



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO. 76 OF 2018

JMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction passed on 28.8.2018 and sentence delivered on 5.9.2018 by the Principal Magistrate Court at Kithimani by the Resident Magistrate Hon E.W. Wambugu in Criminal Case SO 34 of 2017)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JMM.....ACCUSED

JUDGEMENT

1. The appellant was charged, tried and convicted for the offence of defilement contrary to **section 8(1)** read together with section **(8)(2)** of the **Sexual Offences Act No.3 of 2006**. There was also an alternative charge of indecent act with a child contrary to section **11(1)** of the **Sexual Offences Act**. The particulars of the main count were that the appellant on the 11th Day of September, 2017 in Masinga Sub County within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of **CKM** a girl aged 9 years.

2. The evidence was as follows; **Pw 1 CKM** after the court conducted a *voir dire* and was satisfied that she could not understand the nature of an on oath directed her to give unsworn evidence. She stated that she was 8 years old and that the appellant was her father. She testified that on 11.9.2017 her teacher Mrs Mutie sent her home for Ksh 350/- tuition fees and upon arrival she met her mother and father at home. However, her mother left to fetch water and she was left alone with her father. She told the court that her father took her to his bed, promised her Kshs 10/- and then removed her panty and removed his penis and did '*tabia mbaya*' by inserting his penis into her vagina. She stated that she was given Kshs 10/- to buy '*mandazi*' and she went to school and reported to her teacher, Mrs Mutie who in the evening took her to Masinga police station where an officer took her to a hospital in Masinga. She recalled that the appellant did the same act on her whilst she was in class three.

3. **Pw 2 JMM** testified that she was the child's head-teacher and that on 13.9.2017 she sent Pw1 home to get Kshs 350/- tuition money. However, when Pw1 returned from home, she reported to her that the appellant did "*tabia mbaya*" to her and that this was not the first time. She testified that on 16.9.2017, Pw1 reported to her that the appellant had defiled her whilst her mother went to fetch water and the matter was reported to the police, then to the hospital and the complainant was taken to a children center. On cross examination, she testified that about six incidences of defilement were reported to her by Pw1 and these were done when Pw1's mother was not at home. She testified that Pw1 lived in fear as the appellant threatened to kill her if she told anyone about the incident. She testified that Pw1's mother once found the appellant defiling Pw1 and she raised an alarm but however the appellant beat her and threatened to kill her if she revealed what she had seen.

4. **Pw 3 Edwin Mutembei** a Clinical Officer at Masinga sub-county Hospital told the court that he had a P3 form that he filled on 18.9.2017 pursuant to a report of defilement that was said to have occurred on 11.9.2017. He told the court that the hymen was absent upon physical examination. He produced the P3 form as evidence.

5. **Pw4, Josephat Shikuku Ngumbi** the assistant chief of Katulye area testified that on 14.9.2017, he received a report from Pw2 that Pw1 had been defiled. He testified that Pw1 narrated to him how on 11.9.2017 when she was sent home for fees she found the appellant who took her to his bed and did "*tabia mbaya*". He testified that he took Pw1 to the police station and later to Masinga Level 3 hospital. On cross

examination, he testified that he learnt that Pw1's mother had moved to her maternal home after being battered by the appellant who was her husband.

6. **Pw 5 was Joel Muthama Nzoka**, a village manager at Katulye village testified that on 18.9.2017 he received a call from Pw4 to pick up a child who had been defiled by her father with instructions to take her to hospital. He testified that he placed Pw1 on a motorcycle and took her to Masinga Police station.

7. **Pw6 Pc Ann Bosire of Masinga Hospital** told the court that on 18.9.2017 her attention was drawn to a defilement case that was reported on 13.9.2017. She testified that she investigated the matter and established that the appellant had married Pw1's mother when she had already given birth to Pw1 and hence the appellant was Pw1's stepfather. She testified that she took the child to Masinga Level 3 hospital where she was examined and a P3 form filled. She testified that the defilement was said to have occurred on various dates in 2017 and that her head-teacher alerted police on 13.9.2017. On cross examination, she testified that Pw1 could not report the incident to her mother due to threats on her life by the appellant and that the appellant and his wife had quarreled hence his wife had left for her parent's home.

8. The court found that a prima facie case had been established against the appellant sufficient to require him to make a defence and he was placed on his defence. The appellant gave a sworn statement and called three witnesses. **Dw 1** the appellant testified that Pw2 promised Pw1 a tour and that she normally interferes with his home and that of other families in the village. He testified that Pw2 fabricated the case against him and he denied commission of the offence. He told the court that Pw1 lied about the offence. On cross examination, he testified that on 11.9.2017 Pw1 and her brother were sent home for fees and they found him and his wife at home.

9. **Dw2, Alex Kingangi Mutua** testified that on 19.9.2017 he heard that the appellant had been arrested. On cross examination, he testified that he did not know where the appellant was on 11.9.2017 and that Pw2 did not have problems with the villagers or parents.

