on the complainant's mother's evidence, PW3, without considering that it was doubtful;

(iii) The Learned Trial Magistrate erred in law and fact by admitting the evidence of PW2, the Doctor, and the production of the P3 and PRC forms without seeing that the same was bad in law;

(iv) That the Learned Trial Magistrate erred in law and fact by failing to see that some crucial witnesses were left out of the prosecution side;

(v) The Learned Trial Magistrate erred in law and fact in failing to notice that the matter at hand was not proved as required by law; and

(vi) That the Learned Trial Magistrate erred in law and fact by imposing a harsh and excessive punishment without considering that the same was contrary to the law.

3. In his written submissions, the appellant stated that PW1 was not a reliable witness as her evidence was indirect, hence it watered down the provisions of Section 124 of the Evidence Act. The appellant took issue with the fact that the Trial Magistrate believed PW1's evidence. He wondered how an 11 year old child could have been defiled without her mother noticing the same.

4. The appellant was of the view that the complainant (PW1) was a liar because she said she did not bleed when she was defiled for the first time.

5. It was the appellant's submission that PW3 was not a reliable witness because in her evidence she stated that she heard the appellant asking PW1 why she was not growing breasts (sic) (why her breasts were not growing) and she admonished him. That after some time, their neighbour Rose asked her if PW1 had difficulties in walking. He stated that neither Rose nor PW1's grandmother were called as witnesses for the prosecution. He relied on the case of **Muiruri Njoroge and Another** v **Republic** Criminal Appeal No. 185 of 1987 (unreported),

Mombasa Court of Appeal.

6. It was submitted that the Trial Court misdirected itself by admitting the evidence of the P3 form since it did not specify when PW1 was escorted to hospital. Further, PW1 did not state that she sustained any injuries although the P3 form indicated the age of injuries on PW1, to be a week old.

7. The appellant attacked the production of the P3 and PRC forms by a person who was not the maker of the same. He contended that the Doctor who produced the documents did not state that he was familiar with the handwriting and signature of the maker of the said documents. He cited the provisions of Section 50(1)(2) of the Evidence Act on the admissibility of documentary evidence. He also cited the provisions of Section 71(1) (sic) of the Evidence Act and submitted that the prosecution never offered any reasonable explanation as to why the authors of the P3 and PRC forms were not summoned to testify.

8. He argued that defilement is not the only means which causes penetration and suggested that the use of tampons and digits, vaginal insertion of objects and vigorous sporting activities could have made PW1's hymen to break.

9. The appellant submitted that the prosecution should have called the grandmother mentioned in the proceedings and one Rose to clear doubts in its case. He was of the view that the prosecution's failure to do so violated the provisions of Section 109 of the Evidence Act. The appellant argued that if PW1 had been defiled, she would have had fresh injuries in her genital organ.

10. The appellant cited the case of **DWM v Republic** [2017] eKLR, to urge this court to set aside the sentence of life imprisonment. He prayed for his appeal to allowed.

11. Ms Mwangeka, Prosecution Counsel, filed written submissions on behalf of the Director of Public Prosecutions on 25th November, 2019. On the issue of PW1's age, she submitted that the Trial Court relied on the age assessment report which showed that PW1 was 11 years old. The Prosecution Counsel stated that the said report was admissible evidence of proof of PW1's age. She relied on the case of **Josphat Kieti Seet v Republic** [2014] eKLR, to support her submission.

12. With regard to the issue of penetration, the Prosecution Counsel stated that the appellant sent PW1 to buy soap and when she went to take it to him, she knocked at the door and he requested her to get in his house. After she entered his house, he closed the door and started showing her pornographic material from his cellphone. He undressed her and took his *"dudu"* and inserted it in her vagina. She indicated that she was defiled thrice. It was submitted that PW1's evidence was corroborated by medical evidence, in that on examination, she had scratches on her inner thighs, her outer genitalia was swollen and inflamed. She also had a foul smelling discharge and her hymen was not intact.

