



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 11 OF 2019**

**DANIEL KIOKO KAVITE .....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgment of the Senior Resident Magistrate Hon. E.M. Muiru dated 14/03/2018 in Kilungu SRMCR No.345 of 2017.)*

**JUDGMENT**

1. **Daniel Kioko Kavite** the Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on the night of 13<sup>th</sup> and 14<sup>th</sup> June 2017 at Sultan Hamud sub-location, Ngoma location within Kajiado county willfully and intentionally caused his male organ namely penis to penetrate the female organ namely vagina of **FMM** a child aged 14 years.

He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars being that on the night of 13<sup>th</sup> and 14<sup>th</sup> June 2017, he intentionally touched the vagina of **FMM** a child aged 14 years with his penis.

2. He denied the charges and the case proceeded to a full trial after which he was found guilty, convicted and sentenced to serve twenty (20) years) imprisonment. He was aggrieved by the judgment and filed this appeal citing the following grounds:

a) **That**, the subordinate court erred in law and facts by convicting him on the basis of defect in the trial.

b) **That**, the subordinate court erred in law and facts by failing to note that the prosecution did not prove its case beyond reasonable doubt.

c) **That**, the subordinate court erred in law and facts by convicting him for committing defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006, without any evidence of sexual assault as put by Pw4.

d) **That**, the subordinate court erred in law and fact by finding the Appellant guilty without considering the possibility of the entire matter being premised on contradictory evidence which lacks specific documentary proof of the first report about how it made.

e) **That**, the subordinate court erred in law and facts and failed to consider the fact that, due process was not adhered to when Pw1 was put for her testimony.

f) **That**, the subordinate court erred in law and facts by convicting him for alternative charge of indecent act with a child contrary to section 11(1) of Sexual Act No. 3 of 2006 without any evidence of sexual assault as put by Pw1.

3. The prosecution case is that the complainant (Pw1) lives on a plot in a rental house at Sultan Hamud with her mother (Pw2) and her two brothers. On 13<sup>th</sup> June 2017, Pw2 notified Pw1 that she would not be coming home immediately after work as she would be rushing to be with her critically ill aunt at Kilome nursing home. She did exactly that. She was not able to go home that night.

4. On the other hand, Pw1 who was aged 14 years did not lock the door and left the lights on as she went to sleep. She shared a room with her two brothers who shared a bed. She had worn a night dress and a pant. She lay on her side only to wake up and find the Appellant whom she knew as a neighbor lying on top of her. He had removed his trouser and placed it on the table. He was squeezing her breasts having inserted his penis in her vagina. She found blood on her bed and her beddings.

5. On realizing she had woken up, he got off her, wore his trouser and left. She boiled water and took a bath. She later made tea and went to school the next day.

6. It was on 14<sup>th</sup> June 2017 that Pw2 received a report of what had happened from Pw1. A report was made at Sultan Hamud police station. The next day she was taken to hospital and treated. A clinic card (EXB5) showed that Pw1 was born on 9<sup>th</sup> November 2003.

7. In cross examination, Pw1 maintained that she was asleep when she was defiled.

8. Pw3 **No. 93043 Pc. Mwana Idd Hussein** the investigating officer was assigned this matter on 15<sup>th</sup> June 2017. She met Pw1 and Pw2 at the Sultan Hamud hospital and the former was seen by a doctor. They returned to the station and recorded statements. Thereafter Pw1 took them to where the Appellant was and he was arrested. She confirmed that from the occurrence book the incident occurred on 14<sup>th</sup> June, 2017.

9. Pw4 **Doctor Charles Mwendwa** examined Pw1 on 14<sup>th</sup> June 2017 and also filled the PRC form (EXB2). He also filled the P3 form (EXB4) and treatment card (EXB3). The witness produced the lab test results with the Appellant's consent as EXB1. It was his evidence that Pw1 was treated on 19<sup>th</sup> June 2017. Everything was found to be normal save for the broken hymen.

10. The Appellant in his unsworn defence denied the charge against him. He explained how he was arrested on 21<sup>st</sup> June, 2017 from his carwash business in Sultan Hamud.