10. **Dw3, Wilson Matheka Kyuli** testified that he was the father of the appellant and that the appellant had differed with teacher Jacinta. On cross examination, he testified that he had not differed with teacher Jacinta and was not aware of anyone else who had differed with her.

11. **Dw4 Jackline Nzula Muteti** testified that on 18.9.2017, some officers came looking for the appellant who was arrested on 19.9.2017. On cross examination, she testified that on 11.9.2017 she differed with the appellant because she had borrowed money from a welfare group in the area and as a result of that she went to her maternal home. She told the court that they had differed before and had left to her maternal home where she stayed for one month from May to June 2017. She told the court that she was not aware of what happened to Pw1 neither could she recall what happened on 11.9.2017. On cross examination, she told the court that the teacher never tried to interfere with her marriage and that Pw1 is obedient and truthful.

12. The trial court found that the age of Pw1 was either 8 or 9 years; the age contemplated by Section 8(2) of the Sexual Offences Act. The court found that there were no material findings by the clinical officer. The court in placing reliance on the case of **Wamunga v R (1989) KLR 424** found that the appellant was well known to Pw1 and that there were no chances of mistaken identity considering they are father and daughter. The court found that the element of penetration was in the P3 form and the same corroborated the evidence of Pw1. The court formed the opinion that Pw1 was truthful as backed by the evidence of Dw4. The court found that the appellant contradicted the evidence of his witnesses on the issue of the differences between the teacher and the villagers. The court discredited the appellant's evidence that did not challenge the evidence against him and resultantly convicted him under Section 215 of the Criminal Procedure Code for defilement contrary to Section 8(1)(2) of the Sexual Offences Act and after considering mitigation sought an age assessment report of Pw1. The age assessment report was presented on 5.9.2018 and noted that the child was 10 years and that the court found that the complainant was aged 9 years when the offence was committed. The appellant was sentenced to life imprisonment.

13. The appeal was canvassed vide written submissions. It is the appellant's case that absence of a hymen was not proof of defilement. Learned counsel submitted that the trial court did not appreciate that pre-existing differences between the appellant and the head-teacher was instrumental to the institution of the criminal proceedings against the appellant. In placing reliance on Section 124 of the Evidence Act, counsel submitted that there was no evidence to corroborate the evidence of Pw1 and therefore the trial court failed to exercise caution when relying on the uncorroborated evidence of a minor. Counsel cited the case of **Joo V R (2015) eKLR** and submitted that the appellant was presumed innocent until proven guilty. The appellant's counsel submitted that the sentence passed was excessive and unconstitutional and in this regard placed reliance on the case of **Christopher Ochieng v R (2018) eKLR**.

14. The state conceded to the appeal and submitted on four issues. On the issue of whether the case was fabricated, counsel took issue with the fact that the head teacher opted to report the matter to the police station rather than reporting to Pw1's mother first. On the issue of corroboration, counsel cited section 124 of the Evidence Act and noted that the trial court analyzed Pw1's evidence and was satisfied that she was reliable and truthful. On the issue of whether the burden of proof was shifted, counsel submitted that there was nothing to suggest that the trial magistrate shifted the burden of proof to the appellant. On the issue of broken hymen as proof of penetration, counsel submitted that Pw3 did not state whether the absent hymen was caused by penile penetration and in so failing the prosecution failed to prove beyond reasonable doubt the ingredient of penile penetration.

15. This being first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses testify.

16. The court has carefully considered the petition of appeal as amended and submissions presented by both parties. The grounds of appeal may be collapsed into three grounds:

a. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;

b. That the trial magistrate erred in convicting the appellant and yet she failed to conduct a voir dire;

c. That the trial magistrate passed a sentence that was manifestly harsh and excessive.

17. Having considered this appeal, the evidence on record and the rival submissions, the issues for determination are firstly whether the prosecution proved its case beyond reasonable doubt; Secondly whether the appellant was convicted of the offence of defilement despite failure to conduct a voir dire; Thirdly whether this court can interfere with the sentence passed by the trial court.

18. In cases of defilement the following are to be proven:

1. The age of the child.
2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and
3. That the perpetrator is the Appellant.

19. The age of the child was proven vide the age assessment report that was tendered in evidence to which the appellant did not object to its production. The said report was to the effect that Pw1 was aged 9 years as indicated in the charge sheet. Penetration is defined Under Section 2(1) the sexual offences act as the partial or complete insertion of the genital organs of a person into the genital organs of another person. "Genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus. From the evidence of Pw1 as corroborated by the evidence of Pw4 who examined Pw1 and Pw5 who collected Pw1 and took her to the hospital as well as Pw2 who saw the condition of Pw1 after the incident are all pieces of direct and circumstantial evidence respectively that proved the second element of the offence. Further the P3 form duly filled by the clinical officer Masinga Health Centre confirmed the aspect of penetration.