13. On the issue raised by the appellant that the PRC and P3 forms were improperly admitted in evidence as the authors of the same were not called, it was argued that the appellant did not raise any objection to the production of the said documents at the lower court. It was submitted that under the provisions of the Section 77 of the Evidence Act, the court is allowed to presume the authenticity of a medical report without requiring the author of the same to produce it.

14. It was submitted that PW1 and PW2 positively identified the appellant who was their neighbour and who was known by the nickname *"Bingwa"*. Ms Mwangeka stated that the Trial Court found PW1 to be steadfast in her evidence and it was satisfied that she was a truthful witness. She therefore posited that the provisions of Section 124 of the Evidence Act were satisfied.

15. On the issue raised by the appellant about witnesses who were not called to testify, the Prosecution Counsel relied on the provisions of Section 143 of the Evidence Act which states that no particular number of witnesses is required to prove a certain fact, unless the law specifically provides. It was argued that failure to call the witnesses mentioned by the appellant did not weaken the prosecution case. She cited the case of **Martin Okello Alogo v Republic** [2018] eKLR, where the High Court held that a Trial Court can receive the evidence of a child of tender years who is the alleged victim of a sexual offence and proceed to convict an accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.

16. On the issue of sentence, Ms Mwangeka relied on the decision in **Jared Koita Injiri v Republic** [2018] eKLR and urged this court to give a determinate sentence of 30 years imprisonment. She prayed for the appeal on conviction to be dismissed.

17. On 30th January, 2020, the appellant filed a response to the DPP's written submissions. He reiterated that the Doctor who produced the P3 form did not state if she was familiar with the handwriting or signature of the Doctor who filled the said document.

18. The appellant also reiterated that if PW1 had been penetrated, there would have been serious injuries inflicted on her. He therefore argued that penetration could have been caused by many other things. He relied on the case of **Moses Kipchirchir v Republic** [2017] eKLR.

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT

19. The complainant testified as PW1. She was CSM [name withheld]. She was taken through *voir dire* examination. She gave sworn evidence. She stated that she knew the appellant whom she said was Charles Mwaniki Njeru (I have confirmed the name from the original handwritten proceedings as typed proceedings give the name Charles Mwanini Neru). PW1 further stated that the appellant was their neighbor and his house was not far from theirs. She testified that in November of the previous year (2016), the appellant called her and gave her Kshs. 20/= to take to him soap. She bought soap from the shops. She knocked at his door and he told her to get inside (his house). She indicated that when she did so, the appellant closed the door and from his cellphone he begun showing her a photo of nude people having sex.

20. PW1 stated that he then undressed her and did bad manners to her by taking his *"dudu"* and inserting it in her vagina. She stated that she knows that *"dudu"* in English is called penis. She testified that when he finished, he asked her to dress up and leave. She indicated that was the first time, and he did it again 3 times. He told her not to tell anyone. PW1 stated that her grandmother noticed that she had difficulties in walking and told her mother, who asked her what the problem was. She told her what had happened. PW1 was taken to Changamwe Police Station and then to Port Reitz Hospital where she was examined.

21. PW2 was Dr. Rehema Omar a Medical Officer at Coast Province General Hospital (CPGH). She produced the PRC and P3 forms, as well as the age assessment report for PW1. PW2 indicated that the PRC form was filled on 18th November, 2016. The findings were that PW1 had scratches on her thighs and a foul smelling vaginal discharge. Her outer genitalia was swollen and inflamed. Her vagina was tender and redness was noted. Her vagina was not intact. The Doctor stated that red blood cells in her urine was an indication of trauma in the vaginal area. PW2 indicated that the P3 form was filled after 1 week. An age assessment report dated 24th November, 2016 gave PW1's age as 11 years.