11. When the appeal came for hearing the Appellant relied on his written submissions adding that two key witnesses were mentioned by Pw1 but their names were never given. He has referred the court to the case of **Bukenya & Others –vs- Uganda (1972) E.A 349**, on the calling of crucial witnesses.

12. A summary of his written submissions is to the effect that there was no interpretation of the proceedings and so he was disadvantaged. On this, he cites the case of **Antony Njeru Kathiari and Another –vs- R (2007) eKLR**. He further submits that the prosecution did not prove its case to the required standard. That Pw1's age was not proved yet this was an essential ingredient in a defilement case (**John Otieno Obwar – vs- R High court Criminal Appeal No. 34b 2010** by Justice Makhandia (as he then was).

13. To the Appellant sexual intercourse was not proved. He wonders how Pw1 after the assault was able to make tea, go to school and did not inform the teacher or her schoolmates. Secondly he submits that due to the closeness of the date of the incident and examination the medical results should have showed injuries in the private parts of Pw1 and the presence of spermatozoa.

14. He cites contradiction in the evidence of Pw1 and Pw2 on how long they had been on that plot. Pw1 said it was five (5) months while Pw2 said it was two (2) months. He also cites contradictions in the evidence of the witnesses as to the dates of the incident, treatment and filling of crucial documents.

15. He claims that failure to conduct a *voire dire* examination on Pw1 is fatal to the prosecution case. Basically he relies on section 19 Oaths and Statutory Declaration Act.

16. It is also his submission that the evidence on identification and/or recognition was not water tight. On this he cites the cases of:

**i. Roria –vs- R (1967) E.A 584**

**ii. Anjonoini –vs- R 1960 KLR**

He states that none of the neighbors was informed and neither did Pw1 scream to draw their attention.

17. Finally, he says the sentence passed against him is excessive and should be reduced by this court.

18. In response Mrs. Owenga learned counsel for the Respondent states that Pw1's age was proved by a clinic and (EXB5). That penetration was proved by the evidence of Pw1 and the medical evidence which indicated that Pw1's hymen was broken.

19. Counsel submitted that Pw1 was able to see the Appellant well as the lights were on and she knew him as a neighbor within their plot. Pw1 had described him to Pw2 when she reported the incident to her. It is therefore her submission that the prosecution has proved the main charge against the Appellant.

20. On the issue of sentence, she has submitted that the twenty (20) years imprisonment was the minimum for the said offence. It is therefore lawful and not harsh considering the circumstances under which the offence was committed.

21. Mr. Morara for the Respondent on the issue of the date of the offence submits that the charge sheet is clear on the dates of the offence. There was therefore no way the investigation diary would have been written earlier than the offence.

### **Analysis and determination.**

22. This being a first appeal, the court has a duty to re-examine and re-consider the evidence on record and arrive at its own conclusion. It must bear in mind that unlike the trial court, it did not see or hear the witnesses and should therefore give room for that.

23. In the case of **Kiilu and Another –vs- R (2005) IKLR 174** the Court of Appeal held thus:

*(1) “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.*

*(2) 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; it must make its own findings and draw its own 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.*

24. Later in **David Njuguna Wairimu –vs- R (2010) eKLR** the Court of Appeal held that:

*“The duty of the 1<sup>st</sup> appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”*

25. Bearing in mind the above guiding principles, I have considered the evidence on record, the grounds of appeal, submissions of both parties and authorities cited. The issues I find falling for determination are as follows:

*i. Whether the Appellant did not understand the proceedings, due to language barrier.*

*ii. Whether F.M.M’s age was assessed and determined correctly by the court.*

*iii. Whether failure to conduct a voire dire examination on Pw1 was fatal to the prosecution case.*

*iv. Whether there was improper, intentional and unlawful penetration of the vagina of F.M.M.*

*v. Whether the Appellant was positively and properly identified.*

*vi. If issue no (v) is in the affirmative whether the sentence of twenty (20) years imprisonment is excessive and harsh.*

**Issue no. (i) Whether the Appellant did not understand the proceedings, due to language barrier.**

26. It is the Appellant’s contention that there was no interpretation done for him in the course of the proceedings. That the record does not bear any name of an interpreter and the nature of the interpretation e.g. English/Kiswahili/Kamba.

