



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 145 OF 2019

E M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence passed on 26th August 2019

by Hon. E. W. Ndegwa (RM) at Githongo Law Courts

in SO Case No. 2 of 2019.)

JUDGEMENT

1. The Appellant herein was charged and 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.**

2. The Particulars of the offence are that on the 1st day of January 2019 at around 1800 hrs within Meru County intentionally caused his penis to penetrate the vagina of **JK** a child aged 3 ½ years. Upon conviction the Appellant was sentenced to serve life imprisonment.

3. Aggrieved by the aforesaid decision the appellant filed his petition of appeal on 2nd August 2019 raising nine grounds of appeal as follows;

a. That the learned trial magistrate erred in 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 sentencing the Appellant o life imprisonment without considering the facts adduced before court.

c. That the learned trial Magistrate failed to note that investigation was shoddy

d. That the trial magistrate erred in both law and fact by failing to note that the complainant was taken to the hospital eight (8) days after the alleged defilement.

e. That the trial magistrate erred in both law and fact in failing to note that the evidence adduced by the complainant was not supporting the findings of the clinical officer.

f. That the learned trial Magistrate erred in matters of law and facts by not observing that the Prosecution case was not proved beyond reasonable doubt.

g. That the trial Magistrate erred in both law and fact by failing to observe the demeanour of the complainant.

h. The learned Magistrate erred in law and fact by rejecting the Appellants defence without any articulate reason.

4. Upon supply of records of appeal to the Appellant and Respondent's Counsel by the court on 25th November 2019 this court directed the parties to canvass the appeal through written submissions. Both parties have since filed their submissions. The Appellant in his submissions

has included amended supplementary grounds of appeal which are to the effect that:

- a. The learned trial Magistrate erred in matters of law and fact by failing to observe that the mandatory sentence of life imprisonment fails to conform to the tenets of fair trial that accrue to the accused under Article 25(c) of the Constitution
- b. That the learned trial Magistrate erred in both law and fact by sentencing the Appellant to serve life imprisonment without considering the fact adduced before court
- c. That the learned trial Magistrate erred in law and fact by failing to note that the Prosecution failed to note and put into account that there was a grudge between the complainants father and the accused
- d. The learned trial Magistrate erred in both law and fact by failing to note that the investigation was shoddy and that the investigating officer failed to investigate the relationship between the accused and the family of the complainant and failed to call a vital witness.
- e. That the learned trial Magistrate erred in matter of law and fact by failing to note that the prosecution did not prove their case to the required standard as required by the law.

5. The Appellant submitted that he should not have been sentenced to serve life imprisonment as it does not conform to provisions of Article 25 of the Constitution. He relied in the holding of **Denis Kinyua Vs Republic 2017 eKLR** to assert his position .He also urged the court to be guided by the holding in Evans Wanjala Wanyoyi Vs Republic and Gideon Majau Gitire alias Kombo Vs Republic in Meru HCCR A No.131 of 2018.

6. The Appellant also submitted that the testimony of PW1 was not truthful and was contradictory. The Appellant further argued that the Prosecution failed to call a crucial witness one John Mureithi who is alleged to have seen the Appellant sleeping with the complainant on the same bed. He asserted that failure to call a vital witness leaves no doubt that the prosecution did not prove their case beyond reasonable doubt as was held by Ongudi J in JMN Vs Republic in Criminal Appeal Nos.139,140 and 141 at Embu High Court. He urged the court to resolve the benefit of doubt raised by failure to call the alleged witness in his favour and urged the court to be guided by the holding in **Phillip Muiruri Ndaragwa Vs Republic 2016 eKLR**.

7. The Appellant further argued that the fact that the complainant PW2 could not differentiate whether the Appellant's house was wooden, thatched or stone built meant that the complainant was not found in bed with the Appellant in the Appellant's house as claimed by PW1.

8. The Appellant also submitted that PW2 was categorical that the M who defiled her was not in court and that she did not meet him when they were coming from M with her mother.