22. PW1's mother HA [name withheld] testified as PW3. She stated that PW1 was born on 15th December, 2005. She indicated that in November, 2016, she heard the appellant who was their neighbour asking PW1 why her breasts were not growing. She stated that the question took her by surprise and she admonished the appellant. She indicated that although she let the matter rest, it kept on bothering her. It was PW3's evidence that after some time, her neighbour by the name Rose asked her if she had noticed that PW1 had difficulties walking. PW3 stated that she examined PW1 and saw red marks in her outer genitalia. She asked PW1 who had done that to her and she disclosed it was *"Bingwa"* who had been doing bad things to her. PW3 pointed out that *"Bingwa"* was the appellant's nickname.

23. She further testified that she took PW1 to Changamwe Police Station where she found a female officer, who looked at PW1's genitalia and told her to take her child to hospital. PW3 stated that she took PW1 to Port Reitz Hospital in the evening of the same day and the Doctor referred them to CPGH. She indicated that the appellant was arrested in the evening of the following day.

24. No. 96053 PC Jackline Muriuki of Changawme Police Station was the Investigating Officer. Her evidence was that she received a report from 2 ladies who went to the police station with a minor whom they said had been defiled. She sent them to Port Reitz Hospital. They went back and told her that the minor had been attended to. She testified that she collected notes (treatment notes) from the said hospital. That PW1 was taken to CPGH where PRC and P3 forms were filled. She further stated that PW3 led to the arrest of the appellant, whose name PW1 had said was *"Bingwa"*.

25. PW4 indicated that PW1 reported to her that the appellant had shown her pornographic videos on his cellphone and had asked her to suck his penis and thereafter he defiled her.

26. The appellant gave sworn defence and stated that on 19th November, 2016 he woke up and started chatting with his neighbours. He then saw 4 police officers get into their plot. A lady by the name AAS [name withheld] told them he was the one. He was then handcuffed and taken to the police station. He spent the night in custody and on the following day he was told he had defiled a minor. He stated that they demanded for his phone which he still has. He denied that his phone had a touch screen. He denied having committed the offence. He claimed to have been in church at the time he was said to have committed the offence.

27. He also claimed that PW1's mother was his good friend and they had been good neighbours. He stated that he used to charge his phone at her house and she wanted to have a sexual affair with him but he refused and that is how the issue at hand came up.

ANALYSIS AND DETERMINATION

28. The duty of the 1st appellant court is to analyze and re-evaluate the evidence adduced before the lower court and come to its own independent conclusion, while bearing in mind that it has neither seen nor heard the witnesses testify and make an allowance for that fact. The said duty was explained by the Court of Appeal in the case of ***Njoroge v Republic*** *[1987] KLR as follows:-*

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya Vs Republic [1957] EA 336, Ruwalla Vs Republic [1957] EA 570."***

29. The issues of determination in this appeal are:-

(i) If PW1 and PW2 were credible witnesses;

(ii) If the evidence of PW1 was corroborated;

(iii) If the medical reports were admissible in evidence;

(iv) Whether failure to call some witnesses was fatal to the prosecution case;

(v) If the prosecution proved its case beyond reasonable doubt; and

(vi) Whether the sentence was harsh or excessive

If PW1 and PW2 were credible witnesses.

30. The appellant's bone of contention with PW1's evidence was that she could not have been defiled for the first time without bleeding and without her mother (PW2) noticing that something was amiss. On being cross-examined by the appellant, PW1 stated that she did not bleed when he defiled her. In her examination-in-chief, PW1's evidence was that the first time the appellant defiled her was on the day he sent her to buy soap for him. She further said that he did it again 3 times and warned her not to tell anyone.

31. The Trial Court did consider the credibility of PW1 and found her to be a truthful witness. In convicting the appellant, the Trial Court relied on the provisions of Section 124 of the Evidence Act as there was no eyewitness to the commission of the offence. The Trial Court stated as follows regarding the evidence of PW1-

> "*The complainant in this case appeared before this court and upon voire dire examination the court was satisfied that she was a truthful witnesses (sic). She gave sworn evidence and the accused person was allowed to cross-examine her. Indeed upon giving her evidence and even after being subjected to cross-examination by the accused person she remained steadfast. This to me was a test of her truthfulness. I say so because I saw and heard the complainant testify. I observed her demeanor and the minor did not impress me as a child who had been tutored on what to come to say in court."*

32. The Trial Court was aware that it could convict on the uncorroborated evidence of a child of tender age if he believed that the witness was truthful. In this case, the Trial Court was satisfied that PW1 told the truth in her evidence. It is my finding that the said court properly directed itself on the law in accepting the evidence of PW1. This court has no valid reason to depart from the holding of the Trial Court on the said aspect.