20. On the issue of identification of the appellant, the account of Pw1 of the unfortunate happenings of the day as corroborated by the evidence of Pw2 all created circumstances favourable for identification. The only witness to the incident was Pw1 and she was the only eye witness to the incident. In **Abdalla Bin Wendo and Another v. R. (1953), 20 EACA 166** cited with approval in **Roria v. R. (1967) EA 583** the court made a number of observations with regard to the evidence of a single eye witness:

- (a) The testimony of a single witness regarding identification must be tested with the greatest care.
- (b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.
- (c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.
- (d) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge advises himself to the danger of basing a conviction on such evidence alone and is satisfied that the witness was truthful. The record is clear that the trial court was satisfied with the evidence of Pw1 and I see no reason to interfere with her reasoning. In any case the appellant was the complainant's step- father and knew him fairly well and further no evidence was tendered to show that there was any bad blood between complainant, her mother and the appellant so as to suggest a frame up. Again the complainant's mother who testified in favour of the appellant confirmed on cross-examination that the complainant was always truthful. The complainant clearly identified the appellant as the perpetrator and gave a vivid account of how the incident took place.

21. The appellant has raised one of his grounds of appeal that a voir dire was not conducted. I am unable to agree with the appellant. There is no statutory procedure or established uniform format that is followed by judicial officers to help them decide on whether the child should testify on oath or not or not at all since determining the intelligence of the child is left to the good sense of the trial judge or magistrate alone. The record does reveal the questions that were asked and there are answers that were recorded as revealed from the court proceedings conducted on the 20.12.2017 which clearly show that the voir dire was conducted. This means that the appellant's claim that no voir dire was conducted on the complainant is not truthful at all.

22. The appellant has faulted the trial court for failing to consider that there was a grudge. The appellant did not present a credible defence that cast doubt upon the prosecution's evidence. He only told court that he had been framed by the complainant's head-teacher. However, his own witnesses discredited his evidence. For instance, the appellant's wife (Dw4) confirmed on cross-examination that the appellant had no differences with the complainant who is her stepfather and that her said daughter was obedient and truthful. I see nothing to believe that this case was fabricated. I agree with the trial court's finding because the prosecution evidence places the appellant at the scene of the crime and therefore his defence was rightly rejected by the learned trial magistrate. Further though I did not see the appellant testify, I am not convinced that he was telling the truth and in this regard I am guided by the case of **Dinkerrai Ramkrishan Pandya v R [1957] EA 336** where the East Africa Court of Appeal cited the case of **Coughlan v Cumberland (3) (1898) 1 Ch. 704 where Lindly MR, Rigby and Collins LJJ observed** that "when the Question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; **and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on credibility of witnesses whom the court has not seen.**

23. The appellant's wife who testified as Dw4 left no doubt that she was out to cover up for her husband against the accusations brought by her own biological daughter. It would appear that Dw4 literally threw her own young and vulnerable daughter under the bus so to speak and this might explain why the complainant opted to seek help from her teacher rather than her own mother who probably had been looking the other way as her husband's transgressions against the minor went unabated.

24. In light of the foregoing analysis I am satisfied that the prosecution had proved their case beyond reasonable doubt and that the

appellant's version of events is not credible. I find the trial court's finding on conviction was sound and safe.

25. The Sexual Offences Act provides under Section 8(2) that "A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to life imprisonment. The court convicted the appellant under Section 8(2) of the Sexual Offences Act and the appellant's counsel is of the view that the sentence ought to be set aside. Section 382 of the Criminal Procedure Code provides for instances where finding or sentence are reversible by reason of error or omission in a charge or other proceedings. It states that:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

26. The sentence meted out against the appellant was in accordance to section 8(2) of the Sexual Offences Act which provides for a sentence of life imprisonment. However following the Supreme Court ruling in **Francis Karioko Muruatetu and Another Vs R (2017) eKLR** minimum sentences provided by certain statutes such as the Sexual Offences Act have had to be interfered with by the courts so as to be in tandem with the need to enable persons already convicted without being accorded an opportunity to mitigate a second chance to do so. For instance, in the cases of **Christopher Ochieng V R (2018) eKLR** and **Jared Koita Injiri V R (2019) eKLR** the Court of Appeal reduced the minimum sentence of life imprisonment under section 8(2) of the Sexual Offences Act to periods ranging between 25 and 30 years. Being guided by the said authorities I am inclined to interfere with the sentence herein and substitute therefor with a sentence of 25 years from the date of arrest namely 19.9.2017.

27. In the result, I come to the finding that the appeal partly succeeds. The appeal on conviction lacks merit and is dismissed. The appeal on sentence succeeds to the extent that the sentence of life imprisonment is hereby set aside and substituted with a sentence of twenty-five (25) years imprisonment from 19.09.2017.

It is so ordered.

Dated and delivered at **Machakos** this **13th** of **May, 2020**.

D. K. Kemei

Judge