9. The Appellant said that when he cross-examined PW1 the issues of grudge arose concerning the non-payment of a debt where PW1 said, "I did not hear my husband threaten you because of his debt, I did not witness him giving you a loan." He said the investigating officer failed to investigate the relationship between him and the parents of the complainant to establish if there was a grudge. It was his position that he was framed due to non-payment of a loan. The Appellant also argued that PW3 a clinical officer was not certain and he gave findings of a probability. He said that he ought to have been tested to see if he also had the same ailment i.e. gonorrhoea. He also said that DNA testing was also vital to clear the doubt whether the complainant was defiled and that she was defiled by the Appellant.

10. The Respondent also filed its submission on 18th February 2020 stating that the elements of defilement namely;

- a. age of the victim
- b. Whether there was penetration
- c. Whether the penetration was by the Appellant were proved.

11. The Respondent relied on **Criminal Appeal No.78 of 2008 FMN Vs Republic [2013] Eklr** where Justice Gikonyo observed that there are three inextricable elements of defilement that the prosecution must prove

Analysis and Determination.

12. As this is the Appellant's first appeal, the role of an appellate court of first instance is well settled. It was held in the case of **Okeno vs. R (1977) EALR 32** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

13. **Pw1, MM** testified that on 8th January 2019 she was bathing her daughter when she told her that she was feeling pain in her private parts. That she also saw pus oozing from her vagina. That her daughter told her that the Appellant was responsible and that he had defiled her on 1/1/2019 when she took her to the Appellant's home.

14. That on 1/1/2019 she was with the Appellant waiting for her husband JM who had the keys to the house. That the Appellant offered to carry the minor and later on took her to his house. That when she went to pick her up she found the child sleeping besides him. They took the child and went with her home. They did not report the matter immediately as they never thought that the Appellant had defiled her. That after

eight (8) days the minor's vagina started oozing pus. She reported the matter to the Area Assistant Chief of Ngonga Location and later to Mujwa Police post and the child was escorted to Kanyakine Hospital. On examination the child was found to be suffering from gonorrhoea. She was further minor examined at Githongo Sub-County Hospital and further treatment administered.

15. In cross-examination she testified that she did not see any changes in the child after she was defiled. That they would not have known that she was defiled if the disease did not manifest itself. She denied hearing her husband threatening the Appellant because of his debt or witness him giving the Appellant a loan.

16. **Pw2, JK** gave unsworn testimony after the court conducted voir dire examination and established that she was not possessed of sufficient intelligence and did not understand the nature of an oath.

17. It was her testimony that on 1/1/2019 she was at M home when he removed his panty and inserted her "kinyamu" and put it in her vagina (points at it). She said that she was with her mother at M home and immediately thereafter changed to say that at the time her mother was at the roadside with her father and K when M did that thing to her. That she did not tell her mother immediately because the Appellant had warned her not to tell her mother. That the Appellant also promised to buy her a bag. She also stated that she was familiar to the Appellant since she had seen him in M before. The complainant went on to say that the M who defiled her was not in court. She identified the Appellant in court as someone was familiar to her. She said the Appellant's child is known as N, she said the Appellant's father is called Baba N and the Appellant's wife called Mama N. She also said the Appellant's brother is also called N and Appellant's mother is called Mama N. PW2 said she did not see the Appellant when she was coming from M with her father and mother. In cross-examination she stated that she does not know if the house of the Appellant was wooden, thatched or stone built.

18. **Pw3, Moses Biyena** a Registered Clinical Officer from Kanyakine Sub County Hospital presented the P3 form filled on examination of PW2 who was suspected to have been sexually abused. It was his testimony that Pw2 had informed her that her "uncle" undressed her and penetrated her private parts. That he examined the child and established that there were bruises in her vagina, the hymen was broken and there was discharge noted on her private parts. That Urinalysis was done which showed numerous pus cells. Urine culture and sensitivity was done and gram negative diplococciseen and the clinical officer suspected to be Neisseria gonorrhoeae.