33. On the other issue raised by the appellant that PW1 could not have been defiled without her mother (PW3) noticing it, in her examination-in-chief, PW3 stated that she used to get home late from work. It is thus not surprising that she did not notice that anything was the matter with PW1 until their neighbour, Rose, asked her if she had noticed that PW1 was having difficulties in walking. The Trial Court also found PW3 to be a credible witness. This court has found nothing in her evidence which casts any doubt as to her credibility. It is therefore the finding of this court that contrary to the appellant's submission, PW1 and PW3 were credible witnesses.

If the evidence for PW1 was corroborated.

34. PW1's evidence was to the effect that she was defiled in November, 2016. The evidence which was adduced by PW2, Dr. Rehema Omar as per the P3 form confirmed that PW1's hymen was broken, her outer genitalia was inflamed and swollen. Her vagina was tender and redness was noted.

35. PW1 was examined on 24th November, 2016 for purposes of filling the P3 form. She had been previously examined on 18th November, 2016 which was on the day PW3 was alerted that PW1 had difficulties walking. The findings captured on the PRC form were similar to those reflected on the P3 form. As at the time she was examined on 18th November, 2016 it was indicated on the PRC form that the incident had happened a week before then. It is this court's finding that PW1's evidence that she was defiled was corroborated by medical evidence.

If the medical reports were admissible in evidence.

36. The appellant contended that production of the medical reports contravened the provisions of Section 77 of the Evidence Act. He was right in submitting that a proper basis was not laid for production of the medical reports by Dr. Rehema Omar, PW2. All that she said was that the P3 form was filled by Dr. Hassan on 24th November, 2016.

37. The provisions of Section 77 of the Evidence Act state as follows regarding the admissibility of documentary evidence in criminal cases–

> ***"(1) In criminal proceedings any document purporting to be a 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."***

38. The above provisions reveal that any other relevant person other than the maker of the documents specified therein can produce the same if the court believes the authenticity of the documents. The court however reserves the right to summon the makers of such documents. Even in instances where the experts named under the provisions of Section 77(1) of the Evidence Act decline to attend court upon being bonded by Investigating Officers, the Trial Court can summon such experts to attend court, on being moved by the prosecution to do so. An accused person can also apply for authors of such documents to be summoned in court to adduce evidence.

39. In the case of **Joshua Otieno Oguga v Republic** [2009] eKLR, the Court of Appeal considered the issue of production of documents in court other than by the maker of the same and stated thus-

> ***"That in short means that if the appellant wanted the medical report to be produced by a doctor, he had to apply to the court to summon the doctor who prepared the report, otherwise there was nothing wrong in law in the P3 form being produced by PC***

Ann Wambui as she did."

40. The appellant in this case did not apply for the makers of the P3 and PRC forms to be summoned. The said documents were therefore properly produced by PW2 and were admissible in evidence. It is too late in the day now for the appellant to challenge evidence which he could have objected to in the first instance, before the Trial Court.

Whether failure by the prosecution to call some witnesses was fatal to the prosecution case.

41. The appellant took issue with the fact that persons who were mentioned by PW1 as her grandmother and a neighbor who was referred to by PW3 as Rose, were not called to testify. If one reads the evidence adduced by PW1 and PW3 as a whole, it is clear that the person who was referred to by PW3 as Rose, was one and the same person whom PW1 referred to as her grandmother. This court takes judicial notice of the fact that in the Kenyan set up, children do at times refer to elderly women by the term grandmother, to signify respect. The said person noticed that PW1 was having difficulties in walking and alerted PW3 who upon questioning PW1, realized that she had been defiled. As Ms Mwangeka submitted, no particular number of witnesses is required to prove a fact unless it is specifically provided for in law. The other person known as Kabetty was PW1's sister. PW1 did not state that she entered in the appellant's house with her sister after she bought soap for him.