27. There is no dispute that interpretation is a key element in every proceeding. Proceedings are conducted in the language of the court but due care must be taken to ensure that the proceedings are interpreted to the accused if he/she does not understand the language of the court.

28. Under Article 7(1) of the constitution of Kenya 2010, the national language of the Republic is Kiswahili. Under Article 7(2) the official languages of the Republic are Kiswahili and English. In the courts the first language is English which is interpreted to Kiswahili or any other language that is understood by the parties appearing.

29. My understanding of the Appellants submissions is that the failure to indicate the name of the interpreter and the language of interpretation was a grievous omission. He has not clearly come out to say that he did not comprehend the happenings in the court.

30. I have perused the record on the date of plea which was on 22<sup>nd</sup> June 2017. The court clerk was Makau. Though it’s not shown the language of interpretation the response by the Appellant on both counts is shown as “*Si kweli*”. On each and every appearance in court there was a court clerk or court assistant.

31. On the 1<sup>st</sup> hearing date, 30<sup>th</sup> January, 2018 when three (3) witnesses testified the court assistant was Mela. All the three (Pw1, Pw2 and Pw3) testified in Kiswahili and were also cross examined by the Appellant in Kiswahili. The 2<sup>nd</sup> hearing date was on 9<sup>th</sup> February 2018 and the court assistant was Benjamin. Pw4 testified in Kiswahili and the Appellant cross examined him in Kiswahili.

32. The 27<sup>th</sup> February, 2018 was the date for defence hearing. The court assistant was Makau. The provisions of section 211 Criminal Procedure Code were explained to him in Kiswahili language. He gave his defence in Kiswahili. I have set out all this to show that the Appellant understands Kiswahili well and that’s the language that the witnesses testified in.

33. Secondly, part of the work of the court clerk or court assistant is interpretation unless he does not understand a specific language the accused wants the evidence interpreted in. In this case there was no need for the court to avail a special interpreter when the court assistant and court clerk present could interpret English into Kiswahili and vice versa. I find no defect in the trial as alleged by the Appellant.

**Issue no. (ii) Whether F. M. M’s age was assessed and determined correctly by the court.**

34. The charge sheet shows that Pw1 was 14 years when this incident occurred. There are several acceptable ways of proving age in a court of law. For children any of the following will suffice: a birth certificate, baptismal card, health clinic card, age assessment by a hospital, evidence of parents.

35. In the case at hand, Pw1's mother (Pw2) said she was 14 years at the time of offence. She produced Pw1's clinic card (EXB5) showing she was born on 9<sup>th</sup> November, 2003. The offence was said to have occurred on the night of 13<sup>th</sup>/14<sup>th</sup> June 2017. She was exactly 13 years, seven (7) months which was rounded up to 14 years.

36. On this issue I am satisfied that age was proved.

**Issue no. (iii) Whether failure to conduct a voire dire examination on Pw1 was fatal to the prosecution case.**

37. Having confirmed the date of Pw1's birth the issue is whether she was a child of tender years at the time she testified on 30<sup>th</sup> January, 2018. Pw1 turned 14 years on 9<sup>th</sup> November, 2017. Therefore, on 30<sup>th</sup> June 2018 when she testified she was fourteen (14) years, two (2) months plus twenty-one (21) days. Was she subjected to voire dire examination?

38. The Court of Appeal in the case of **Manipett Loonkomok –vs- R (2016) eKLR** held as follows:

***“We turn to consider the effect of failure by the court to administer voire dire on the complainant. It is firmly settled that not in all cases that voire dire is not administered or is not administered properly the entire trial would be vitiated. This court sitting at Nyeri has recently reiterated what has been said many times before that question will depend on the peculiar circumstances and particular facts of each case.” See James Muriithi –vs- R Criminal Appeal No. 10 of 2014” .....***

*The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However, way back in the celebrated case of **Kibageny Arap Lolil –vs- R (1959) E.A 82** the Court of Appeal for Eastern Africa held that the phrase “a child of tender years” meant a child under the age of 14 years. The only statutory definition of a “child of tender years is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This court has recently in **Patrick Kathurima –vs- R Criminal Appeal No. 137 of 2014** and in **Samuel Warui Karimi – vs- R Criminal Appeal No. 16 of 2014** stated categorically that the definition in the Children Act is not of general application that it was only intended for protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that that the time honoured 14 years remains the correct threshold for voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true as this court recently found that; **“In appropriate cases where voir dire is not conducted, but there is sufficient independent evidence to support the charge ... the court may still be able to uphold the conviction.”***