19. It was his testimony that there was prove that the child defiled since there was evidence of highly penetrative sexual activity. He estimated the age of the minor to be 3 ½ years old. He presented the **lab report form dated 9/1/2019 as Pexh 1, Treatment notes as Pexh 2 and P3 form as Pexh 3.**

20. **Pw4 PC, Mediatrix Auma** testified that on 10/1/2019 they received a call from OCS Chief Inspector Njuguna who informed her that there was a child at Mujua Police Post who had allegedly been defiled. That together with PC Alfred Mbaya they proceeded to the post and picked the child, namely JK PW2 herein, and escorted her to Kanyakine Hospital where she was treated. That he later on she took the child for age assessment and her age was assessed at between 2 to 4 years old. She presented the **age assessment report dated 1/3/2019 as Pexh 4.**

21. In cross-examination she testified that the Appellant was arrested by police officers based from Mujua Patrol Police base assisted by the Assistant Chief on 24th January 2019. That the parents of PW2 did not know immediately that she had been defiled. That the child informed her that the Appellant had defiled her.

22. On 16/7/2019 the trial court found that the prosecution had raised a prima facie case against the Appellant and therefore placed him in his defence. **The Appellant testified as DW1** and said that on 1/1/2019 he was at his home until 1:00 p.m. when he received a call from Wilson Mutu main forming him of some work at Nkubu. That he went to Nkubu at 2:00 p.m. where they talked with Wilson Mutuma until 9:00 p.m. That he did not see PW2 and/or her parents on the material date. That he continued with his chores until on 22/1/2019 when he was arrested and escorted to Mujua Police Post. He said he was not informed the reason for his arrest. That he was later taken to Kariene Police station where he was informed after three (3) days that he had defiled PW2. He was later taken to the hospital for examination.

23. In cross-examination he testified that he is familiar to the minor's parents as they live 3 kilometres away from where he resides and have been their neighbour for 10 years. That he had been framed because he had worked with the complainants father in the year 2014 and had not given him Kshs. 3,000/= owing to him. He stated that he has not call Wilson to come to testify since he had left for Nairobi. That he also did not call her wife and children since they had left him on 10/1/2019.

24. In its determination the trial court held that the evidence of Pw1 and the circumstantial evidence place the complainant in the appellants house where Pw1 found her only wearing an underwear and a vest hence justifying an inference of guilt upon the appellant. The trial court also found that the accused alibi and allegation that he owed a debt to the complainant's father was raised for the first time in his defence hence the same was untenable since there was no proof of the existing debt and the said debt did not involve the minor.

25. In defilement cases there are three inextricable elements that the prosecution must prove namely;

- (a) Was the victim a child
- (b) Was there penetration; and
- (c) Was the penetration by the Appellant

Age of the Victim

26. Age assessment does not necessary mean certificate of birth, the court could still come to the conclusion of the age of the victim from other evidence. In this case Pw4 testified that he conducted an age assessment of the minor and placed the age of the minor at between 2-4

years. Pw3 the clinical officer also stated that he assessed the age of the minor to be 3 ½ years. I therefore find that the age of the victim was therefore proven.

Was there penetration

27. Pw3 the clinical officer stated that there was presence of broken hymen, bruises on the vagina and other urinalysis, there was prove that the child had been defiled since there was evidence of highly penetrative sexual activity. He also produced the treatment notes and P3 report to prove these allegations. The fact that there was penetration was therefore justifiably proven.

28. As relates to the **3rd Ground of appeal** I have considered the treatment notes, the P3 report and the testimony of the Clinical Officer, I find the same to be consistent and supporting the element of penetration.

Was the penetration by the Appellant?