42. Section 143 of the *Evidence Act* provides that:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

43. Further, in **Mwangi v R [1984] KLR 595,** the Court of Appeal held that:-

> ***"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."***

44. This court adds that it is not the number of witnesses called that leads to proof of a particular fact, but the quality of evidence adduced. There would be no need for the prosecution to call multiple witnesses who will add no value to their case. It is this court's finding that failure to call Rose and Kabetty was not fatal to the prosecution case.

If the prosecution proved its case beyond reasonable doubt.

45. The identity of the appellant was not in issue. He was commonly known as *"Bingwa"*. When PW3 asked PW1 what had happened to her, she told her that *"Bingwa"* had defiled her. PW3 examined PW1's private parts and saw she had red marks in her outer genitalia. She reported the incident to Changamwe Police Station where they were referred to hospital. Medical reports in the form of PRC and P3 forms proved that PW1 had been defiled. The age of PW1 was established to be 11 years as at the time she was defiled. An age assessment report dated 24th November, 2016 was produced by PW3 to support the said fact. In addition, PW1's mother informed the Trial Court that PW1 was born on 15th December, 2015.

46. PW1 gave coherent, cogent and credible evidence of how the appellant sent her for soap, asked her to get into his house after buying it. He showed her pornography on his cellphone, undressed her and defiled her. He threatened to kill her with a knife, if she told anyone.

47. Apart from the foregoing evidence, the conduct of the appellant before PW3 found out that PW1 had been defiled raised PW3's antennae with regard to his question to PW1 as to why her breasts were not growing. That occurred in November, 2016. The said question made PW3 uneasy and she admonished the appellant. She said that although she put the matter to rest, it still kept on bothering her. The foregoing signifies that even before the commission of the offence, the appellant had already sexually harassed PW1. The appellant's defence that he did not commit the offence cannot stand in light of the evidence adduced against him. His claim that he rejected PW3's sexual overtures was an afterthought. He never cross-examined her about the said allegation when she testified in court. It is this court's finding that the appellant's defence was properly rejected by the Trial Court.

48. This court's finding is that the prosecution proved its case beyond reasonable doubt. I hereby uphold the conviction against the appellant for the offence of defilement contrary to Section 8(1) a read with Section 8(2) of the Sexual Offence Act.

Whether the sentence was harsh or excessive.

49. The appellant submitted that the sentence of life imprisonment imposed on him was harsh and excessive. Ms Mwangeka was of a similar view and urged this court to reduce the sentence of life sentence to a determinate sentence of 30 years. This court has considered the circumstances of this case and has borne in mind the Court of Appeal decision in **Jared Koita Injiri v Republic** [2019] eKLR, which arose from a defilement case. The victim was 9 years old. The said court substituted the sentence of life imprisonment imposed on the appellant therein with 30 years imprisonment.

50. In this case the victim was 11 years old. The appellant preyed on her and introduced her to pornography and thereafter defiled her. Sentencing is a matter that is left to the discretion the court. It is however the view of this court that a less severe sentence will serve the punitive factor and also deter the appellant from preying on other minors in the future.

51. This court sets aside the sentence of life imprisonment imposed on the appellant. The same is substituted with a sentence of 20 years imprisonment. Since the appellant was in custody during his trial in the lower court, in accordance with the provisions of Section 333(2) of the Criminal Procedure Code, the appellant's sentence shall be computed from 21st November, 2016, when he was first arraigned in the lower

court. The appeal succeeds only to the extent indicated in this Judgment.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **12th** day of **May, 2020. The Judgment was delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Valerie Ongeti, Prosecution Counsel, for the DPP

Mr. Mohamed Mohamud - Court Assistant