39. From the above finding by the Court of Appeal, it is not in all cases where a voire dire examination has not been conducted that the prosecution case will be vitiated. In the present case Pw1 was above 14 years when she testified though she was below 14 years at the time of the alleged offence. I also do appreciate the fact that I did not see or hear the witness testify but the trial court did.

40. While recording Pw1's evidence, the learned trial Magistrate introduces Pw1 as A female adult duly sworn states as follows in Kiswahili. Pw1 may therefore have appeared as an adult to her. All in all, I find no merit in this argument by the Appellant, since the trial court did the right thing.

**Issue no. (iv) Whether there was improper, intentional and unlawful penetration of the vagina of F.M.M.**

41. There are two witnesses who testified to this i.e. Pw1 and Pw4. Pw1 was clear in her evidence that she was woken up by pain in her private parts. When she eventually woke up from her sleep she found:

- Somebody lying on top of her as she faced up.
- She was completely naked.
- The person lying on her had inserted his private part in hers and was squeezing her breast.
- She found blood on her bed and beddings.

42. Pw4 is the doctor who examined Pw1's genitalia on 14/06/2017 at 4:00 pm and found the following:

- No injuries noted on her genitalia.
- Broken hymen.

He said lab tests done as per the form (EXB1) had the following results: -

- HIV test was negative

- High vaginal swab (HVS) did not show any spermatozoa
- Syphilis test was negative
- Urine test for pregnancy was negative.

He came to the conclusion that Pw1 had been defiled only because of the broken hymen.

43. The Sexual Offences Act 2006 defines “**penetration**” as:

**“the partial or complete insertion of the genital organs of a person into the genital organs of another person”**

The Court of Appeal in the case of **Sahali Omar –vs R (2017) eKLR** held that:

**“..... penetration whether by use of fingers, penis or any other gadget is still penetration as provided under the Sexual Penetration Act.”**

44. Is a broken hymen *per se* evidence of penetration as stated by the doctor? According to Pw1 this incident occurred around midnight of the night of 13<sup>th</sup>/14<sup>th</sup> June 2017 and she bled. She was examined on 14<sup>th</sup> June 2017 afternoon. The doctor did not find any bruises, inflammation, spots of blood or actual blood in Pw1’s genitalia. The beddings that were allegedly blood stained were never produced as exhibits. Pw4 did not explain anything about this broken hymen. Was it freshly broken or it was an old breakage?

45. There was no discharge nor presence of spermatozoa and pus cells in the vagina from the HVS that was taken. She had been examined less than 24 hours after the alleged ordeal, according to Dr. Charles Pw4 who treated her, filled the PRC form and also examined her and filled the P3 form.

46. At this point I wish to point out anomalies in one of the documents produced by Pw4. A treatment card is usually the first document a patient encounters at the hospital even before any tests are done. That document was produced in this case as EXB3 by Pw4 who said he had authored it. The date on it is shown as 19/06/2017. Its contents on the history are as follows:

**“Alleges to have been sexually assaulted by a person known to her, woke up found her neighbor sleeping ontop of her (five days ago) before asking him out. She took a shower and went to school.”**

47. All indications from the report in the occurrence book, (evidence of Pw3), the lab tests (EXB1) and the evidence of Pw1 and Pw2 talk of 14<sup>th</sup> June 2017. Its intriguing why such an important document as EXB3(*treatment notes*) would be speaking otherwise and even saying the incident occurred five days before 19<sup>th</sup> June 2017 which was the day of treatment. The big question is whether Pw1 was seen at the hospital on 14<sup>th</sup> June 2017 or 19<sup>th</sup> June 2017 and if it’s on 19<sup>th</sup> June 2017 when was the report made and when did the incident occur?