29. The **1st 2nd and 5th grounds of appeal** relate to the element of penetration. I have considered the eight days duration between when the complainant is alleged to have defiled the minor and the date the same was reported. I have also considered the evidence of the prosecution and that of the defence. The treatment notes and the P3 form all state that the age of the injuries to be 8 days. The history outlined in the treatment notes revealed that Pw2 was defiled by a person known to her on 1/1/2019. The same is replicate in the P3 form. Pw2, was categorical in her testimony that it is the Appellant who had defiled her. Pw1 stated that he found the appellant sleeping besides the complainant. The identification of the appellant was also clear since he is a person who was known to both Pw1 and Pw2 prior to the incident. The appellant did not raise the alibi evidence at the first instance but brought the same during his defence.

30. I have considered that the fact that the trial court conducted *voire dire* and was of the opinion that Pw2 does not possess sufficient intelligence but does not understand the nature of an oath and that Pw2 proceeded to give unsworn testimony.

31. **Section 19 of the Oaths and Statutory Declarations Act Cap 15** Laws of Kenya makes the following provision:

“Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.”

See Also; P M M v Republic [2014] eKLR

32. The trial court in its determination found the evidence of Pw2 being credible and gave a candid account of what transpired on 1/1/2019. In the evidence of PW2 she said M removed my panty and did me using his ‘Kinyamu’ thing. He removed my panty while we were in his house. When she was asked to identify the M who defiled her she said the M who defiled her was not in court. When cross examined by the Appellant she said when she was coming from M with her mother and father he did not see the Appellant. She confirms this in re-examination although she also says she doesn’t know any other M. The trial Magistrate did not address herself to the evidence of identification of the assailant given by the complainant PW2 particularly that it was determined during *voire dire* examination that she was not possessed of sufficient intelligence and did not understand the nature of an oath. The age of the child which was assessed at between 2 and 4 years must have been a factor in the failure by the minor to identify with precision whether the Appellant herein was the assailant. She said that the Appellant was the father of a child called N and the father of the Appellant was also Baba N the mother of the Appellant was Mama N, the brother of the Appellant was N and the wife of the Appellant was also Mama N. It is not possible that all these scenarios can be true. The age of the minor ought to have prompted the prosecution and the trial court to avail an intermediary to assist the child narrate to the court even without taking oath the circumstances under which she was defiled and who was the assailant.

33. The mother of the complainant testified that the Appellant took the complainant and went home ahead of her and that when the Appellant was taking the complainant PW2 was in company of BK and the father of complainant one JM, that when they went home and did not find the complainant they proceeded to the house of the Appellant and found the Appellant sleeping and the child was sleeping besides him and that the child was fully dressed but the Appellant was wearing an underwear and a vest. BK who allegedly saw the Appellant carrying the complainant did not record her statement and did not testify in court. JM, the father of the complainant who allegedly found the child lying beside the Appellant did not record his statement to confirm that indeed they found their daughter lying beside the Appellant on 1st January 2019. Further when PW1 and her husband allegedly found their daughter PW2 lying beside the Appellant they did not examine the child to establish if she had been harmed in any way. PW2 says that it was on 8th January 2019 that the complainant told her that she was having pain in her private parts and that is when she was examined and found to have been defiled. The period between 1st January 2019 and 8th January 2019 is not accounted for. Is it possible that someone else could have defiled the child? The Appellant said that when he was arrested he was taken to hospital but the results of his examination were not produced to confirm whether he had similar infection as the one found when the complainant was examined and P3 form produced.

34. The fact that PW1 is the one who told her mother PW2 that the Appellant is the one who defiled her but does not appear to sufficiently identify the Appellant in court as the one who defiled her and the fact that BK who was with PW1 when the Appellant allegedly took the complainant and JM who was with PW1 when they allegedly found the child lying beside the Appellant in his house were not called to testify makes this court find that it was not safe to convict the Appellant in those circumstances where the evidence was not proved beyond a reasonable doubt.

35. This appeal therefore succeeds and the conviction is quashed and the sentence set aside. The Appellant to be released forthwith unless lawfully detained.

HON. A. ONG'INJO

JUDGE

JUDGMENT DATED AND DELIVERED AT NAIROBI VIA SKYPE THIS 21ST DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON. A. ONG'INJO

JUDGE