48. The prosecution case is that a man entered Pw1’s room, undressed her completely (*removed night dress and pant*) turned her from the side and made her lie on her back, penetrated her vagina using his penis to the extent of her bleeding but she never heard or felt a thing! By the time she woke up the man was through and was busy squeezing her breasts. The medical evidence of Pw4 does not support this story since the doctor did not say the interference with the hymen was fresh. There was no evidence of any bleeding as alleged by Pw1.

49. After placing all these pieces of evidence together, I have come to the conclusion that there may have been an attempt to defile but no defilement that took place.

**Issue no. (v) Whether the Appellant was positively and properly identified as the perpetrator.**

50. It is Pw1’s evidence that it is the Appellant and neighbor who came to their house that night. Her evidence is that she had left the lights on and the door was not locked since she was expecting her mother (Pw2) to come home.

51. It is her further evidence that in the said room where she was, there is another bed shared by her two brothers. The names and ages of these two brothers were never given to the police or the court. Furthermore, none of them testified. Their evidence would have assisted the court especially in the face of the shaky evidence of Pw1.

52. It is also Pw1’s and Pw2’s evidence that the former only knew the suspect by appearance as a neighbor and not by name. Pw2 did not also seem to know the suspect’s name. It is her evidence that upon being given a description by Pw1 she knew the person as her neighbor whose door faced theirs on the same plot. It’s not clear whether this is the information they gave to the police. According to Pw1, they had been on the said plot for five (5) months while Pw2 said it was only two (2) months.

53. The investigating officer is not the one who received the report and she did not visit the scene. She states that she was notified of this occurrence by the deputy OCS on 15<sup>th</sup> June 2017 at 9:00 am. She called Pw2 who told her they were at the hospital for filling of the P3 form. She joined them at Sultan Hamud district hospital and she went with them to the doctor where the P3 and PRC forms were filled. This was on 15<sup>th</sup> June, 2017 and not 14<sup>th</sup> June 2017 and 19<sup>th</sup> June 2017 as is reflected on the said documents.

54. After Pw3 recorded statements from the witnesses Pw1 took them to where the Appellant was and he was arrested and charged.

Pw3 did not tell the court from where the Appellant was arrested. According to the Appellant he was arrested from where he used to do car washing. Is this where Pw1 took Pw3? If so does this tell this court something deeper about Pw1?

55. The Appellant was not arrested from his house which is supposedly opposite Pw2's house! Pw3 did not tell the court where she arrested him from. It means he was arrested from his place of work as he says. How did Pw1 know where he used to work?

56. Assuming that Pw1 and Pw2 gave a description of the suspect to the police would the best decision have been for Pw2 to take them to arrest him or for the police to go and arrest and organize for an identification parade? The proper procedure should have been followed and an identification parade conducted.

57. There was no evidence given as to how big the plot in issue is and how many tenants stay there. Pw1 did not scream or call for any help. She may have feared. All the same her two brothers should have heard the commotion and would have been the best witnesses. Unfortunately, the investigating officer never saw the need of involving them.

58. According to Pw3 the Appellant was arrested on 15<sup>th</sup> June, 2017 but the Appellant says he was arrested on 21<sup>st</sup> June 2017. I have checked the record and noted that the charge sheet has given the date of arrest as 21<sup>st</sup> June 2017 and that must be the correct one. Any reason why the Appellant if known was not arrested soon after the recording of statements.

59. Section 124 of the Evidence Act provides:

***“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for no reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.***

60. My understanding of this proviso is that before the court relies on the victim's sole evidence to convict, it must be satisfied with its entire credibility. If that is overlooked then innocent persons could be convicted, on fabricated evidence. Whenever there is any doubt in the court's mind on the victim's credibility, the court must look for corroborative evidence. If none is available, then the accused must be acquitted.

61. In the present case I find Pw1's evidence not to have been credible and the evidence of Pw2 – Pw4 did not add any corroborative value to it. For my part I am not satisfied that there was sufficient evidence to link the Appellant with what may have happened to the complainant. That being the position, I do not have to delve into issue no. (iv) on the sentence.

62. I therefore find merit in the appeal which I allow. The conviction is quashed and sentence set aside. Appellant to be released forthwith unless lawfully held under a separate warrant.

Orders accordingly.

**Delivered, signed & dated this 12<sup>th</sup> day of May 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**